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WITH KEY-NUMBER ANNOTATIONS

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CIRCUIT COURTS OF APPEALS, DISTRICT
COURTS, AND COMMERCE COURT
OF THE UNITED STATES

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CASES REPORTED

	Page		Page
A. B. Gaston Co., Charles Hunnicutt Co. v. (D. C.)	585	City of Chillicothe, Mo., City Water Co. of Chillicothe v. (C. C. A.)	503
Adams v. Puget Sound Traction, Light & Power Co. (D. C.)	205	City of La Moure, Drexel State Bank v. (D. C.)	702
Akhay Kumar Mozumdar, In re (D. C.)	115	City Water Co. of Chillicothe v. Chillicothe, Mo. (C. C. A.)	503
Allen, Griffin v. (C. C. A.)	61	Clan Line Steamers, Tweedie Trading Co. v. (C. C. A.)	70
Allen, Young v. (C. C. A.)	318	Clark, Arizona & N. M. R. Co. v. (C. C. A.)	817
American-Hawaiian S. S. Co. v. Bennett & Goodall (C. C. A.)	510	Clark Lehigh Val. R. Co. v. (C. C. A.)	717
American Linseed Oil Co. v. Crumline (C. C. A.)	332	Chise, Revett v. (D. C.)	673
American Sea Green Slate Co., O'Halloran v. (D. C.)	187	Cloquet Lumber Co. v. Burns (C. C. A.)	40
American Sugar Refining Co. v. Delaware, L. & W. R. Co. (C. C. A.)	733	Coal & Coke R. Co. v. Nease (C. C. A.)	237
American Sugar Refining Co. v. New York Cent. & H. R. R. Co. (C. C. A.)	733	Codori, In re (D. C.)	784
Apollo Bros. v. Perkins (C. C. A.)	530	Cohn, H. J. Heinz Co. v. (C. C. A.)	547
Archer v. Imperial Mach. Co. (C. C. A.)	81	Columbia, The (C. C. A.)	929
Arizona & N. M. R. Co. v. Clark (C. C. A.)	817	Columbus Savings & Trust Co., Haskell v. (C. C. A.)	322
Atlantic Coast Line R. Co., Simons-Mayrant Co. v. (D. C.)	387	Continental Securities Co. v. Interborough Rapid Transit Co., two cases (D. C.)	467
Bailey, United States v. (D. C.)	782	Cook, The Robert H., two cases (D. C.)	626
Banks, In re (D. C.)	662	Cooke, United States v. (D. C.)	682
Barde, In re (D. C.)	654	Cordley, Perfection Cooler Co. v. (D. C.)	769
Barnes Co. v. Vandyck-Churchill Co. (D. C.)	855	Corey v. Boston Ice Co. (D. C.)	465
Barrell v. Fitchburg Duck Mills (D. C.)	371	Corey v. Independent Ice Co. (D. C.)	469
Beckwith v. Malleable Iron Range Co. (D. C.)	848	Corn Products Refining Co. v. Douglas & Co. (D. C.)	571
Bennett, United States v. (C. C. A.)	524	Crowell, In re (D. C.)	967
Bennett & Goodall v. American-Hawaiian S. S. Co. (C. C. A.)	510	Crumline, American Linseed Oil Co. v. (C. C. A.)	332
Bicknell v. Boston Ins. Co. (D. C.)	455	Delaware, L. & W. R. Co., American Sugar Refining Co. v. (C. C. A.)	733
Big Four Implement Co. v. Wright (C. C. A.)	535	Delaware, L. & W. R. Co., McWilliams v. (C. C. A.)	64
Blackstone v. Everybody's Store (C. C. A.)	752	Diamond State Steel Co., Hitner v. (D. C.)	616
Board of Directors of Miller Levee Dist. No. 2, St. Louis Southwestern R. Co. v. (C. C. A.)	338	Doherty, The J. (D. C.)	997
Boston Ice Co., Corey v. (D. C.)	465	Dorothy, The (D. C.)	455
Boston Ice Co., Ferris v. (D. C.)	465	Douglas & Co., Corn Products Refining Co. v. (D. C.)	571
Boston Ins. Co., Bicknell v. (D. C.)	455	Drexel State Bank v. La Moure (D. C.)	702
Bowker Torrey Co., Smith v. (D. C.)	967	Eastman Kodak Co., Goodwin Film & Camera Co. v. (D. C.)	351
Breeding, United States v. (D. C.)	645	Elizabeth E. Vane, The (C. C. A.)	929
Brykczynski, In re (D. C.)	813	Elmer, Worthington v. (C. C. A.)	306
Burns, Cloquet Lumber Co. v. (C. C. A.)	40	Elswick Steam Shipping Co., Manson S. S. Line v. (D. C.)	984
Burr, Hull v. (C. C. A.)	543	Equitable Trust Co. of New York v. Pollitz (C. C. A.)	74
Butler & Co., In re (C. C. A.)	705	Erie R. Co. v. Kraft (C. C. A.)	293
Charles Hunnicutt Co. v. A. B. Gaston Co. (D. C.)	585	Erie R. Co. v. Weber (C. C. A.)	293
Charlton Hall, The (C. C. A.)	343	Everybody's Store, In re (C. C. A.)	752
Chicago Great Western R. Co., Fox v. (D. C.)	886	Everybody's Store, Blackstone v. (C. C. A.)	752
Chicago, M. & St. P. R. Co. of Idaho, United States v. (D. C.)	164	Everybody's Store, Zucker v. (C. C. A.)	752
Cincinnati, H. & D. R. Co. v. Sheriff of City of New York (C. C. A.)	768	Fayetteville Wagon Wood & Lumber Co., New Paddock-Hawley Co. v. (D. C.)	786
		Ferris v. Boston Ice Co. (D. C.)	465

	Page		Page
Fessenden, National Electric Signaling Co. v. (C. C. A.)	915	Interborough Rapid Transit Co., Continental Securities Co. v., two cases (D. C.)	467
Fitchburg Duck Mills, Barrell v. (D. C.)	371	Interborough Rapid Transit Co., United Tunnel Imp. Co. v. (C. C. A.)	561
Fox v. Chicago Great Western R. Co. (D. C.)	886	International Fire Ins. Co. of Ft. Worth, Tex., Wolfe v. (C. C. A.)	262
Frankfort Marine, Accident & Plate Glass Ins. Co. v. John B. Stevens & Co. (C. C. A.)	757	I. Rheinstrom & Sons Co., In re (D. C.)	119
Freeman v. New Jersey Portland Cement Co. (D. C.)	699	James McCaulley, The (D. C.)	669
Gadd, Southern R. Co. v. (C. C. A.)	277	J. Doherty, The (D. C.)	997
Gaddy, Tennessee Copper Co. v. (C. C. A.)	297	Jersey City, Wells Fargo & Co. v. (D. C.)	871
Gage Lumber Co. v. McEldowney (C. C. A.)	255	John B. Stevens & Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. (C. C. A.)	757
Gaston Co., Charles Hunnicutt Co. v. (D. C.)	585	Johnson, Great Northern R. Co. v. (C. C. A.)	521
General Bakelite Co. v. Nikolas (D. C.)	111	Kearsage Land Co. v. Von Baumbach (D. C.)	423
General Electric Co., Steinberger v. (D. C.)	114	Keller, In re (D. C.)	118
General Electric Co., Westinghouse Mach. Co. v. (C. C. A.)	75	Keenebec, The (C. C. A.)	72
Giles, Walker v. (D. C.)	825	Kirkpatrick, McBride v. (D. C.)	893
Goldman, United States v. (D. C.)	1002	Kostelak, United States v. (D. C.)	447
Goodwin Film & Camera Co. v. Eastman Kodak Co. (D. C.)	351	Kraft, Erie R. Co. v. (C. C. A.)	293
Graham v. Murphy (C. C. A.)	268	Krell Auto Grand Piano Co. of America v. Story & Clark Co. (C. C. A.)	946
Graham v. Quinlan (C. C. A.)	268	Kryptok Co. v. Stead Lens Co. (D. C.)	85
Great Northern R. Co. v. Johnson (C. C. A.)	521	Lane Lumber Co., In re (C. C. A.)	762
Green, In re (D. C.)	693	Lang v. Twitchell-Champlin Co. (D. C.)	363
Griffin v. Allen (C. C. A.)	61	Lee, Puget Sound Electric Ry. v. (D. C.)	860
Grossman, Rajah Auto Supply Co. v. (C. C. A.)	84	Lehigh Val. R. Co. v. Clark (C. C. A.)	717
Grout v. Ruskin (C. C. A.)	273	Lenore, United States v. (D. C.)	865
Gye, Hamburg-Amerikanische Packetfahrt Gesellschaft v. (C. C. A.)	247	Lewis Luckenbach, The (C. C. A.)	66
G. & C. Merriam Co. v. Syndicate Pub. Co. (C. C. A.)	515	Lloyd, Smith v. (D. C.)	815
Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft v. Gye (C. C. A.)	247	Lloyd, Sullivan v. (D. C.)	815
Hamel, Sterling Paper Co. v. (C. C. A.)	300	Long Arm System Co. v. New York Shipbuilding Co. (C. C.)	955
Haskell v. Columbus Savings & Trust Co. (C. C. A.)	322	Louisville Cone Co., Valvona Marchiony Co. v. (C. C.)	374
Heinz Co. v. Cohn (C. C. A.)	547	Louisville & N. R. Co. v. United States (Com. C.)	591
Henkel, Henry v. (D. C.)	805	Louisville & N. R. Co. v. Western Union Tel. Co. (C. C. A.)	1
Hennebry, In re (D. C.)	882	Luckenbach, The Lewis (C. C. A.)	66
Henney, New York Cent. & H. R. R. Co. v. (C. C. A.)	78	McBride v. Kirkpatrick (D. C.)	893
Henry v. Henkel (D. C.)	805	McCaulley, The James (D. C.)	669
Herman, In re (D. C.)	594	McClaghry, Stevens v. (C. C. A.)	18
Hitner v. Diamond State Steel Co. (D. C.)	616	McEldowney, Gage Lumber Co. v. (C. C. A.)	255
H. J. Heinz Co. v. Cohn (C. C. A.)	547	Mac Fock, Ex parte (D. C.)	696
Howard, In re (D. C.)	402	McGregor, Thompson Towing & Wrecking Ass'n v. (C. C. A.)	209
Howard Reeder, The (C. C. A.)	929	McPherson, Stillwell v. (D. C.)	837
Howbert, Stratton's Independence v. (D. C.)	419	McWilliams v. Delaware, L. & W. R. Co. (C. C. A.)	64
Howell, Mechanics' & Metals' Nat. Bank v. (D. C.)	973	Malleable Iron Range Co., Beckwith v. (D. C.)	848
Hull v. Burr (C. C. A.)	543	Marcell, Ex parte (D. C.)	809
Hunnicutt Co. v. A. B. Gaston Co. (D. C.)	585	Marchiony, Valvona-Marchiony Co. v. (D. C.)	380
Hyde, Minerals Separation v. (D. C.)	956	Mark, Safety-Armorite Conduit Co. v. (C. C. A.)	346
Illinois Cent. R. Co. v. Porter (C. C. A.)	311	Massee v. Williams (C. C. A.)	222
Illinois Cent. R. Co., Union R. Co. v. (C. C. A.)	745	Maxey v. United States (C. C. A.)	327
Imperial Mach. Co., Archer v. (C. C. A.)	81	Mechanics' & Metals' Nat. Bank v. Howell (D. C.)	973
Incorporated Town of Stonewall, Okl., v. Stone (C. C. A.)	540	Merriam Co. v. Syndicate Pub. Co. (C. C. A.)	515
Independent Ice Co., Corey v. (D. C.)	459		

Page	Page
Metropolitan Trust Co. of City of New York, Turner v. (C. C. A.)	495
Miller, Rankin v. (D. C.)	602
Minerals Separation v. Hyde (D. C.)	956
Moats, New York Life Ins. Co. v. (C. C. A.)	481
Moola Singh, Ex parte (D. C.)	780
Morgan, Schwab v. (D. C.)	107
Munson S. S. Line v. Elswick Steam Shipping Co. (D. C.)	984
Murphy, Graham v. (C. C. A.)	268
Murray v. Pacific Coast S. S. Co. (D. C.)	688
National Electric Signaling Co. v. Fessenden (C. C. A.)	915
Nease, Coal & Coke R. Co. v. (C. C. A.)	237
Neff, Read v. (D. C.)	890
New England S. S. Co. v. New York Dock Co. (C. C. A.)	73
New Jersey Portland Cement Co., Freeman v. (D. C.)	699
New Paddock-Hawley Co. v. Fayetteville Wagon Wood & Lumber Co. (D. C.)	786
New York Cent. & H. R. R. Co., American Sugar Refining Co. v. (C. C. A.)	733
New York Cent. & H. R. R. Co. v. Henney (C. C. A.)	78
New York Dock Co., New England S. S. Co. v. (C. C. A.)	73
New York Life Ins. Co. v. Moats (C. C. A.)	481
New York Shipbuilding Co., Long Arm System Co. v. (C. C.)	953
Nikolas, General Bakelite Co. v. (D. C.)	111
O'Halloran v. American Sea Green Slate Co. (D. C.)	187
Olympia, The (C. C. A.)	767
Oshkosh Grass Matting Co. v. Waite Grass Carpet Co. (C. C. A.)	937
Pacific Coast S. S. Co., Murray v. (D. C.)	688
Pennsylvania R. Co., Roman Catholic Church of St. Anthony of Padua v. (C. C. A.)	897
Perella, Valvona-Marchiony Co. v. (D. C.)	377
Perfection Cooler Co. v. Cordley (D. C.)	769
Perkins, Appollo Bros. v. (C. C. A.)	530
Philadelphia, The (C. C. A.)	936
Pollitz, Equitable Trust Co. of New York v. (C. C. A.)	74
Porter, Illinois Cent. R. Co. v. (C. C. A.)	311
Puget Sound Electric Ry. v. Lee (D. C.)	860
Puget Sound Traction, Light & Power Co., Adams v. (D. C.)	205
Pullman Co., Tamble v. (C. C. A.)	30
Pullman Co., Younglove v. (D. C.)	797
Quinlan, Graham v. (C. C. A.)	268
Quinn, Ex parte (D. C.)	195
Rabinowitz & Koen, In re (D. C.)	118
Rajah Auto Supply Co. v. Grossman (C. C. A.)	84
Rankin v. Miller (D. C.)	602
Read v. Neff (D. C.)	830
Reeder, The Howard (C. C. A.)	929
Revett v. Clise (D. C.)	673
Rheinstrom & Sons Co., In re (D. C.)	119
Rice, Woodford v. (D. C.)	473
Riley, Underfeed Stoker Co. of America v. (D. C.)	963
Robert H. Cook, The, two cases (D. C.)	626
Rogers, The Thomas W. (C. C. A.)	69
Rollman Mfg. Co. v. Universal Hardware Works (D. C.)	97
Roman Catholic Church of St. Anthony of Padua v. Pennsylvania R. Co. (C. C. A.)	897
Ruskin, Grout v. (C. C. A.)	273
Rutland, St. Louis & S. F. R. Co. v. (C. C. A.)	287
Safety-Armorite Conduit Co. v. Mark (C. C. A.)	346
St. Louis Southwestern R. Co. v. Board of Directors of Miller Levee Dist. No. 2 (C. C. A.)	338
St. Louis & S. F. R. Co. v. Rutland (C. C. A.)	287
Samuels & Lesser, In re (D. C.)	195
Sao Paulo, The (C. C. A.)	51
Sargent Land Co. v. Von Baumbach (D. C.)	423
Schmidt, In re (D. C.)	678
Schwab v. Morgan (D. C.)	107
Sheriff of City of New York, Cincinnati, H. & D. R. Co. v. (C. C. A.)	768
Silver Star, The (D. C.)	600
Silverstein, Valvona-Marchiony Co. v. (C. C.)	374
Simons-Mayrant Co. v. Atlantic Coast Line R. Co. (D. C.)	387
Smith v. Bowker Torrey Co. (D. C.)	967
Smith v. Lloyd (D. C.)	815
Southern R. Co. v. Gadd (C. C. A.)	277
Southern Wholesale Grocers' Ass'n, United States v. (D. C.)	434
Stannard, United States v. (D. C.)	198
Stead Lens Co., Kryptok Co. v. (D. C.)	85
Steinberger v. General Electric Co. (D. C.)	114
Sterling Paper Co. v. Hamel (C. C. A.)	300
Stevens v. McClaughry (C. C. A.)	18
Stevens & Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. (C. C. A.)	757
Stillwell v. McPherson (D. C.)	837
Stone, Incorporated Town of Stonewall, Okl., v. (C. C. A.)	540
Story & Clark Co., Krell Auto Grand Piano Co. of America v. (C. C. A.)	946
Stratton's Independence v. Howbert (D. C.)	419
Sullivan v. Lloyd (D. C.)	815
Superior, The (C. C. A.)	546
Sutton Land Co. v. Von Baumbach (D. C.)	423
Syndicate Pub. Co., G. & C. Merriam Co. v. (C. C. A.)	515
Synnott v. Tombstone Consol. Mines Co. (C. C. A.)	544
Tamble v. Pullman Co. (C. C. A.)	30
Tennessee Const. Co., In re (D. C.)	203
Tennessee Copper Co. v. Gaddy (C. C. A.)	297
Texas, The (D. C.)	669
Thomas W. Rogers, The (C. C. A.)	69
Thompson Towing & Wrecking Ass'n v. McGregor (C. C. A.)	209
Tombstone Consol. Mines Co., Synnott v. (C. C. A.)	544
Tonopah Min. Co. of Nevada, Vincent v. (D. C.)	579
Transfer No. 20, The (C. C. A.)	767
Turner v. Metropolitan Trust Co. of City of New York (C. C. A.)	495

	Page		Page
Tweedie Trading Co. v. Clan Line Steamers (C. C. A.)	70	Vincent v. Tonopah Min. Co. of Nevada (D. C.)	579
Twitchell-Champlin Co., Lang v. (D. C.)	363	Von Baumbach, Kearsage Land Co. v. (D. C.)	423
Underfeed Stoker Co. of America v. Riley (D. C.)	963	Von Baumbach, Sargent Land Co. v. (D. C.)	423
Union R. Co. v. Illinois Cent. R. Co. (C. C. A.)	745	Von Baumbach, Sutton Land Co. v. (D. C.)	423
United States v. Bailey (D. C.)	782	Waite Grass Carpet Co., Oshkosh Grass Matting Co. v. (C. C. A.)	937
United States v. Bennett (C. C. A.)	524	Wakefield, In re (D. C.)	189
United States v. Breeding (D. C.)	645	Walker v. Giles (D. C.)	825
United States v. Chicago, M. & St. P. R. Co. of Idaho (D. C.)	164	Wall, In re (D. C.)	994
United States v. Cooke (D. C.)	682	Weber, Erie R. Co. v. (C. C. A.)	293
United States v. Goldman (D. C.)	1002	Wells Fargo & Co. v. Jersey City (D. C.)	871
United States v. Kostelak (D. C.)	447	Western Steel Corp., In re (C. C. A.)	495
United States v. Lenore (D. C.)	865	Western Union Tel. Co., Louisville & N. R. Co. v. (C. C. A.)	1
United States, Louisville & N. R. Co. v. (Com. C.)	591	Westinghouse Mach. Co. v. General Elec- tric Co. (C. C. A.)	75
United States, Maxey v. (C. C. A.)	327	W. F. & John Barnes Co. v. Vandyck- Churchill Co. (D. C.)	855
United States v. Southern Wholesale Gro- cers' Ass'n (D. C.)	434	Wm. S. Butler & Co., In re (C. C. A.)	705
United States v. Stannard (D. C.)	198	Williams, Massee v. (C. C. A.)	222
United Tunnel Imp. Co. v. Interborough Rapid Transit Co. (C. C. A.)	561	Wolfe v. International Fire Ins. Co. of Ft. Worth, Tex. (C. C. A.)	262
Universal Hardware Works, Rollman Mfg. Co. v. (D. C.)	97	Woodford v. Rice (D. C.)	473
Valvona-Marchiony Co. v. Louisville Cone Co. (C. C.)	374	Worthington v. Elmer (C. C. A.)	306
Valvona-Marchiony Co. v. Marchiony (D. C.)	380	Wright, Big Four Implement Co. v. (C. C. A.)	535
Valvona-Marchiony Co. v. Perella (D. C.)	377	Wright-Dana Hardware Co., In re (D. C.)	636
Valvona-Marchiony Co. v. Silverstein (C. C.)	374	Wright, Yazoo & M. V. R. Co. v. (C. C. A.)	281
Vandyck-Churchill Co., W. F. & John Barnes Co. v. (D. C.)	855	Yazoo & M. V. R. Co. v. Wright (C. C. A.)	281
Vane, The Elizabeth E. (C. C. A.)	929	Young v. Allen (C. C. A.)	318
		Younglove v. Pullman Co. (D. C.)	797
		Zucker v. Everybody's Store (C. C. A.)	752

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

LOUISVILLE & N. R. CO. v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. July 22, 1913.)

No. 2,456.

1. APPEAL AND ERROR (§ 954*)—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.

As a general rule, an appellate court will not reverse an order granting or refusing a preliminary injunction, unless it appears that in making the order the legal discretion vested in the court was improperly exercised; but it will reverse an order granting an injunction where there appears any insuperable objection in point of jurisdiction or merits to the maintenance of the suit, and may in such case dismiss the bill, since there can be no room for the exercise of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

2. INJUNCTION (§ 38*)—TEMPORARY INJUNCTION—GROUNDS—PREVENTING INTERFERENCE WITH TELEGRAPH LINES.

A telegraph company is a public service corporation, and where such a company has been operating its lines, forming an extensive system, over the right of way of a railroad company under a contract which has expired by limitation, a court of equity has power in a proper case, in the public interest, to enjoin the railroad company from interfering with such operation pending proceedings instituted by the telegraph company under state statutes to condemn right of way for its lines over the property of the railroad company.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86-90; Dec. Dig. § 38.*]

3. COURTS (§ 266*)—JURISDICTION—TERRITORIAL LIMITATION—NATURE OF SUIT.

Complainant, a telegraph company, for years operated lines over the right of way of defendant's railroad, extending through Kentucky and other states as a part of its general system covering the entire country, under a contract with defendant. The term expired, and, the parties having failed to agree on a renewal of the contract, complainant served notice of its termination. Complainant having instituted proceedings, under the laws of the several states through which the road passed, to condemn right of way for its lines over the right of way of defendant therein, defendant forbade complainant to use the poles and wires on the railroad property after a date fixed, announcing its intention to appropriate them

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

itself if they were not removed. *Held*, that a federal court in Kentucky, in which state defendant was incorporated, had jurisdiction to enjoin it from interfering with the operation of complainant's lines, not only in that state, but in the others, pending the determination of said several proceedings; the suit not being of a local character, but one affecting complainant's entire system, and also rights of the public, and defendant being personally before the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806-808; Dec. Dig. § 266.*]

4. JURY (§ 19*)—CONDEMNATION PROCEEDINGS BY TELEGRAPH COMPANY—VALIDITY OF STATUTE.

Ky. St. § 4679a, authorizing telegraph companies, domestic or foreign, to condemn right of way for their lines along and upon the right of way of any railroad, and prescribing the procedure therefor, is not in violation of the state Constitution, in that it provides for a jury of 12 in the county court to fix the compensation to be paid, whereas section 248 of the Constitution provides that "in civil and misdemeanor cases in courts inferior to the circuit courts a jury shall consist of six persons," since the condemnation proceeding is a special proceeding, and not necessarily to be classed with ordinary civil cases, and since an appeal is given from the county court to the circuit court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 104-133; Dec. Dig. § 19.*]

5. COMMERCE (§ 8*)—TELEGRAPH COMPANIES—VALIDITY OF STATE STATUTES—EMINENT DOMAIN.

A state statute, granting the right of eminent domain to telegraph companies with respect to railroad rights of way, is not inconsistent with any legislation of Congress, nor invalid as an attempted regulation of interstate commerce as applied to interstate lines of railroad.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

6. EMINENT DOMAIN (§ 10*)—FOREIGN CORPORATIONS—CHARTER POWERS—CONSTRUCTION OF STATUTE.

The Western Union Telegraph Company is incorporated under the telegraph statute of New York of 1848, which by amendment in 1862 authorized any company organized thereunder to build or acquire lines additional to those described in its certificate of organization, either within or without the state, but required it in such case to file with the Secretary of State within one year thereafter a certificate describing such lines. *Held*, that such requirement was a condition subsequent, and did not prevent the company from acquiring new lines in other states, or from condemning right of way therefor, if authorized by the laws of such states; that its failure to file the required certificate within the time fixed did not affect its right to continue to maintain and operate such lines in the absence of any action by the state of New York, which alone could enforce the requirement and could waive it.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

7. INJUNCTION (§ 153*)—PRELIMINARY INJUNCTION—CONDITIONS ON GRANTING.

Where complainant had been operating its telegraph lines over the right of way of defendant railroad company for 25 years under a contract which did not provide for the payment of rental, but for the rendition of mutual services between the parties, an injunction granted after the termination of the contract, restraining defendant from interfering with the operation of complainant's lines pending suits by complainant to condemn right of way for the same, and which required "both parties to maintain the present status," was not subject to objection as being im-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

provident or inequitable because it did not require complainant to pay a money rental.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 338, 339; Dec. Dig. § 153.*]

8. INJUNCTION (§ 157*)—PRELIMINARY INJUNCTION—SCOPE.

Complainant, a New York corporation, obtained a temporary injunction from a federal court in Kentucky restraining defendant railroad company from interfering with the operation of complainant's telegraph lines, which constituted a unitary system over its right of way in that and other states pending proceedings in such several states to condemn right of way therefor. *Held*, that the order was not reversible as an abuse of discretion because in two of such states, states where foreign telegraph companies could not exercise the right of eminent domain, local companies were organized which took over complainant's lines in such states and instituted the condemnation proceedings; the right of such companies to maintain the same being a matter for determination by the local courts in the proceedings themselves.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 340, 342; Dec. Dig. § 157.*]

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit in equity by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. From an order granting a temporary injunction defendant appeals. Affirmed.

For opinion below, see 201 Fed. 946.

This is an appeal under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [U. S. Comp. St. Supp. 1911, p. 194]) from an order refusing to dissolve an injunction. The facts requiring present statement are these:

On June 18, 1884, the parties to this suit, whom we shall call respectively the railroad company and the telegraph company, entered into contract whereby the telegraph company was given, during the term of the contract, the exclusive right of way for the construction and use of commercial telegraph lines along the railway lines then or thereafter owned, leased, controlled, or operated by the railroad company. The latter was given a considerable amount of free telegraph service, and detailed provision was made for certain interchanges of services and facilities of the two companies in connection with the operation of the railroad and telegraph business, respectively. The contract was to continue in force until July 1, 1909, and thereafter until the expiration of one year after the giving of written notice by either of the parties of its election to terminate the contract. For about two years following July, 1909, negotiations were had between the two companies respecting their future relations. The railroad company being unwilling to make any material modification of the existing contract, the telegraph company gave written notice of the termination of the same at the expiration of one year from the delivery of the notice, which has been treated as August 17, 1911. Thereafter the telegraph company made a proposition, looking to its acquirement of a permanent right of way, at a rental much smaller than the railroad company regards as at all adequate, and on December 21, 1911, instituted proceedings in the county court of Jefferson county, Ky., to expropriate the right to maintain its poles, wires, and other apparatus upon the right of way of the railroad company within the state of Kentucky. The railroad company opposed the condemnation proceeding, and denied the constitutionality of the statute under which it was taken. The county court held the statute constitutional, whereupon the railroad company instituted suit in the circuit court for Jefferson county, to prohibit the county court from trying the condemnation proceeding. The telegraph company thereupon dismissed its proceeding in the county court, and brought its condemnation suit in the court below on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

July 9, 1912. On August 5th following, the railroad company gave written notice to the telegraph company, requiring the latter to commence, immediately after August 17, 1912 (being the date of the termination of the contract under the telegraph company's notice), to remove from the railroad right of way and premises all the poles, wires, batteries, instruments, appliances, and other fixtures comprising the telegraph line, and to complete such removal previous to December 1, 1912. The telegraph company was further notified that in default of its compliance with such requirement of removal previous to the prescribed date, the railroad company would take possession of, appropriate, and use, after that date, all the telegraph company's poles, cross-arms, wires, batteries, instruments, appliances, and other fixtures remaining at that time on the railroad company's right of way or premises, in all the states affected by the contract, and would hold or otherwise dispose of the same as its own property, and refuse to longer permit the telegraph company to use the same for any purpose.

The railroad company further gave notice that it would be compelled to make use of the telegraph company's poles and wires for telegraph business in conducting the railroad's business until after the removal of the telegraph company's lines, because of the inability of the railroad company meanwhile to erect its own telegraph or telephone lines. Meanwhile, the telegraph company had instituted condemnation proceedings in the states of Tennessee, Alabama, Georgia, Mississippi, Louisiana, and Florida, for similar condemnation of the rights of way along the railroad company's lines in those states; and the Western Union Telegraph Company of Illinois and the Western Union Telegraph Company of Indiana had instituted proceedings for similar condemnation of rights of way in Illinois and Indiana, respectively, which proceedings were to inure to the benefit of the telegraph company. On October 14, 1912, which was a little over two months after the giving by the railroad company of the notice to remove last referred to, the telegraph company filed its bill in this cause. Injunction was asked for the purpose of giving opportunity of testing complainant's legal rights of condemnation. A temporary injunction was granted, and after the filing of answer, a motion to dissolve the injunction was made, from whose denial this appeal is taken.

Helm Bruce and H. L. Stone, both of Louisville, Ky., for appellant.

Richards & Harris and Humphrey, Middleton & Humphrey, all of Louisville, Ky. (Rush Taggart and George H. Pearsons, both of New York City, of counsel), for appellee.

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge (after stating the facts as above). [1] The general rule by which this court should be governed in reviewing orders relating to injunction, temporary or interlocutory, is that the order will not be disturbed unless it appears that the court below has exercised its discretion upon a wholly wrong comprehension of the facts or law of the case; or, otherwise stated, that the legal discretion vested in the court to grant or withhold the order was improperly exercised. *Interurban Ry. & T. Co. v. Westinghouse Elec. & Mfg. Co.*, 186 Fed. 166, 170, 108 C. C. A. 298, and cases there cited; *City of Shelbyville v. Glover*, 184 Fed. 234, 238, 106 C. C. A. 376, and cases cited. If, however, there appears any insuperable objection in point of jurisdiction or merits to the maintenance of the suit, the court should at least reverse the order for injunction (*Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.*, 72 Fed. 545, 550, 19 C. C. A. 25; *Mayor, etc., of Knoxville v. Africa*, 77 Fed. 501, 505, 23 C. C. A. 252; *City*

of *Shelbyville v. Glover*, supra, at page 238), and may properly dismiss the bill of complaint (*Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 495, 20 Sup. Ct. 708, 44 L. Ed. 856; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 286, 25 Sup. Ct. 493, 49 L. Ed. 739; *U. S. Fidelity Co. v. Bray*, 225 U. S. 205, 214, 32 Sup. Ct. 620, 56 L. Ed. 1055; *City & County of Denver v. New York Trust Co.*, 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101, decided by the Supreme Court May 26, 1913). In such case there could be no room for the exercise of discretion in granting or refusing to dissolve the injunction.

[2] By section 3964, Rev. Stat. United States (U. S. Comp. St. 1901, p. 2707), all railroads in operation are made post roads. By the act of July 24, 1866 (14 Stat. 221, c. 230; Rev. Stat. § 5263, and following [U. S. Comp. St. 1901, p. 3579]), telegraph companies are given the right to construct and operate their lines along and over post roads. But it has been held that this latter statute does not confer the power of eminent domain. *Western Union Tel. Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 560, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. The telegraph company is, however, a public service corporation. Its activities are of public, and not merely of private, concern. When the bill in this cause was filed, it was operating, over the railway lines in question, an important part of its telegraph system, which extends over the entire United States, and has important foreign connections. It serves not only private customers, but the state and national governments and their representatives. Any interruption of the service of the telegraph company may well result in an interruption of public service.

When the bill was filed the telegraph company was occupying the railway company's right of way by virtue of a previous contract therefor; and, while its right to so occupy under the contract had ceased, it was prosecuting in various of the states statutory proceedings for the acquirement of interests necessary to the continued occupancy of such rights of way. Courts of equity under these circumstances have the power to enjoin interference by the railroad company with such possession by the telegraph company, at least in the jurisdictions in which such proceedings are pending, for such reasonable time as may be required to prosecute to conclusion the various pending condemnation proceedings, assuming, of course, the existence of a meritorious cause, and further assuming the validity and applicability of state statutes authorizing such condemnation. *Winslow v. B. & O. Ry. Co.*, 188 U. S. 646, 660, 23 Sup. Ct. 443, 47 L. Ed. 635; *Owensboro, etc., Ry. Co. v. Harrison*, 94 Ky. 410, 22 S. W. 545. Appellant insists, however, that the federal court, sitting in Kentucky, has no jurisdiction over the property involved so far as it lies outside the state of Kentucky, and so has no power to enjoin interference with the telegraph property outside that state; that the Kentucky statute of condemnation invoked by the telegraph company is unconstitutional and void, for various reasons; that appellee has no charter power to condemn the lands in question; that relief is precluded through laches, *lack of equity*, and *estoppel*; that the situation with respect to cer-

tain of the pending condemnation proceedings is such as to preclude injunction in aid thereof; and that on the merits appellee is without standing.

[3] 1. *Had the District Court, sitting in Kentucky, jurisdiction to enjoin the threatened acts of interference in states other than Kentucky?*

The general rule is well established that where the necessary parties are before a court of equity it is immaterial that the subject-matter of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the court. In such case the power exists to compel the defendant to do all things necessary, which he could do voluntarily, to give full effect to the decree against him. Courts in such cases consider the equities between the parties, and make decrees in personam, according to such equities, enforcing obedience to their decrees by means of process against the person. This principle has been recognized in numerous cases, among the more prominent of which are: *Massie v. Watts*, 6 Cranch, 149, 3 L. Ed. 181; *Muller v. Dows*, 94 U. S. 444, 449, 24 L. Ed. 207; *Phelps v. McDonald*, 99 U. S. 298, 308, 25 L. Ed. 473; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 622, 32 Sup. Ct. 340, 56 L. Ed. 570. See, also, *Robertson v. Howard*, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, decided by the Supreme Court June 10, 1913. In such cases the decree, of course, does not operate upon the res, but only upon the person of the defendant. *Fall v. Easton*, 215 U. S. 1, 8, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853, and following, and cases there cited.

Appellant contends that this principle applies only to cases of fraud, trust, and contract, and so is without application here. It is true that *Massie v. Watts* and *Phelps v. McDonald* involved charges of fraud, and that *Muller v. Dows* was an action for the foreclosure of a mortgage upon land in more than one state, and so was based upon contract. It is also true that in *Massie v. Watts* the principle was stated as applying to cases of "fraud, of trust, or of contract." But we have found nothing in any of the cases to which our attention has been called limiting the jurisdiction to such cases. On the other hand, there is no apparent reason for such limitation. Indeed, in *Philadelphia Co. v. Stimson*, 223 U. S., at page 623, 32 Sup. Ct. 345, 56 L. Ed. 570, which was not a case of fraud, contract, or trust, the Supreme Court of the District of Columbia was expressly held, upon a bill filed to set aside certain harbor lines in the harbor of Pittsburgh, Pa., to have jurisdiction to restrain the Secretary of War from causing a criminal proceeding to be instituted against complainant because of the reclamation and occupation of its land outside the prescribed limits. It was there said:

"The defendant is within the district, amenable to the process of the court. There is no ground upon which it may be denied jurisdiction to decide whether he should be restrained from continuing his opposition to the complainant's plan of improvement. Rather should it be said that the case falls within the general rule sustaining the jurisdiction of a court of equity which has control of the person of the defendant and may compel obedience to its decree. *Phelps v. McDonald*, 99 U. S. 293, 308 [25 L. Ed. 473]."

But appellant contends that an action for the threatened interference with appellee's poles, wires, and equipment is merely local, and so could be brought only in a court having jurisdiction over the territory in which the injury is committed. But is the threatened interference merely local? Assuming for the moment that such interference with the poles, wires, and equipment would affect only the physical structures involved, even then, except so far as the properties threatened were real in nature, the action would seem to be transitory. An interference by appellant with the poles would not have been a trespass upon real property, both because appellant was in possession of the right of way, and, even more so, because, the contract having expired, together with the easement of support for the poles, the latter had no real estate character. The case before us is not a proceeding in rem. Its purpose was to preserve the status quo until appellee's rights of expropriation can be determined by the state courts. The cases principally relied upon by appellant in support of its contention are not controlling. For example: In *Northern Indiana R. R. Co. v. Mich. Central R. R. Co.*, 15 How. 233, 14 L. Ed. 674, it was held that the United States Circuit Court for the District of Michigan had no jurisdiction to restrain the building of a railroad in Indiana in alleged violation of complainant's exclusive right to build and maintain a railroad along the route in question. The suit was founded upon the alleged exclusive nature of complainant's charter, which allowed it to oust the defendant company from its right of way. In denying the jurisdiction of the Michigan court the Supreme Court laid stress upon the proposition that ejectment could not have been maintained in the state of Michigan, and seemingly by analogy applied the same rule to the suit in question. In *Mississippi, etc., R. R. Co. v. Ward*, 2 Black, 485, 17 L. Ed. 311, it was held that the United States Court for the District of Iowa had no jurisdiction with respect to the removal, as an obstruction to navigation, of so much of a bridge across the Mississippi river as was beyond the Iowa state line. But that was a suit to abate a nuisance, and was properly characterized in the opinion as a proceeding in rem.

The distinction between local and transitory actions is well illustrated in *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913, and *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127. In the former case it was held that a court sitting in Ohio had no jurisdiction of a proceeding in trespass upon lands situated in another state, although conversion of the timber cut was also involved, and for the reason that the principal cause of action was the trespass. In the latter case, however, a court sitting in Washington was held to have jurisdiction of an action for timber cut in Idaho, because the conversion of personal property was the gravamen of the charge, the Chair Company Case being distinguished in the opinion.

But is it true that the injury by the threatened interference with appellee's possession and use of the telegraph poles and wires affects only the physical structures involved? If property rights elsewhere are directly and immediately affected by such interference, it would

seem clear that the right of action for such further interference would be transitory. This general proposition is fairly illustrated by *Miller & Lux v. Rickey* (C. C.) 127 Fed. 573, affirmed by the Circuit Court of Appeals for the Ninth Circuit, 152 Fed. 11, 81 C. C. A. 207. In a narrow view, an interference with appellee's poles and wires would affect the physical structures so interfered with, and so would be to that extent a local injury. But in its broader aspect the injury affects the entire unitary telegraph system of which the poles and wires in the various states constitute merely parts. The threatened act of interference in each state was but a part of an announced plan of presumably simultaneous interference with the telegraph system on appellant's lines throughout. An interference in one state would destroy the through communication now existing. The injury is thus not alone to the physical structures where locally situated, nor alone to appellee, but extends to and affects directly the interests of the public, not only in each of the states in which the telegraph lines in question are located, but elsewhere and generally. The injunction bill avoided a multiplicity of suits, and the defendant was before the court and subject to its processes and orders. The court did not, in our opinion, lack jurisdiction to enjoin it from interfering by its action with the existing status, pending the determination of appellee's right to acquire a permanent interest in the use of the railroad's right of way, from the mere fact that the physical structures threatened with interference were located in states beyond the territorial jurisdiction of the court. We are unable to see that section 57 of the Judicial Code evidences a congressional intent to forbid the exercise of jurisdiction of the nature we are considering. That section relates to proceedings in rem. The jurisdiction here in question must be sustained, if at all, upon the ground that the court is acting upon the person of the defendant.

[4] 2. *The validity of the Kentucky condemnation statute.*

By section 4679a of the Kentucky statutes, telegraph companies, chartered or incorporated by the laws of Kentucky or of any other state, are given the right, upon making just compensation as provided by statute—

"to construct, maintain and operate telegraph lines * * * on, along and upon the right of way and structures of any railroad in this state."

Subsection 3 provides for condemnation proceedings in the county court, and by subsection 4 a jury of 12 is provided for the assessment of damages and compensation. Subsection 7 provides for the entry of judgment upon the verdict of the jury, and by subsection 8 each party is given the right of appeal to the Court of Appeals of the state. Section 242 of the Constitution of Kentucky forbids the General Assembly to deprive any person of an appeal from a preliminary assessment of damages, and provides that upon such appeal "the amount of damages shall, in all cases, be determined by a jury according to the course of the common law." Such jury obviously must be composed of 12 persons. *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 19 Sup. Ct. 580, 43 L. Ed. 873; *Wendling v. Commonwealth*, 143 Ky. 587,

137 S. W. 205. Section 248 of the Constitution of Kentucky provides that:

"In civil and misdemeanor cases, in courts inferior to the Circuit Courts, a jury shall consist of six persons."

It is argued that although the condemnation statute provides for a jury of 12, it is unconstitutional because such jury is provided in a court which can constitutionally, "in civil and misdemeanor cases," have a jury of but six persons.

The rule is too well settled to require reference to authority that a statute may not be declared unconstitutional unless its unconstitutionality is clear. The statute in question was passed 15 years ago. A case involving its machinery has been before the Court of Appeals of the state (*Postal Telegraph Cable Co. v. Patton*, 153 Ky. 187, 154 S. W. 1073); the question of constitutionality not having been raised, so far as appears from the reported decision. The statute has been held constitutional by the judge of the District Court in this case, as well as by the judge of the county court in the condemnation proceeding involved here, although the point now under consideration is not mentioned in the opinion of the county judge, and the opinion of the district judge is not in the record. We are not impressed that the statute is unconstitutional by reason of the objection we are considering. An assessment preliminary to the jury's award does not seem to be constitutionally necessary; and, if the trial in the county court is a constitutional jury trial, the statute is satisfied. A jury of the constitutional number is there provided. True, a jury of 12 is by the Constitution impliedly forbidden to the county court "in civil and misdemeanor cases." The trial on the question of compensation is a suit, a controversy, a judicial proceeding, within the federal judiciary and removal statutes, and is "subject to the ordinary incidents of a civil suit"; and because of this (there being the requisite diversity of citizenship), this suit was properly brought in the federal court. *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 244, 25 Sup. Ct. 251, 49 L. Ed. 462, and following. At the same time, the proceeding is one of a special nature, not an ordinary "civil" case, as the term is usually employed. The county court is a constitutional court. The Constitution provides (section 141) that its jurisdiction "shall be regulated by general law." It is a court of record. It has judicial powers. Presumably it has the power of superintendence over the trial and the control of verdict incident to a common-law trial by jury, as defined in *Capital Traction Co. v. Hof*, supra, 174 U. S. at page 13, 19 Sup. Ct. 580, 43 L. Ed. 873. That appellant is given for the protection of its rights a jury of greater dignity than permitted in the ordinary "civil and misdemeanor cases" does not invalidate, unless this proceeding clearly belongs in that category; for the Constitution does not forbid to the county court a constitutional jury in cases other than "civil and misdemeanor cases." The general statute prescribing the jurisdiction of county courts confers jurisdiction over condemnation proceedings only because embraced in the term "such other jurisdiction as may be conferred upon it by law." We are not satisfied that it is the intent of the Constitution to forbid a constitu-

tional jury in a special proceeding of this character. But were the contrary to be assumed, it is clear that if an appeal is provided from a judgment of the county court to the circuit court, with the right of trial by constitutional jury, the objection in question is obviated, the proceeding in the county court being in such case properly regarded as a preliminary assessment.

By section 978 of the Kentucky statutes an appeal to the circuit court is expressly given "from judgments of the county court in proceedings to condemn land for any purpose." In the circuit court a constitutional jury can admittedly be had. The provision cited is broad enough to embrace proceedings under the telegraph condemnation act. It was passed, however, in 1893, five years before the adoption of the act giving telegraph companies the right of eminent domain; and the latter act provides that "all laws in conflict" with it are repealed. It is argued that the general act of 1893 (Laws 1893, c. 221, § 29) is in conflict with the special act of 1898 (Laws 1898, c. 49), because the former provides for appeal to the circuit court, while the latter makes provision only for an appeal to the Court of Appeals, where trial by jury may not be had, and that the former act is thus necessarily repealed. Such result does not necessarily follow. The repealing clause of the later act does not mention the act of 1893. The former is repealed, if at all, only because necessarily in conflict with the latter. Courts will always construe a legislative act so as to give it effect as law if it be practicable to do so (*Tabor v. Cook*, 15 Mich. 322, 325); and the question of repeal is one of legislative intent. *Campau v. Detroit*, 14 Mich. 276. We think the act of 1898 and the act of 1893 are reasonably susceptible of such construction as to permit an appeal from the judgment of the county court to the circuit court, with the right of review by the Court of Appeals of the judgment of the latter court. Such a construction was placed by the Supreme Court of Alabama upon a condemnation statute of that state under circumstances not greatly differing from those presented here. *Woodward Iron Co. v. Cabaniss*, 87 Ala. 328, 6 South. 300; *Postal Telegraph Cable Co. v. Alabama Great Southern Ry. Co.*, 92 Ala. 331, 9 South. 555.

By section 8 of the telegraph condemnation statute an appeal by the railroad company is not allowed to operate as a supersedeas, provided the telegraph company give bond in double the amount of the award payable in case the judgment shall be reversed; while under section 242 of the state Constitution municipal and other corporations generally, as well as individuals, invested with the right of taking private property for public use are required to make compensation before the property is taken, injured, or destroyed. This provision of section 8 is apparently unconstitutional; but, in our opinion, it does not necessarily affect the validity of the remainder of the act. Other objections to the constitutionality of the act are urged. We have considered them all, and content ourselves with saying that, in our judgment, they do not, so far as available to appellant, render the act unconstitutional.

[5] *Is the Kentucky condemnation statute invalid as attempting to regulate interstate commerce?*

By virtue of Act June 15, 1866, c. 124, 14 Stat. 66 (Rev. Stat. § 5258 [U. S. Comp. St. 1901, p. 3565]), and Act June 8, 1872, c. 335, 17 Stat. 308, 309 (Rev. Stat. § 3964 [U. S. Comp. St. 1901, p. 2707]), all railroads are made government post roads. By Act July 24, 1866, c. 230, 14 Stat. 221 (Rev. Stat. §§ 5263–5269 [U. S. Comp. St. 1901, pp. 3579, 3580]), telegraph companies are authorized to construct, maintain, and operate lines of telegraph on the public domain and over and along post roads of the United States, such lines to be so constructed and maintained as not to interfere with the ordinary travel on such roads; provision being made for the transmitting of telegrams both for the public and for the government by railroads having telegraph lines. The transmitting of telegraphic communication is commerce, and telegraph companies doing interstate business are federal instrumentalities of commerce and subject to the jurisdiction of Congress under the commerce clause of the Constitution. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 8, 24 L. Ed. 708, and following. By the act creating the Commerce Court (Act June 18, 1910, c. 309, 36 Stat. 544 [U. S. Comp. St. Supp. 1911, p. 1288]), the provisions of the commerce act were extended to telegraph companies.

Appellant contends that by the legislation referred to Congress has occupied the field of regulation with respect to both railroad and telegraph companies engaged in interstate commerce, and by the telegraph act of 1866 referred to has deliberately withheld from telegraph companies the right of eminent domain, and evidenced an intention that telegraph companies may construct and operate telegraph lines on railroad rights of way only with the consent of the railroad companies, thus excluding the states from jurisdiction over that subject. If Congress has so occupied the field and evidenced such intention, the claimed result follows. *Northern Pacific Ry. Co. v. State of Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237; *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314. But the mere fact that Congress has legislated upon the general subject does not exclude state legislation, unless an intent exclusively to occupy the field is indicated, except where the state legislation conflicts with the federal. See *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, recently decided by the Supreme Court. The case specially relied upon to support the contention that Congress has denied to telegraph companies eminent domain on railroad rights of way is *Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517, cited in an earlier part of this opinion. That case, in our opinion, lends no support to this contention. True, it was there held that the act of 1866 did not confer upon telegraph companies the right of eminent domain, or authorize the occupation by telegraph companies of the rights of way of railway companies without the consent of the latter; and, as there was in that

case no state statute which was even claimed to give such right, the effect of such statute, had there been one, was expressly passed by without determination. There is, however, in our judgment, nothing in the opinion cited which even impliedly casts doubt upon the validity of such state legislation. On the contrary, certain decisions of the inferior federal courts sustaining the right of eminent domain under state statutes are there cited without disapproval.¹

In the Pennsylvania case Congress was not declared to have occupied the field of regulation in the respect stated, nor to have indicated an intention to exclude the exercise of eminent domain under state legislation. On the contrary, "the fundamental idea and sole purpose" of the act of 1866 was held to be "a prohibition of all state monopolies," citing and relying upon *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, *supra*. As expressed in *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 169, 32 Sup. Ct. 449, 451 (56 L. Ed. 710):

"It [the act of 1866] made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a state to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own."

Not only do we see nothing in the act of 1866 indicating an intention by Congress to exclude the power of the states to grant telegraph companies the right of eminent domain with respect to railroad rights of way, but we think such statutes directly promote the object of the federal statute as declared in the Pennsylvania and Richmond cases, and that it was the intention of Congress to leave to the states the question of granting or withholding the right of eminent domain.

[6] 3. *Has appellee charter power to condemn the lands in question?*

Appellee was incorporated under the New York telegraph act of 1848 (Laws 1848, c. 265), which provided for such organizations for the purpose of owning, constructing, using and maintaining lines of electric telegraph wholly within or partly beyond the limits of the state. Previous to 1862, according to its articles of incorporation, its line (so far as concerns the lines under consideration here) extended only from Cincinnati, through Covington, Georgetown and Frankfort to Louisville, with a branch to Lexington. In 1862 (Laws 1862, c. 425) the telegraph statute was so amended as to authorize any telegraph company incorporated under it to own, construct, use, and maintain any line or lines of electric telegraph not described in the original certificate of organization, whether wholly within or wholly or partly beyond the limits of the state of New York, upon the terms and conditions and subject to the liabilities prescribed in the original act, so far as applicable. In case of such construction, ownership, use, or maintenance of lines not described in the original certificate of organization, the company was required, within one year after such

¹ *Postal Tele. Cable Co. of Idaho v. Oregon Short Line R. Co.* (C. C.) 104 Fed. 623; *s. c.* (C. C. A. 9th Cir.) 111 Fed. 842, 49 C. C. A. 663; *Postal Tele. Cable Co. of Montana v. Oregon Short Line R. Co.* (C. C.) 114 Fed. 787; *Postal Tele. Cable Co. v. Southern Ry. Co.* (C. C.) 89 Fed. 190.

construction or acquirement of ownership, to file in the office of the Secretary of State of New York a certificate to be executed and acknowledged by at least two-thirds of the directors of the corporation, describing the general route of the line, and designating the extreme points connected thereby. No certificate covering the route in question seems to have been filed, and appellant now insists that appellee is without power to construct and operate the line in question, and so cannot take the benefit of the statutes of Kentucky and the other states involved, which grant the right of eminent domain for purposes of such construction and maintenance, because prohibited by the state of New York from extending its operations beyond the limits stated in its articles of incorporation. It may be conceded that if appellee is prohibited by the laws of New York from owning, constructing, operating, and maintaining the telegraph lines in question, such prohibition would be available as a defense to one whose lands are proposed to be taken away without his consent. *Case v. Kelly*, 133 U. S. 21, 23, 10 Sup. Ct. 216, 33 L. Ed. 513; *United States v. Northern Pacific R. R. Co.*, 152 U. S. 284, 300, 14 Sup. Ct. 598, 38 L. Ed. 443; *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 7, 22 Sup. Ct. 531, 46 L. Ed. 773; *Atkinson v. Marietta & Cincinnati Ry. Co.*, 15 Ohio St. 21. But does this prohibition appear? The failure to file the certificate of extended route does not have the effect of destroying the incorporation of the telegraph company. We may therefore lay out of account such decisions as deny the right of eminent domain to a mere de facto corporation. Nor is appellee without specific authority to extend its lines over the route in question. On the contrary, such authority is expressly conferred by the statute of appellee's creation. The only alleged infirmity is that the extended route has not been certified to the New York state authorities, as required by the act. But such certification is not made a condition precedent to the right of extension. To the contrary, permission to so extend previous to any certification thereof, or of intention to do so, is necessarily implied. It follows that if appellee's right to extend its lines over the existing routes is to be tested as of the time of its application to condemn for the purpose, a contravention of the New York statute could not be claimed, for that statute requires no certification until after the construction, etc. If, however, the date of original construction and operation of the lines is to be taken, the question then is, Has the right to continue such ownership and operation been lost; and, if so, how? The statute does not declare that the failure to certify the extended route within the designated period shall ipso facto work forfeiture of the right to continue the ownership and operation of such extended lines. Nowhere in the original act, or in the amendment of 1862, nor in any previous amendment to which our attention has been called, is there any provision whatever by way of penalty for failing to make such certification. In these circumstances, we think the applicable rule is that appellee's failure to make the certificate did not, ipso facto, terminate appellee's rights; that the state of New York alone is concerned with the enforcement of this condition sub-

sequent, and may either enforce it or waive it, as it may deem best. It follows that it does not lie with appellant to set up appellee's default in the respect stated as a defense to the condemnation proceedings. The following authorities are more or less pertinent to the subject: *Matter of New York, etc., Bridge Co. v. Smith*, 148 N. Y. 540, 546, 42 N. E. 1088; *Briggs v. Cape Cod Ship Canal*, 137 Mass. 71; *Brown v. Wyandotte, etc., Ry. Co.*, 68 Ark. 134, 139, 56 S. W. 862, and following; *Coe v. Gregory*, 53 Mich. 19, 18 N. W. 541.

The line of authorities holding that under the National Banking Act the only penalty for violation of certain administrative features of the act is forfeiture of the charter, while not strictly in point, have some bearing upon the general principles involved here.

[7] 4. *Laches, lack of equity and estoppel.*

Appellee is charged, with respect to the institution and conduct of condemnation proceedings, with laches so gross as to preclude equitable relief. But this subject was addressed to the equitable discretion of the District Court. There are pertinent facts and considerations tending to support the discretion which was exercised. Without attempting to discuss the arguments pro and con, it is sufficient that we cannot say that the District Court exceeded the limits of a proper discretion in failing to give to the considerations urged by appellant the weight which it claims for them.

It is further insisted that the granting and the refusal to dissolve the injunction was improvident and inequitable because appellee was not required, as it is contended it should have been, to pay appellant at stated times a current rental for the use of its right of way pending condemnation proceedings. The injunction bond does not secure such rental in case the injunction is ultimately sustained; and it is not clear that it could be taken into account in an award of compensation in the condemnation proceedings. Appellant makes a showing, by affidavit, of large rental value of its right of way. It would be inequitable to deprive appellant of the use of its property pending litigation without suitable compensation therefor. But the contract under which the parties were operating when litigation began did not provide a money rental. The consideration moving to each party was an interchange of service. The injunction expressly requires "both parties to maintain the present status," and we infer from the opinion that the court understood that appellant was actually having the use of appellee's telegraph plant during the pendency of suit, not only poles and wires, but "apparatus and structures"; and appellee's brief asserts that this use includes instruments, batteries, and terminal and city wires. Judge Evans laid stress upon his belief "that the defendant itself will be well-nigh as much benefited by the injunction as will be the complainant," adding: "Indeed, it is difficult to see how either side could get along without it if active and hostile litigation should continue." If this understanding of the facts is correct, we cannot say that the district judge exceeded a proper discretion in failing to require payment of money rental. If, however, appellee has failed, or shall hereafter fail, in readiness and willingness to give appellant such

service, appellant should have the right to dissolution of the injunction, unless upon payment of reasonable compensation pending the same.

[8] 5. *Condemnation proceedings in particular cases.*

It is conceded that foreign telegraph companies have not the right of eminent domain under the laws of Illinois and Indiana. In those states, shortly before the institution of this suit, condemnation proceedings were begun by the Western Union Telegraph Company of Illinois and the Western Union Telegraph Company of Indiana, respectively; those companies being respectively organized under the laws of Illinois and Indiana. The record tends to show, and we assume, that these two corporations are merely subsidiaries of, and owned and controlled by, appellee, and were organized for the purpose of condemning the rights of way over appellant's road in those states, and under an arrangement whereby appellee's poles and wires are to be turned over to the local corporations on their acquiring the rights of way sought to be condemned. The condemnation proceedings are characterized as fraudulent and collusive, and such as should not be countenanced by this court. A similar question was presented to the Court of Appeals for the Ninth Circuit in *Oregon Short Line R. R. Co. v. Postal Telegraph Cable Co. of Idaho*, 111 Fed. 842, 49 C. C. A. 663, which was a direct review of a condemnation proceeding under the statutes of Idaho, which statutes did not give the right of eminent domain to foreign corporations. It was there held that when the condemnor showed that it was a corporation de facto of the state, the further right to contest its authority to condemn land or prosecute the objects of its organization belongs to the state alone. The same question was presented to the Supreme Court of Utah, likewise on direct review of condemnation proceedings, and the same holding made. *Postal Telegraph Cable Co. of Utah v. Oregon Short Line R. R. Co.*, 23 Utah, 474, 480, 65 Pac. 735, 90 Am. St. Rep. 705, and following. A contrary holding in a case of attempted condemnation by a railroad company was made in Nebraska, whose laws, however, do not allow a foreign railway corporation to either acquire or hold a right of way except on becoming a corporation of that state. *Koenig v. C., B. & Q. R. Co.*, 27 Neb. 699, 703, 43 N. W. 423. Assuming that only a de jure corporation can lawfully exercise the power of eminent domain, we are not prepared to hold that the Western Union Telegraph Companies of Illinois and Indiana are not de jure corporations. It does not appear that they have not fully complied with all the requirements of the statutes of Illinois and Indiana, respectively, and are not fully authorized to do business within those states. The fact that in Illinois the local company has as yet no employés is not controlling. The domestic corporations are presumably subject to the control and supervision of the respective states of their creation. We are cited to no decision of the highest court of either Illinois or Indiana which would deny the right of the local companies to condemn under the facts stated, nor to any statute forbidding a foreign telegraph company to own rights of way and other property in those states. In the absence of such decisions or statutes, and without attempting to decide whether the right of the local corporations to con-

demn can be raised by appellant in the condemnation proceedings, or whether the assertion of that question belongs to the respective states alone, it seems clear that we would not be justified in overturning the exercise of discretion by the court below in preserving the existing status until the determination of the condemnation proceedings in the state courts, notwithstanding the dismissal by the trial courts of proceedings in those states. We are not impressed that the criticised arrangements between appellee and the Illinois and Indiana companies are in violation of section 3 of the federal act of July 24, 1866, as defeating the reserved right of the United States to purchase appellee's lines in Illinois and Indiana at an appraised value; for whatever rights appellee or the local companies have would seem subject to the act.

Among appellant's lines affected by the injunction are—

"a line * * * from Cincinnati, Ohio, through the state of Kentucky, * * * also a line * * * from St. Louis, Mo., running thence southeast to Evansville, Ind.," etc.

It appears that there are three miles of Cincinnati terminals and two miles of terminals in St. Louis. These two cities extend to the borders of the respective states so covered by the railroad and telegraph lines. The record is said to show that no condemnation proceedings have been taken in either Ohio or Missouri. The motion to dissolve the injunction does not mention this point, unless as contained in the voluminous pleadings and affidavits filed, to which the motion refers as its basis. The point is not referred to in the court's opinion on motion to dissolve. Appellant's brief makes no reference to its presentation except that reference is made to the fact of the inclusion of the terminals in the temporary injunction, and to the extent of these terminals as contained in the "statement showing miles of wire erected on Western Union poles on Louisville & Nashville right of way in the state of Missouri" and similarly in the state of Ohio. Why condemnation proceedings were not taken in Ohio and Missouri, or whether they are in contemplation, we are not informed by the briefs. The statutes of both Ohio and Missouri contain provisions for condemnation which on their face seem applicable. Whether the injunction is intended to cover these terminals is not entirely clear. In view of the situation stated, and having in mind the unitary character of the telegraph lines, we think we are not called upon to reverse the order complained of as to these two terminals, pending the determination of condemnation proceedings affecting the great bulk of the telegraph mileage. But what we have said is, of course, without prejudice to an application to the court below for a modification of the injunction, so far as it may pertain to Ohio and Missouri, provided condemnation proceedings are not brought in those states.

6. *The merits of the condemnation proceedings.*

In November, 1911 (which was after appellee gave notice of the termination of the contract of 1884), appellant amended its charter under the Kentucky statute so as to include the franchise of owning, constructing, operating, and maintaining telegraph and telephone lines on its railroad rights of way for public commercial business, as well

as for its own railway purposes. It accepted the federal act of June 23, 1879 (21 Stat. 31, c. 35), which provides for the doing of a telegraph business by railroad companies, and has filed affidavits herein to the effect that the entire width of the railroad rights of way is necessary to the proper and safe operation of its railroad, telegraph, telephone, and signal wires. It also shows by affidavit that after the institution of appellee's condemnation proceeding in the Kentucky county court, but before the new proceeding was taken in the federal district court, appellant's officers selected a location for its proposed telegraph and telephone poles and wires throughout substantially its entire railway lines, which is practically and in nearly all cases the precise location occupied by appellee's poles and wires. It claims the absolute right of such preferential location, and that such location is necessary to the beneficial use and operation of its proposed lines of wires. It has, of course, not been able to do anything in the way of construction. Other objections on the merits are urged. But we think all these questions are for the courts in which the various condemnation proceedings are pending. Many of them involve questions of fact which we cannot try out on affidavits, especially on a review of this character, involving the due exercise of discretion by the court below.

The questions of law presented are of course ultimately for the courts having jurisdiction of the condemnation proceedings, and we could not properly anticipate their decision to the extent of overturning the exercise of discretion by the District Court unless where the facts and the law were such as to make this ultimate result certain, which is not the case here. It is true that the Supreme Court of Georgia (construing, as we do, the language of the opinion in connection with the syllabus prepared by the court) has held that the telegraph company could not condemn lines on both sides of the railway tracks, and that it is vested with no preference in the adoption of location, and that it should be enjoined from condemning a right of way selected in good faith by the railway company. See *Western & Atlantic Ry. Co. v. Western Union Telegraph Co.*, 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225; and *Louisville & Nashville Ry. Co. v. Same Defendant*, 138 Ga. 432, 75 S. E. 477, the latter case being controlled by the rulings in the *Western & Atlantic Case*. That decision must be recognized as the law of Georgia, so far as it pertains to appellee's condemnation proceeding pending in that state. But we think it requires no modification of the injunction under review, because, first, appellee has no lines in Georgia on both sides of the railway tracks, and the District Court in the Kentucky condemnation proceedings took a different view of the question under the Kentucky statutes; and, second, the Georgia decision was on error to a final decree on the merits, dismissing the railway company's suit to restrain the condemnation proceedings; the case being remanded for another hearing. The questions of fact involved have thus not been decided by the Georgia courts adversely to appellee.

After a careful consideration of the case (including certain ob-

jections which we think do not require discussion), we are impressed that the discretion vested in the district court, with respect to the injunction complained of, was not improperly exercised. In so saying, we are not to be understood as expressing an opinion upon the ultimate merits of the controversy between the parties.

The order appealed from is affirmed with costs.

STEVENS v. McCLAUGHRY, Warden of United States Penitentiary.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1913.)

No. 3,879.

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 984*)—SENTENCE—DIFFERENT OFFENSES PARTS OF SAME ACT—CONTEMPORANEOUS LARCENY AND LARCENY AND EMBEZZLEMENT.

The sentence of a defendant, convicted under separate counts of an indictment under section 5469, Revised Statutes (U. S. Comp. St. 1901, p. 3692), of larceny of a mail pouch containing registered letters and of letters, and also of larceny of registered letters and embezzlement of their contents, committed at the same time and place and as parts of a continuous criminal act to separate punishments, is beyond the jurisdiction of the court and void as to the excess above the maximum punishment that may be imposed for a single offense; and, after the defendant has satisfied such a sentence, he is entitled to his release by habeas corpus.

Separate offenses which are committed at the same time and are parts of a continuous criminal act, inspired by the same criminal intent which is an essential element of each offense, are susceptible of but one punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2504-2509, 2541; Dec. Dig. § 984.*]

2. HABEAS CORPUS (§ 30*)—VOID JUDGMENT—ERRONEOUS JUDGMENT—FUNCTION OF WRIT OF ERROR.

The proper federal court may release by writ of habeas corpus one who is being restrained of his liberty for many years by virtue of the judgment of a federal court beyond its jurisdiction and therefore void, but it may not release one so held by virtue of a judgment which is erroneous but within the jurisdiction of the court which rendered it, and hence not void. The writ of habeas corpus is not available to perform the function of a writ of error where the judgment assailed is not void.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

3. HABEAS CORPUS (§ 27*)—EXCESS OF JUDGMENT BEYOND JURISDICTION VOID.

The excess of a judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction, and a prisoner held under such excess only is entitled to his release by writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22; Dec. Dig. § 27.*]

4. HABEAS CORPUS (§ 4*)—FAILURE TO SECURE WRIT OF ERROR IN TIME—EFFECT.

One who is being restrained of his liberty for many years by virtue of the judgment of a federal court which is beyond its jurisdiction and void is not barred from a release therefrom, by writ of habeas corpus.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the fact that he might have secured such relief by a writ of error, but failed to apply for it until it was too late.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Petition of Charles A. Stevens, alias Charles Savage, for a writ of habeas corpus, to Robert W. McClaghry, Warden of the United States Penitentiary, at Leavenworth, Kan. From an order denying the petition, petitioner appeals. Reversed and remanded, with directions to discharge petitioner.

Turner W. Bell, of Leavenworth, Kan., for appellant.

Charles S. Briggs, Asst. U. S. Atty., of Topeka, Kan. (H. J. Bone, U. S. Atty., and A. M. Harvey, Asst. U. S. Atty., both of Topeka, Kan., on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

SANBORN, Circuit Judge. This is an appeal from an order which denied the petition of Charles A. Stevens, alias Charles Savage, for a writ of habeas corpus and a release from the United States penitentiary at Leavenworth, Kan. He was indicted, convicted, and sentenced, under the first two counts of an indictment, to imprisonment for five years under section 5469 of the Revised Statutes (U. S. Comp. St. 1901, p. 3692), for feloniously taking, stealing, and carrying away on June 6, 1908, "from and out of a certain United States mail car lying and being upon a side track at the union depot transfer station for United States mails at Kansas City, Jackson county, Mo., and then and there being the duly authorized depository for registered mail matter, a certain letter pouch containing registered mail, * * * from Los Angeles, Cal., to New York, N. Y., which said pouch contained large quantities of registered mail matter, from United States post office at Los Angeles, Cal., and intended for delivery at United States post office at New York City, N. Y.," and 108 letters and packages which had been lately deposited in the United States mails for mailing and delivery. At the same trial he was convicted and sentenced to an imprisonment for five years more, under section 5469 of the Revised Statutes, under four counts of the same indictment, for feloniously taking, stealing, and carrying away on June 6, 1908, "from and out of a certain United States mail car lying and being upon a side track at the union depot transfer station for United States mails at Kansas City, Mo., and then and there being a duly authorized depository for registered letters, certain mail matter," to wit, four registered letters numbered 96,419, 96,420, 96,421, and 96,422, and feloniously embezzling and converting to his own use the contents thereof. Each of these four letters was thus described in the indictment:

"A certain letter which had theretofore been deposited in the United States post office in Los Angeles, Cal., for mailing and delivery, to wit, registered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

letter No. 96,419 (or one of the other numbers), of the United States post office at Los Angeles, Cal., mailed and deposited in said post office by the Farmers' & Merchants' National Bank of Los Angeles, Cal., and intended to be conveyed by mail and addressed to and intended for the Importers' & Traders' National Bank of New York City, N. Y., which said letter then and there contained"

—\$12,500 lawful money of the United States.

[1] The petitioner served his term of five years under the first two counts of the indictment, and then presented his petition for his release on the ground that all the offenses of which he was convicted constituted a single continuing criminal act, inspired by the same felonious intent, which was equally essential to each of the offenses charged in the indictment, and that the excess of his sentence beyond imprisonment for five years, which was the maximum punishment prescribed by section 5469 for a single offense, was beyond the jurisdiction of the court which sentenced him, and void, under the decision of this court in *Munson v. McClaughry*, 198 Fed. 72, 75, 76, 117 C. C. A. 180, 42 L. R. A. (N. S.) 302, the decision of the Circuit Court of Appeals of the Ninth Circuit in *Halligan v. Wayne*, 179 Fed. 112, 102 C. C. A. 410, and the opinions in *Re Snow*, 120 U. S. 274, 285, 7 Sup. Ct. 556, 30 L. Ed. 658; *Hans Nielsen*, Petitioner, 131 U. S. 176, 182, 190, 9 Sup. Ct. 672, 33 L. Ed. 118; *Kite v. Commonwealth*, 11 Metc. (Mass.) 581, 583; *Triplett v. Commonwealth*, 84 Ky. 193, 1 S. W. 84; *Yarborough v. State*, 86 Ga. 396, 12 S. E. 650; *Commonwealth v. Birdsall*, 69 Pa. 482, 485, 8 Am. Rep. 283.

The principle upon which the decisions in these cases rests is that two or more separate offenses which are committed at the same time and are parts of a single continuing criminal act, inspired by the same criminal intent which is essential to each offense, are susceptible to but one punishment. The most familiar illustration of the rule is that burglary with intent to commit larceny and larceny committed at the same time and as one continued act do not subject the perpetrator to two punishments, one for the burglary and another for the larceny, because the same criminal intent is indispensable to each, and they are each parts of a continuing criminal act. In order to take this case out from under this principle, counsel for the government argue that section 5469 denounces several separate offenses, two of which are: (1) Stealing the mail, or any letter or packet from any authorized depository for mail matter; and (2) taking the mail, or any letter or packet, which contains an article of value, from any authorized depository for mail matter, opening and embezzling the contents thereof; that the intent to embezzle is not essential to the former, but is indispensable to the latter offense; that the two offenses are therefore separate. Let all this be conceded. Nevertheless, in the case at bar, the pleader alleged the stealing of the letters in the third, fourth, fifth, and sixth counts of the indictment in the same words in which he alleged the stealing of the letter pouch and the letters in the first and second counts. He averred that the defendant "did unlawfully, and feloniously take, steal, and carry away from and out of a certain United States mail car" the letters whose contents he also

alleged that the defendant embezzled. Conceding, but not admitting, that the United States might have charged and upon conviction have punished the separate offense of taking the four registered letters and embezzling their contents, its averment in the four counts which treat of these letters, of the intent to steal them and of their stealing made that intent an issue under each count and an essential element of each offense charged, and thus brought this case directly under the rule and the authorities cited. In burglary with intent to commit larceny and larceny committed at the same time the intent to break and enter is not essential to the offense of larceny, but the intent to steal is indispensable to each offense. So in the case at hand, the intent to embezzle is not essential to the offense of stealing a mail pouch and the letters, but under this indictment the intent to steal and the stealing is made by the pleadings as indispensable an element of the four offenses charged in the third, fourth, fifth, and sixth counts of the indictment as it is of the offenses charged in the first two counts.

Counsel call attention to the conceded rule that charges of separate offenses of the same class may be joined in separate counts in the same indictment. But this rule and the practice under it does not detract from the soundness or effect of the principle that two or more separate offenses which are committed at the same time and are parts of a continuing criminal act inspired by the same indispensable felonious intent are susceptible of but one punishment. The two offenses in *Munson v. McClaghry*, 198 Fed. 72, 117 C. C. A. 180, 42 L. R. A. (N. S.) 302, were charged in separate counts of the same indictment, and the situation was the same in *Halligan v. Wayne*, 179 Fed. 112, 102 C. C. A. 410.

Finally it is said that the record fails to prove that the stealing and carrying away charged in the third, fourth, fifth, and sixth counts of the four registered letters, and the conversion of their contents, was a part of the same continuing act as the stealing and carrying away of the mail pouch and the 108 letters charged in the first and second counts. Let us see. The record is that the defendant was tried and convicted under each of these counts; hence that the charges they contain are true. The first count charges that on June 6, 1908, the defendant, at Kansas City, Mo., took, stole, and carried away—

"from and out of a certain United States mail car lying and being upon a side track at the union depot transfer station for the United States mails at Kansas City, Jackson county, Mo., and then and there being the duly authorized depository for registered mail matter, certain United States mail, to wit, a certain letter pouch containing registered mail, the lock on said pouch being number 2,424, rotary number 311, from Los Angeles, Cal., to New York, N. Y., which said pouch then and there contained large quantities of registered mail matter from United States post office at Los Angeles, Cal., and intended for delivery at United States post office at New York City, N. Y."

Each of the third, fourth, fifth, and sixth counts charged that the defendant on June 6, 1908, at the same time that he took the mail pouch, at Kansas City, Mo., at the same place that he took the mail pouch, feloniously took, stole, and carried away a registered letter "from and out of a certain United States mail car lying and being upon

a side track at the union depot transfer station for United States mails at Kansas City, Mo.," a mail car at the same place and described in the same words as the car from which he took the registered mail pouch, "a certain letter which had lately theretofore been deposited in the United States post office at Los Angeles, Cal., mailed and deposited in said post office by the Farmers' & Merchants' National Bank of Los Angeles, Cal., and intended to be conveyed by mail and addressed to and intended for the Importers' & Traders' National Bank of New York City, N. Y.," such a letter as in the ordinary and almost invariable course of business would be in the letter pouch, and nowhere else, containing registered mail from Los Angeles, Cal., to New York, described in the first count of the indictment.

[3] The averments in each of the counts of this indictment that the six stealings occurred at the same time, at the same place, from a mail car described in each of them in the same words, and that the registered letters described in the third, fourth, fifth, and sixth counts were such as in the usual course of business would have been in the mail pouch containing registered letters from Los Angeles to New York described in the first count, converge upon the mind with such compelling force as to leave no doubt that all these stealings were committed at the same time, were parts of a single continuous criminal transaction, and that they were inspired by the same indispensable felonious intent. This conclusion is in accord with the decision in the Circuit Court of Appeals of the Ninth Circuit in *Halligan v. Wayne*, 179 Fed. 112, 102 C. C. A. 410, and with the decision of this court in *Munson v. McClaughry*, 198 Fed. 72, 117 C. C. A. 180, 42 L. R. A. (N. S.) 302, where the fact that a count for burglary with intent to commit larceny charged the commission of the offense at the same time and place as a count for larceny was held sufficient, without more, to satisfy the court that the offenses charged were parts of the same continuous act. The case at bar, therefore, falls within the rule upon which the decisions in these cases are founded. It rests upon the principle that no man shall be twice punished for the same offense, so that when under the first two counts of the indictment the district court had sentenced the petitioner to the maximum punishment fixed by the law, it had exhausted its power, and its second sentence to imprisonment for five years more on the third, fourth, fifth, and sixth counts was in excess of its jurisdiction and void. The excess of a sentence or judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction, and a prisoner held under such excess may be released by writ of habeas corpus. *Ex parte Lange*, 18 Wall. 163, 176, 178, 21 L. Ed. 872; *In re Snow*, 120 U. S. 274, 285, 7 Sup. Ct. 556, 30 L. Ed. 658; *Hans Nielsen, Petitioner*, 131 U. S. 176, 182, 190, 9 Sup. Ct. 672, 33 L. Ed. 118; *Mackey v. Miller*, 126 Fed. 161, 163, 62 C. C. A. 139, 141; *Ex parte Peeke* (D. C.) 144 Fed. 1016; *Bigelow v. Forrest*, 9 Wall. 339, 19 L. Ed. 696; *Foltz v. St. Louis & San Francisco Ry. Co.*, 60 Fed. 316, 320, 8 C. C. A. 635, 639.

Since this case was argued and submitted, however, the Supreme Court has handed down, on May 26, 1913, its opinion in the Matter of the Petitions of *Spencer, Scholl, and Moyer*, 228 U. S. 652, 33

Sup. Ct. 709, 57 L. Ed. 1010, who had applied for writs of habeas corpus to release them from imprisonment under sentences of a state court requiring them to pay fines and costs and undergo an imprisonment for an indeterminate period, the minimum of which should be 18 months and the maximum two years, upon the ground that when they committed their crimes the maximum imprisonment which could be imposed upon them was two years and the minimum six months, and that the amendment which permitted the sentences imposed was an *ex post facto* and unconstitutional law. They had first appealed from their sentences to the Superior Court of Pennsylvania where the judgments had been affirmed. They had then petitioned the Supreme Court of the state for a special allocatur to allow an appeal to that court from the judgment of the Superior Court. The Supreme Court had given the amendment such a construction as rendered it constitutional and valid, and had denied their petition. The petitioners had not raised the constitutionality of the amendment to the law which they sought to challenge in either of the courts of the state, nor had they sought a writ of error to the Supreme Court of the state from the Supreme Court of the United States. They had, however, applied to the United States District Court after their defeats in the state courts for writs of habeas corpus, those applications had been denied, and they were met in the Supreme Court of the United States by the objections that they were too late, and that their claims had been adjudicated in the United States District Court. They had paid their fines and costs, and their contention was that their sentences of imprisonment were void, although it was plain that under any interpretation of the original statutes and the amendment to them their sentences were legal and valid for at least six months of the terms of their imprisonment, and they had not served that much of those terms. The Supreme Court refused to issue the writ of habeas corpus on the ground, among others, that their sentences to imprisonment were not void, but were merely erroneous, and that the national courts in the exercise of their discretion may and should, save in exceptional cases of which that was not one, refuse to interfere by habeas corpus with the course or final administration by the state courts of the criminal justice of their state, and should require the petitioners to present their claims by writs of error, citing *Urquhart v. Brown*, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760, which rests on the latter ground, and *In re Lincoln*, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984, which is founded on the rule that the Supreme Court may deny the writ in petty criminal cases where no writ of error has been sought and no application for a writ of habeas corpus has been made to any lower court, although the prisoner is restrained under the judgment of a federal court and there is full jurisdiction to issue the writ. The circumstances in *Lincoln's Case* were these: The petitioner had been sentenced by the United States District Court to jail for 60 days and to pay a fine of \$100, for selling liquor to Indians. His jail sentence had expired. Under the law he could either pay the fine, of which he was complaining, or be discharged within 90 days from February 19, 1906, by taking the poor debtor's oath. The Supreme Court declared

that the case was practically a moot one, for the decision was filed on May 14, 1906, only five days before he could be discharged under the poor debtor's oath; that in *Ex parte Mirzan*, 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513, it had declined to issue a writ of habeas corpus after a conviction, "holding that it might be issued by the proper circuit court, and that application should be made to that court, except in cases where there were some special circumstances making the immediate action by this court necessary or expedient," and it declined to issue the writ, with the concluding remark that "to permit every petty criminal case to be brought directly to this court upon habeas corpus, on the ground of an alleged misconception or disregard of our decisions, would be a grievous waste of our time, which should be devoted to a consideration of the more important legal and constitutional questions which are constantly arising and calling for our consideration." This brief review of *Lincoln's Case* seems to demonstrate that it is no authority for any claim that a District Court ought not to issue its writs to relieve a prisoner, like the petitioner here, who is otherwise remediless, from an illegal and unconstitutional imprisonment for five years under a void sentence of a federal court, because this decision rules the practice of the Supreme Court only, and not that of the District Court, because it is limited by its facts to a moot and a petty criminal case, and a case which involves one's deprivation of his liberty for five years is not petty, and because in the case in hand the petitioner applied for his writ to a lower court, to which he was directed to apply by the Supreme Court in the *Lincoln* and *Mirzan* Cases. Moreover, the Supreme Court calls special attention in that decision to the fact that, even that court had issued the writ and discharged a prisoner although the claim to his discharge could have been and was not litigated by writ of error in *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, and that it would do so in a matter involving a question of great significance involving the rights of many. 202 U. S. 178, 183, 26 Sup. Ct. 602, 50 L. Ed. 984. What question is of greater significance, or involves the rights of more persons, than the right to the constitutional immunity from a second punishment for the same offense? *Hans Nielsen, Petitioner*, 131 U. S. 176, 183, 184, 9 Sup. Ct. 672, 33 L. Ed. 118.

We return to the cases of *Spencer* and others. The opinion in that case sets forth the facts that by writ of error to the Superior Court of Pennsylvania and by petition to the Supreme Court of that state the petitioners had challenged the sentence of which they complain, and had not in either case raised, as they might have done, the issue that it was based on an *ex post facto* law; that they had applied to the United States District Court for a writ of habeas corpus on that ground, and their application had been denied; that their sentence was in any event valid for six months of their terms, and those six months had not expired, and after reciting all these facts it reviewed the opinion in *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872, where a prisoner was relieved of a void sentence by writ of habeas corpus from the Supreme Court, and distinguished the cases of *Spencer* and others from that case on the ground that their sentences were erroneous but

not void, while the sentence in the Lange Case was void, invoked the rule that a writ of habeas corpus may not be used to perform the function of a writ of error, called attention to the fact that the amendment to the statute which was claimed to be *ex post facto* had been so construed by the Supreme Court of Pennsylvania as to have no *ex post facto* effect, and then because the application was too late, coming after a decision of a like application by the United States District Court and after reviews by the state courts, because the statute challenged had been construed by the State Supreme Court to be harmless and because the sentence assailed was erroneous but not void, it refused to issue the writ. In the course of the opinion the Supreme Court called attention sharply to the fact that the sentences of the petitioners were subject to review and modification by the Supreme Court of Pennsylvania, and that no application therefor on the ground that the amendment to the law was *ex post facto* had been made to that court. This portion of the opinion suggests two questions: Did the Supreme Court hold or intend to hold by its decision in these cases, or in the Lincoln Case, that a United States District Court may not and ought not, in any case, to issue a writ of habeas corpus and release a person otherwise remediless, who is being restrained of his liberty by virtue of a judgment of a federal court beyond its jurisdiction, where he might have obtained his release by a writ of error, but failed to do so until it was too late, and, if not, does the case in hand fall within the class of cases in which such a writ may and should issue? The Circuit Court of Appeals of the Fifth Circuit seems to have been of the opinion that the first of these questions should be answered in the affirmative. *Moyer v. Anderson*, 203 Fed. 881. After a careful consideration of the purpose and effect of the right to the writ of habeas corpus, and of the rules and practice which govern it, it has been found difficult for us to reach that conclusion. In deference to the profound learning, commanding ability, and long experience of the eminent jurists who occupy the bench in that circuit, and to the high authority of that court, it has seemed proper to state the reasons which have forced us to a different conclusion.

The judgment in the case at bar was rendered by a national court, and the cogent reasons against interference by the federal courts with the administration of justice in the state courts are inapplicable here. *Ex parte Royall*, 117 U. S. 254, 6 Sup. Ct. 742, 29 L. Ed. 872; *In re Dowd* (C. C.) 133 Fed. 747, 754; *In re Lincoln*, 202 U. S. 178, 182, 26 Sup. Ct. 602, 50 L. Ed. 984. While it is a conceded rule that a writ of habeas corpus may not be used as a mere writ of error, it has been an established principle of our national jurisprudence for many years that one restrained of his liberty by virtue of a judgment or order of a court which that court had no jurisdiction to make might be released by the writ of habeas corpus, whether such a release could have been secured by writ of error or not. *Ex parte Lange*, 18 Wall. 163, 169, 173, 21 L. Ed. 872; *Ex parte Heff*, 197 U. S. 488, 508, 509, 25 Sup. Ct. 506, 49 L. Ed. 848; *Ex parte Bridges*, 4 Fed. Cas. 98, 104; *Ex parte Wilson*, 114 U. S. 417, 422, 429, 5 Sup. Ct. 935, 29 L. Ed. 89; *In re Snow*, 120 U. S. 274, 285, 7 Sup. Ct. 556, 30 L. Ed. 658; *Ex parte Bain*, 121 U. S. 1, 13, 14, 7 Sup. Ct. 781, 30 L. Ed.

849; Hans Nielsen, Petitioner, 131 U. S. 176, 182, 190, 9 Sup. Ct. 672, 33 L. Ed. 118. The cases of Spencer and others questioned a judgment of a state court imposing a sentence of imprisonment for an indeterminate period the minimum of which should be 18 months and the maximum two years, on the ground that there was no law, except an *ex post facto* law, which authorized an imprisonment for more than six months. The petitioners had not served six months. The judgments under which they were restrained were not void because the court had jurisdiction to sentence them for six months. Moreover, their validity depended upon the construction of statutes of the state which its courts on writs of error had construed against them, so that the judgment challenged was an erroneous and not a void judgment, and the writ of habeas corpus was not available under the rule of Hans Nielsen, Petitioner, 131 U. S. 176, 183, 184, 9 Sup. Ct. 672, 33 L. Ed. 118.

On the other hand, the case at bar is one in which the trial court had jurisdiction to sentence the petitioner, for all the offenses with which he was charged to an imprisonment for five years and no longer. It imposed that sentence, thereby exhausting its power to sentence him to imprisonment, and then without jurisdiction sentenced him to an imprisonment for another five years. The second sentence alone is challenged; no part of it is valid; he did not seek to reverse it by writ of error, and his time to apply for such a writ has expired. Is he barred from all relief? In *Ex parte Lange*, 18 Wall. 163, 169, 173 [21 L. Ed. 872], the petitioner had been tried, convicted, and sentenced for an offense for which he was liable to the alternative punishment of fine or imprisonment. The court imposed both. He paid the fine, and made application to the same court by writ of habeas corpus for release on the ground that he was then entitled to a discharge. The circuit court set aside its judgment and sentenced him to imprisonment only. He then applied to the Supreme Court by writ of habeas corpus for his release. Mr. Justice Miller delivered the opinion of the court and, among other things, he said:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. * * * But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court, cannot review that judgment for error, it can discharge the prisoner only when it is void. But we do not concede the major premise in this argument. A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes. We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment

the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

And the court discharged the prisoner.

In *re Bridges*, 4 Fed. Cas. 98, 105, No. 1862, the petitioner had been tried, convicted, and sentenced for perjury by a state court without jurisdiction of the subject-matter. He prayed a writ of habeas corpus and a discharge. Mr. Justice Bradley said:

"It is contended, however, that where a defendant has been regularly indicted, tried, and convicted in a state court, his only remedy is to carry the judgment to the court of last resort, and thence by writ of error to the Supreme Court of the United States, and that it is too late for a habeas corpus to issue from a federal court in such a case. This might be so if the proceeding in the state court were merely erroneous; but where it is void for want of jurisdiction, habeas corpus will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case."

In *Ex parte Wilson*, 114 U. S. 417, 422, 429, 5 Sup. Ct. 935, 29 L. Ed. 89, a prisoner, convicted and sentenced to imprisonment at hard labor on a trial upon an information, sought release by writ of habeas corpus because he had never been indicted or presented by the grand jury, and the Supreme Court granted his release although the question raised by the petition had not been urged at the trial.

In *Ex parte Bain*, 121 U. S. 1, 13, 14, 7 Sup. Ct. 781, 30 L. Ed. 849, the prisoner had been tried, convicted, and sentenced to imprisonment on an indictment which the court had amended before the trial. He prayed a writ of habeas corpus and a discharge. The Supreme Court held that the trial court lost its power to try him by the amendment and discharged him.

In *re Snow*, 120 U. S. 274, 285, 7 Sup. Ct. 556, 30 L. Ed. 658, section 3 of the Acts of Congress of March 22, 1882, c. 47, 22 Stat. 31, provided that if any male person in a territory of the United States should cohabit with more than one woman, he should, on conviction thereof, be punished by a fine of not more than \$300, or by imprisonment for not more than six months, or by both said punishments. On December 5, 1885, three indictments were found against Snow, the first for continuously living and cohabiting with seven women named as his wives, between December 31, 1882, and December 31, 1883, the second for continuously claiming, living and cohabiting with the same women as his wives between January 1, 1884, and December 1, 1884, and the third for continuously living and cohabiting with the same women between the first day of January, 1885, and the first day of December, 1885. There was a separate trial and conviction on each indictment. After the verdicts had been rendered, the court sentenced Snow on the same day to pay a fine of \$300 and to imprison-

ment for six months on each indictment. After serving six months and paying a fine of \$300 Snow prayed the trial court for a writ of habeas corpus and a release from further imprisonment, on the ground that the offenses charged in all the indictments constituted a single continuous offense, that the court had been without jurisdiction to impose more than one punishment therefor, and that the sentences on the second and third indictments were void. The district court denied the application, and the petitioner appealed to the Supreme Court. That court sustained the claim of the petitioner, held that the acts charged in the three indictments constituted one continuous criminal act, and said:

"Not only had the court which tried them no jurisdiction to inflict a punishment in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on habeas corpus, when the sentence on more than one of the convictions is sought to be enforced"

—reversed the court below and ordered the issue of the writ.

In *Hans Nielsen, Petitioner*, 131 U. S. 176, 182, 190, 9 Sup. Ct. 672, 674 (33 L. Ed. 118), another case with parallel facts is reported. To the objection that the validity of the second sentence could not be assailed by writ of habeas corpus, Mr. Justice Bradley replied:

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. * * * It was laid down by this court in *re Coy*, 127 U. S. 731, 758 [8 Sup. Ct. 1263, 1272, 32 L. Ed. 274], that the power of Congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: 'And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him.' * * * It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte Lange*, where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of *Snow*: The court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment."

[2] And here is the true distinction between the cases in which the writ of habeas corpus may and those in which it may not issue. If the judgment or sentence challenged is without the jurisdiction of the court and void, the writ may issue. If it is erroneous, but within the jurisdiction of the court which rendered it, the writ may not issue. The parallel between the cases of *Snow* and *Nielsen* and the case at bar is complete, and unless the decision in the case of *Spencer* and

others has overruled the cases which have just been reviewed, and departed from the fundamental principles they sustain and the practice under them which has prevailed for years in *In re Mayfield*, 141 U. S. 107, 116, 11 Sup. Ct. 939, 35 L. Ed. 635; *In re Ladd* (C. C.) 74 Fed. 31, 42; *In re Waite* (D. C.) 81 Fed. 359, 362, 372; *Mackey v. Miller*, 126 Fed. 161, 163, 62 C. C. A. 139; *Ex parte Peeke* (D. C.) 144 Fed. 1016—there would seem to be no doubt of the power or duty of the court to issue the writ in the case in hand. We are not persuaded that it has overruled them, departed from the rules they maintain, or decided that every one restrained of his liberty by a void judgment which he might have challenged by a writ of error, is barred of relief by means of the writ of habeas corpus. It has not expressly declared that those decisions are wrong, or that the principles on which they rest are erroneous, and they are too firmly established to be overthrown by silence. On the other hand, it has carefully distinguished the leading case, the *Lange Case*, from those in which its opinion was delivered, and to hold that one who is being deprived of his liberty for a long term of years by virtue of a sentence beyond the jurisdiction of the court which rendered it has deprived himself of his right to relief by writ of habeas corpus because through ignorance, poverty, or neglect he failed to challenge that judgment by writ of error until it was too late is to rob the writ of the very purpose of its existence, the purpose to afford speedy and inexpensive relief from unlawful imprisonment to those otherwise remediless. To us it is incredible that the Supreme Court ever intended to decide, to take the striking illustrations of Mr. Justice Miller in *Ex parte Lange*, 18 Wall. at page 176, 21 L. Ed. 872, that one who should be sentenced by a justice of the peace having jurisdiction to fine for a misdemeanor, or by a court of general jurisdiction on an indictment for a libel, to imprisonment and death, who through ignorance or neglect should fail to appeal or procure a writ of error within the prescribed time, would be barred of relief by the writ of habeas corpus. It is a writ of right. The acts of Congress declare that the court to which the application for it is made "shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto," and "shall proceed in a summary way to determine the facts of the case, * * * and thereupon to dispose of the party as law and justice require." Revised Statutes, §§ 755, 761. The petitioner is being restrained of his liberty for five years by a judgment of a federal court which was beyond its jurisdiction and void.

[4] And our conclusion is that one who is being restrained of his liberty for many years by virtue of the judgment of a federal court which is beyond its jurisdiction and void may, and should, be relieved from that restraint by the proper federal court by means of the writ of habeas corpus, and that he is not barred from such relief by the fact that he might have obtained it by a writ of error, but failed to do so until it was too late. The case at bar falls under the rule we have announced and within the class of cases governed by it, and the court below should have issued the writ and discharged the prisoner. The order denying the petition for the writ of habeas corpus and for

the release of the petitioner from the penitentiary is accordingly reversed, and the case is remanded to the District Court, with directions to discharge the prisoner.

TAMBLE v. PULLMAN CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913.)

No. 2,338.

1. ABATEMENT AND REVIVAL (§ 57*)—ABATEMENT OR SURVIVAL—ACTION TO RECOVER TAXES PAID—PLEADING.

When the declaration in an action against a county trustee in Tennessee to recover taxes paid under protest stated a common-law right of action against the defendant individually to recover all taxes, both state and county, so collected by him, it also included a statutory cause of action to recover the state taxes under Shannon's Code Tenn. § 1061, and on the withdrawal of any claim, except for such taxes, the action became one under the statute, which did not abate on the death of the defendant, but was properly revived against his successor in office.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 286-293; Dec. Dig. § 57.*]

2. TAXATION (§ 146*)—TENNESSEE STATUTE—CARS OF FOREIGN CORPORATION.

A state has power to tax property permanently located within its jurisdiction, although owned by a foreign corporation and having its actual use only in connection with other parts of a system employed in interstate commerce, and also to tax movable property of such a corporation brought into the state to be there so used and employed; and when such property is not continuously the same, but, as in case of cars, is constantly changing, it may fix the tax by an appraisalment of the average amount so used. But in order to exercise such power a state must, by appropriate legislation, fix a taxable situs for such movable and changing property, and provide a method and basis for its assessment; and this the state of Tennessee has not done, with respect to passenger cars owned by nonresident corporations.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 254; Dec. Dig. § 146.*]

Taxation of foreign corporations, see note to McCanna & Fraser Co. v. Citizens' Trust & Surety Co. of Philadelphia, 24 C. C. A. 13.]

3. TAXATION (§ 490*)—FINDINGS OF STATE BOARD OF EQUALIZATION—REVIEW—COLLATERAL ATTACK.

The state board of equalization of Tennessee, created by Acts Tenn. 1907, c. 602, is not vested with any part of the judicial power of the state, and although its decisions are made reviewable by writ of certiorari from the Supreme Court, they are not such judgments as render the questions determined *res judicata*, if not so reviewed, but may still be attacked collaterally by a suit in equity on the ground that the board acted without jurisdiction.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 872, 873; Dec. Dig. § 490.*]

In Error to the Circuit Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Action at law by the Pullman Company against Peter M. Tamble, trustee of Davidson County, Tenn. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 173 Fed. 200.

Until the arising of the present controversy, the Pullman Company (hereafter called the "Company") had not been taxed on its cars by the state of Tennessee, or by any municipality in the state, but there had been levied against it only an annual, general, specific tax, imposed by, and paid to, the state. Tennessee has a system by which the tax-collecting officer may assess and collect taxes, not only for the current year, but also for the three preceding years, upon property which by mistake of law or fact has not been assessed. Conceiving that a considerable number of cars belonging to the Company had a taxable situs at the city of Nashville, in the county of Davidson, the county trustee of that county undertook to assess these cars for the year 1907, and to "back assess" them for the years 1904, 1905, and 1906. This proceeding was not finished until 1908, and was accordingly made to include taxes for that year. After a hearing, the county trustee fixed the valuation of these cars as personal property in Davidson county for each of the five years, and rendered "judgment" in favor of the state for a five-year total of \$7,908 tax and interest, and in favor of Davidson county for \$15,204, the five-year total of county taxes and interest. He also added the statutory penalty of 15 per cent.

Following the statutory procedure, the Company appealed this proceeding to the state board of equalization. This board, after hearing, increased the valuations and "gave judgment" against the Company for a total of \$9,610 due to the state for the five years 1904-1908, and for a total sum of \$21,132 taxes due to Davidson county for the same years. This so-called judgment was, by the board, certified to the county trustee of Davidson county, the proper collecting officer, and the Company brought suit in the United States Circuit Court for the Middle District of Tennessee to enjoin such collection. That court denied the motion for preliminary injunction, indicating that if the Company was aggrieved its proper remedy was to pay the tax under protest and sue to recover. The Company adopted this course, paid the entire state and county tax and brought this suit in the court below against the county trustee, and others, to recover the payment so made. Later, it limited its demand in this suit to the recovery of the state tax, and its position, as so limited, was sustained by the court below and final judgment rendered accordingly. The county trustee brings this writ of error.

Upon the trial, a jury was waived, and the court found the facts. They may be epitomized as follows: The Company was organized under the laws of Illinois, where its principal office is. It has, in Tennessee, no place of business, except as its district agencies may be so called. It is engaged in the business of operating sleeping cars and parlor cars upon railroads throughout the United States, Canada, and Mexico. In the management of this business, it has division superintendents, each of whom has supervision throughout several states. It also has district agents, each of whom has a subordinate and modified supervision over a smaller district. It has such agencies in Tennessee, at Memphis, Nashville, Knoxville, and Chattanooga. The territory of the Nashville district agent extends from Evansville, Ind., and Bowling Green, Ky., south to Decatur and Bridgeport, Ala., and from McKenzie, Tenn., east to Harriman, Tenn. His duties are generally to inspect and ride on the cars within these limits, see that they are kept in proper condition, and see that the Company's employes perform their duties to the Company and to the public. He has authority to hire and discharge employes working within his district; he assigns cars to the various runs which begin and end within his district; to him requisitions are made by the railroads or other persons desiring additional cars not already in service; and he and the agents of similar authority at the other places named are the only representatives of the Company within the state.

The Tennessee taxing laws contemplate the ad valorem assessment of all personal property situated within the state on the 10th day of January of each year. The cars assessed in this proceeding were within Davidson county at some time during that day, and are all included within three classes:

1. *Emergency or Protection Cars.* The Company kept, at Nashville, a reserve of cars for use in emergencies. There were three or four of such cars usually on hand, excepting as they were drafted into use. Their identity was

continually changing. They were ready to supply any sudden and irregular demand—as to replace a disabled car, to care for an unexpected traffic, etc. They were day by day attached, indiscriminately, to through and local trains—being started on a journey to Memphis, to be returned the next day, or not at all, or to Chicago, or to New York, perhaps to be returned later, or perhaps not, all as dictated by the daily situation, at Nashville, in connection with the business in other parts of the country. When such a car was sent out, and was not to come back at once, its place in the reserve was supplied by some other car as soon as possible.

2. *Local Cars.* Cars which were in service, on a regular run of which Nashville was one terminus. Some of these runs were wholly within the state, bringing the car or its substitute back to Nashville every other day; others extended beyond the state, and a given car, or its substitute, would be in Nashville every second or third or fourth day. The stop or lay-over of these local cars, in Nashville, varied from 12 to 36 hours. A particular car would usually remain for some time in service in the same run, but changes were frequent, and the car sent out might or might not come back.

3. *Through Cars.* These cars passed through Nashville in a regular run from some point without the state to another point beyond the state. In these runs, a given car, or the one substituted for it, would be in Nashville at regular periods, sometimes every day, sometimes at longer intervals. The delay of each car at Nashville ordinarily varied from a few minutes to a few hours.

As to all these classes, the cars were, on January 10th, in Davidson county, only in the course of passing therethrough, or else had been disconnected from some railroad train entering Nashville, and were held for the purpose of being attached to some train going out of Davidson county as soon as needed therefor. The number of cars assessed, as located in Davidson county on January 10th, was the average number in the same manner present therein each day in the year. The Company had no control over the movements of cars in service, but the railroads routed and diverted such cars at their discretion.

Further essential facts will be stated in connection with the specific points to which they refer.

C. T. Cates, Jr., of Knoxville, Tenn., Theo. J. McMorrough, of Nashville, Tenn., Thomas B. Lytle, of Murfreesboro, Tenn., and Barthell, Howell & O'Connor, of Nashville, Tenn., for plaintiff in error.

W. L. Granbery, of Nashville, Tenn. (Gustavus S. Fernald, of Chicago, Ill., of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). When the suit was commenced, the defendants were the collecting officer, Tamble, as trustee of Davidson county, and also Davidson county itself, and J. B. Jetton, one of the state "revenue agents." The declaration alleged that the plaintiff, under duress and protest, had paid to the county trustee the full sum of all county and state taxes, interest, and penalties, for the five years in question. The right to recover was based upon the claims that neither the county trustee nor the state board had any jurisdiction to assess the property in question, that such property never had any taxable situs within the state of Tennessee, and that the valuation adopted by the state board was arbitrary and unfair, and not upon the same basis as the valuations of other property—whereby, if the action taken was allowed to stand, plaintiff would lose its property without due process of law and would be de-

prived of the equal protection of the laws. The Company also insisted that the property assessed consisted solely of instruments of interstate transportation, and that the action of the state authorities was an unlawful interference with interstate commerce. It was not alleged that any part of the sum demanded had been by the county trustee paid over to Davidson county, but it was charged that the trustee had immediately paid over to the revenue agent his statutory percentage of the sum collected. Defendant Tamble demurred, because, among other reasons, the statutory right to pay under protest and sue to recover (section 1061, Shan. Code) attached only to state taxes, and demands for state and county taxes could not be joined in such a suit. The court held that the action could be maintained as a common-law action for the entire sum against the man who had unlawfully collected the entire sum, and also held that the actions, if any, ultimately resulting against the county and the revenue agent, could not be joined with this action. Thereupon the suit was dismissed against Davidson county and the revenue agent, and proceeded against Tamble, county trustee, as sole defendant. He died, and his death was suggested on the record, as well as the fact that Crouch was his successor in office. Plaintiff obtained leave "to withdraw its suit in so far as the same relates to the taxes collected on behalf of Davidson county, leaving the suit to stand alone to recover the taxes, interest, penalty, and costs accruing and paid on account of the taxes claimed on behalf of the state of Tennessee"; and the suit was revived against Crouch. The judgment rendered was in the peculiar form authorized only by the Code, directing a refund from the state treasury.

[1] Defendant urges that by the action of the court upon the demurrer the character of the suit was fixed as one at law against Tamble for his personal tort, that this action abated by Tamble's death, and that it was error to revive the same and give judgment against Crouch. This was its original character, and it may be conceded that abatement, by Tamble's death, would have been a necessary incident; but we think the nature of the suit was modified, and properly so, by the proceedings taken. The declaration made a case for recovery of the state taxes, under section 1061 of Shannon's Code; it also stated a common-law right of action which covered and included this statutory right and more besides. When, later, plaintiff abandoned the remainder of the cause of action and let it stand for the state taxes alone, plaintiff was not stating a new or additional cause of action, but only dropping out and abandoning part of its demand. There was, in the remainder of the claim, nothing inconsistent with the statutory action; and we are satisfied that it was not erroneous to permit the character of the action to be thus modified, and to treat it from that time on as a suit under the statute, and to shape the judgment accordingly.

[2] We are satisfied also that there was no Tennessee statute in existence contemplating or providing for any ad valorem assessment of these cars, and hence it follows that the assessment was without the authority of law and was wholly void. This same question arose in

the court below upon the demurrer; and we adopt, upon this subject, Judge Sanford's opinion, printed in the margin. (See end of opinion.)

[3] It is further urged that the finding of the state board of equalization is a judgment, and that, whether it is right or wrong, the Pullman Company is bound thereby. It is said that the proceeding to "back assess" is not the ordinary assessment and levy of a tax, but it is an inquiry, by a competent tribunal, into the question whether property has escaped taxation and into the value of such property; that this tribunal has power to render judgment for the full amount it finds due; that means are provided for a review of such judgment by an appellate tribunal; but that, like other judgments, it cannot be collaterally attacked. Since the existence of power to levy this tax depended upon whether the property assessed had a taxable situs in Davidson county—at least in part a question of fact—and since a court, giving judgment between parties who are before it, has power to determine its own right to proceed under the facts upon which that right depends, we naturally come to the inquiry whether the state board of equalization is, in this sense, a court. We do not intend to decide that this finding of taxable situs, if made by a court of general jurisdiction, would be conclusive of its own power, but to ascertain first whether that question is here involved.

Chapter 602 of the Acts of 1907, being the Tennessee general assessment law, provides that the state board of equalization shall be composed of the Secretary of State, the Treasurer, and the Comptroller, and that among other powers granted and duties imposed it shall (section 37, par. 11) hear appeals from county trustees upon matters of back assessment. By section 37, par. 10:

"The action of the state board of equalizers shall be final and conclusive as to all matters passed upon by the board. Taxes shall be collected upon the valuation so fixed and found by said board."

The Supreme Court of Tennessee has somewhat casually (*Briscoe v. McMillan*, 117 Tenn. 131, 100 S. W. 111) referred to the state board as "the state's highest tax court, and a quasi court of record," and said that the question then under consideration had, by its decision, become *res judicata*. The finding of the state board is by it, and in the subsequent proceedings for enforcement, denominated a "judgment." A writ of certiorari will lie from the state Supreme Court to the board. These things give color to the claim that its findings upon a disputed question of fact or law, where the parties have been before it and their contentions have been fully heard, may be conclusive, even though involving the existence of conditions upon which its power to proceed is dependent.

On the other hand, we find no state decision indicating that any part of the judicial power of the state, as judicial power is properly defined, was vested in this board. The process which is issued pursuant to its finding is not execution, but the ordinary distress warrant regularly issued by an administrative officer. Certiorari is the ordinary common-law writ by which a court reviews the action of an administrative board or executive officer, where such review can be had at all; and so the existence of this remedy does not imply the judicial char-

acter of the board. The right to attack the board's finding collaterally by an equity suit to enjoin is recognized in Tennessee to an extent seemingly beyond what would be permitted as against the action of a court. *Briscoe v. McMillan*, *supra*. Upon the whole, we think the state board is to be considered as an administrative body rather than as a part of the judicial system of the state, and that from this standpoint must be considered the effect of its finding that the facts existed which gave it the power and the right to make the assessment in controversy. The findings of such a board may be, for many purposes and to a large extent, conclusive, and yet be far from constituting that judicial decision upon which alone the claim of *res judicata* may be based. Considered from this standpoint, we approve and adopt Judge Sanford's opinion upon this subject. (See end of this opinion.)

Counsel have elaborately presented many matters of detail which were not discussed by Judge Sanford, and some Tennessee cases not cited by him. It is enough to say of these that we have considered them all, and we do not think they affect the result reached by the court below, or materially impair the force of the reasons given therefor.

The judgment is affirmed, with costs.

NOTE.—The portions of the opinion below, adopted herein, are as follows:

4. Under the allegations of the declaration the back assessment of taxes made by the trustee of Davidson county on the cars of the plaintiff in Davidson County on January 10 of the years in question, were void for the reason that said cars had no taxable situs in said county on said dates, and there was no act of the Tennessee Legislature authorizing their assessment for taxation therein, or providing a method therefor.

It is well settled that the capital stock of an interstate carrier may be taxed by any state through which its lines of business extend, by taking as a basis of assessment such portion of its capital stock as the number of miles of railroad over which its cars are run within the state bear to the whole number of miles in all the states through which its cars run. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Fargo v. Hart*, 193 U. S. 490, 499, 24 Sup. Ct. 498, 48 L. Ed. 761; *Kehrer v. Stewart*, 197 U. S. 60, 67, 25 Sup. Ct. 403, 49 L. Ed. 663; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 206, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493.

And while a state cannot impose a direct tax upon property outside of its jurisdiction belonging to a corporation domiciled elsewhere, it may tax property permanently located within its jurisdiction, although belonging to a corporation domiciled elsewhere and having its actual use only in connection with other parts of a system engaged in interstate commerce. *Fargo v. Hart*, 193 U. S. 490, 499, 24 Sup. Ct. 498, 48 L. Ed. 761. And where a foreign corporation brings into a state a portion of its movable property to be there used and employed, a tax may not only be properly placed by such state upon the property thus used and employed, so as to impose its fair share of the burden of taxation upon similar property used in like way by the citizen of the state, but where the specific and individual items of property so used and employed are not continuously used, but constantly changing according to the exigencies of the business, such taxation may be fixed by the state by an appraisement of the average amount of the property thus habitually used and employed. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 82, 19 Sup. Ct. 599, 43 L. Ed. 899.

It is, however, clear that in order that a state may tax such changeable and movable property used by a foreign corporation within its borders it must by some appropriate legislation fix a taxable situs for such property and

provide a method and basis for its assessment. The mere fact that property of a foreign corporation is in a state on a given date does not of itself give it a taxable situs there, when it has not come to rest within the state for a definite time so as to become part of the general mass of property of the state and acquire an actual situs for taxation. See *Pittsburg Coal Co. v. Bates*, 156 U. S. 577, 588, 15 Sup. Ct. 415, 39 L. Ed. 538; *Kelley v. Rhoads*, 188 U. S. 1, 7, 23 Sup. Ct. 259, 47 L. Ed. 359; *Ayer v. Kentucky*, 202 U. S. 409, 421, 26 Sup. Ct. 679, 50 L. Ed. 1082, 6 Ann. Cas. 205.

Upon the point that the tax upon the plaintiff's cars is void unless the State of Tennessee has by an act of Legislature provided for their taxation, the present case is ruled by *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. Ed. 94, in which it was held that a tax sought to be imposed and collected by the State of Virginia upon movable property, engines and cars, of a Maryland corporation, could not be collected because the State of Virginia had enacted no law applicable to the taxation of such property. The court said: "It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the situs of the Baltimore & Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the situs of all its personal property; but for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. * * * But looking at the statute under which the proceeding in question has been taken for the taxation of this property, we think it quite clear that it has no application to the rolling stock owned by the Baltimore and Ohio Railroad Company employed by it in the manner described in the operation of other railroads in Virginia. * * * It follows from this that it was not liable for the payment of the taxes, the collection of which was enjoined by the decree of the Circuit Court."

See also by analogy *Mayor v. Alexander*, 10 Lea (Tenn.) 476; *Franklin County v. Railroad*, 12 Lea (Tenn.) 521, 527; *Bank v. Memphis*, 101 Tenn. 154, 46 S. W. 557; *Southern Express Co. v. Patterson*, 122 Tenn. 279, 123 S. W. 353; *State Board v. Holliday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826; *Yost v. Transportation Co.* (C. C. A., 6 C.) 112 Fed. 746, 50 C. C. A. 511.

In *Franklin County v. Railroad*, supra, the Supreme Court of Tennessee said: "The choses in action of a corporation, its rolling stock and personal property, according to the principles of the common law, have their situs at the domicile or place of business of the company. Mayor and Aldermen of Gallatin v. Alexander, 10 Lea [Tenn.] 475; Mayor and Aldermen of Nashville v. Thomas, 5 Cold. 607; Cooley on Taxation, 273. But the Legislature may change the situs of such property for purposes of taxation. *McLaughlin v. Chadwell*, 7 Heisk. [Tenn.] 389, 406; *Bedford v. Nashville*, 7 Heisk. [Tenn.] 409; *State Railroad Tax Cases*, 92 U. S. 575, 607, 23 L. Ed. 663; *Cooley on Taxation*, 274."

In *Southern Express Co. v. Patterson*, supra, in a case involving the assessment of a tax on the intangible property of a foreign express company, the Supreme Court of Tennessee held that while such property was assessable by

the Legislature, the proceedings under which it was sought to assess it were void because the state law provided no method for its assessment.

In *State Board v. Holliday*, supra, the court said, speaking in reference to a similar constitutional provision in the State of Indiana: "This constitutional provision" is "a legislative power to select the subjects for taxation" and "imposes the duty and limitation upon the Legislature of providing by law regulations or methods for a just valuation of all property, both real and personal, for taxation. Where the Legislature has not exercised this power, no other department of the state government can supply the omission; and where no such regulation has been prescribed by law as to any particular species of property, then such property cannot be taxed. This conclusion may rest either on the inference from such failure to prescribe such regulations that the Legislature did not intend to select that particular species of property as a subject for taxation, or regardless of the legislative intent the failure to prescribe such regulations leaves such property unselected as a subject for taxation. *Riley v. Western Union Tel. Co.*, 47 Ind. 511; *Senour v. Ruth*, 140 Ind. 318, 39 N. E. 946; *Hyland, Auditor, v. Brazil Block Coal Co.*, 128 Ind. 335, 26 N. E. 672. The statute must not only provide what property shall be taxed, but it must provide methods for the valuation of such property, and clothe some person, officer, or tribunal with power and authority to assess such valuation; and, if the statute contains no such provisions, it will be insufficient to subject such property to taxation. *Riley v. Western Union Tel. Co.*, supra; *Senour v. Ruth*, supra."

And in a note on the subject of the taxation of personal property in 56 Am. Dec. 520, it is said, at page 535: "This peculiar property, which has furnished the topic of so much discussion, is held to be situated, in the absence of a special statute, in the town where the principal office of the corporation is; that is, at the corporate residence. Without the help of a statute, it is incapable of acquiring a permanent locality or situs separated from the owner's residence. *Mohawk, etc., R. R. Co. v. Clute*, 4 Paige [N. Y.] 384; *Appeal Tax Court v. Western Md. R. R. Co.*, 50 Md. 274; *Philadelphia, Wilmington, etc., R. R. Co. v. Appeal Tax Court*, 50 Md. 397; *Appeal Court v. Northern Cent. Ry. Co.*, 50 Md. 417; *Appeal Tax Court v. Pullman Palace Car Co.*, 50 Md. 452; *Kansas City, etc., R. Co., v. Severance*, 55 Mo. 378; *City of Dubuque v. Illinois Cent. R. R. Co.*, 39 Iowa, 56; *Orange, etc., R. R. Co. v. Alexandria*, 58 Va. 176. But it may be provided by statute that such property be taxed in each county at a rate proportional to the length of the road within the county. *Cook County v. Chicago, etc., R. R. Co.*, 35 Ill. 460; *Kansas City, etc., R. R. Co. v. Severance*, 55 Mo. 378; *Richmond, etc., R. R. Co. v. Alamance Commissioners*, 84 N. C. 504."

It is clear that the provision of article 2, § 28, of the Constitution of Tennessee requiring all property to be taxed according to its valuation, is not self executing and that the Legislature must provide a method of valuation and assessment before it can be enforced. *Bank v. Memphis*, supra; *Southern Express Co. v. Patterson*, supra.

An examination of the assessment acts under which the right to assess the plaintiff's property is claimed, namely, chapter 258 of the Act of 1903, and chapter 602 of the Acts of 1907, discloses no provision for the taxation of property of this character. While these acts provide generally that all property shall be assessed for taxation except such as is excluded in certain specific exemptions, the methods of assessing the tax provided in these acts are only applicable, so far as personal property is concerned, to property having an actual situs in a given county where it can be regularly assessed for taxation. There is no provision whatever in either of these acts fixing a situs for taxation upon movable and transitory property of nonresidents, such as the cars in question not having an actual situs within any given county, or providing any method whatever for its assessment. It is not provided either that such movable property which may happen to be in a given county on the tenth of January shall be assessed in such county, or that an aggregate taxation shall be fixed on an appraisal of the average amount of property thus habitually used and employed, to be apportioned among the several counties through which the cars may be used, or any basis whatever pro-

vided for their taxation. In short, no situs is fixed for the taxation of such movable property of nonresidents and no method for the assessment of the taxes provided by the state.

The fact that such property is not embraced within the provisions of the general assessment law is indicated by the uniform construction given to similar assessment laws for many years, under which, prior to the present time, no effort has been made by the taxing officers to assess taxes on property of this character. *State Board v. Holliday*, 150 Ind. 216, 229, 49 N. E. 14, 42 L. R. A. 826. And in chapter 48 of the Acts of 1901, p. 71, passed at the same session of the Legislature as the general assessment act of 1901, which was substantially the same as those of 1903 and 1907, while provision was made for the assessment by the railroad commissioner of taxes on railway cars used within the state but owned by nonresidents, "passenger cars" were expressly excluded. Furthermore, if any of the cars sought to be assessed in these proceedings were assessable in Davidson county on the day in question, they could with equal propriety be assessed for taxation on the same day in each of the various counties through which they may have passed. While double or treble taxation may not necessarily be illegal, the fact that a given construction of a statute would result in multiple taxation and injustice, may be considered in arriving at the legislative intention. See *Holy Trinity Church v. United States*, 143 U. S. 457, 461, 12 Sup. Ct. 511, 36 L. Ed. 226; *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 12 Sup. Ct. 517, 36 L. Ed. 340; *Cumberland Telephone Co. v. Kelly* (C. C. A., 6 C.) 160 Fed. 316, 319, 87 C. C. A. 268, 15 Ann. Cas. 1210.

Nor can I regard as correct the conclusion of the Tennessee Board of Equalization that on the facts found by them in reference to the location of the plaintiff's agent at Nashville, the plaintiff had itself fixed a situs for the taxation of its cars at Nashville. It clearly appears that whatever the authority of this agent over the movement of these cars may have been he had never in fact located any of these cars for any definite period at Nashville. In the absence of such situs in fact, their taxable situs must, therefore, as a matter of law, follow the domicile of the owner, unless the State of Tennessee has itself, by appropriate legislation, exercised its right, under the foregoing authorities, of fixing a taxable situs in Tennessee and providing for their taxation. And see *Southern Express Co. v. Patterson*, *supra*.

I am hence constrained to conclude that, as on the facts alleged in the declaration and set forth in the findings of the State Board of Equalization, these cars had no actual situs in Davidson county, and as the State of Tennessee, while having the right so to do, has never seen proper to provide for their taxation in any manner, either indirectly, through proportionate taxation of the capital stock of the plaintiff, under the rule laid down in *Pullman Palace Car Co. v. Pennsylvania*, or by direct taxation of the cars themselves, fixing a situs for such taxation and the method for its assessment, or providing, as it might have done, that in view of the movable character of the property such taxation should be upon an average basis of cars in actual use in Tennessee instead of on specific cars, under the rule laid down in *Marye v. Baltimore & O. R. Co.* and *American Transit Co. v. Hall*, there was not, during the periods of time for which this tax was sought to be made, any legislation of the State providing for their assessment or authorizing them to be back assessed for such periods by the trustee of Davidson county. Clearly the county trustee has only the authority in this regard conferred upon him by the statutes of the State. *Railroad v. Williams*, 101 Tenn. 146, 46 S. W. 448. And while it may be true, as urged by counsel for the defendant, that the plaintiff has for many years escaped taxation upon its property in the State from which the State and the county might have derived revenue, yet this omission is a question of legislative policy with which it is beyond the province of the court to deal. This right of taxation never having been made effective by the State by legislation directed to this subject, in the absence of such legislation the court therefore has no alternative except to hold that the back assessment of the taxes in question, being made, without legislative authority, is, upon the facts alleged, void and of no effect.

5. The plaintiff is not prevented from recovering the money paid under protest by reason of the fact that it did not resort to a writ of certiorari and supersedeas to review the action of the State Board of Equalization, and the judgment of that board is not conclusive upon it as *res adjudicata*.

It may well be that where the state has provided an apt act of the Legislature for the taxation of property, and an appeal is taken by a taxpayer to the State Board of Equalization under the provisions of the law, the judgment of the State Board of Equalization acting in such matter, within the scope of its authority, and in reference to property over whose taxation it has been given jurisdiction, is binding until set aside by the court in a proper proceeding for review by a writ of certiorari; and it is clear that such judgment of the State Board of Equalization is not subject to collateral attack for mere irregularities in its exercise. *Smoky Mt. Co. v. Lattimore*, 119 Tenn. 620, 105 S. W. 1028.

The present case, however, falls within the rule laid down by the Supreme Court of Tennessee in *Briscoe v. McMillan*, 117 Tenn. 115, 100 S. W. 111, in which it was held that the failure of the complainant to review an action of the State Board of Equalizers by certiorari would not deprive the Chancery Court of the right to enjoin the certification of the action of the Board of Equalizers in cases where its assessment of taxes was entirely void. The court said on this point: "The next insistence is that complainant's remedy, if any, is in the court of law by certiorari. The bill, however, proceeds upon the idea that the assessment made by the State Board of Equalizers is absolutely void and, if such a case is made by the bill, we think jurisdiction of the Chancery Court is well settled. *National Bank of Chattanooga v. Mayor and Alderman*, 8 Heisk. (Tenn.) 814; *Alexander v. Henderson*, 105 Tenn. 431, 58 S. W. 648. It is true Acts 1903, p. 674, c. 258, section 38, subsection 10, expressly provides that the action of the state board 'shall be final and conclusive as to all matters passed upon by the board and taxes shall be collected upon the valuation so fixed and found by the state board.' It will be observed no method is provided by this act by appeal or otherwise for reviewing the action of the state board; but, on the contrary, the act expressly provides that the action of the state board shall be final. Ordinarily this condition would render the remedy by certiorari peculiarly appropriate; but if, as alleged in the bill, the action of the State Board of Equalization is void, then the jurisdiction of a court of equity to prevent the execution of a void judgment is universally recognized. In such a case, it is wholly immaterial that the act provides that the action of the state board shall be final, since such action only relates to the lawful exercise of the jurisdiction of the board, and not to acts which are absolutely void." And see, by analogy, *Ward v. Alsop*, 100 Tenn. 619, 46 S. W. 573; *Railroad v. Williams*, 101 Tenn. 146, 46 S. W. 448; *Alexander v. Henderson*, 105 Tenn. 431, 58 S. W. 648.

The holding in *Briscoe v. McMillan* is directly applicable to the question now at issue. Under the allegations of the declaration and under the facts found by the State Board of Equalization, as set out therein, the judgment of the Board of Equalization is, in my opinion, entirely void, as matter of law, on account of the want of legislative authority for the assessment of the tax in question upon this class of property. The judgment of the State Board of Equalization, being therefore void for want of authority over the subject-matter of taxation, cannot become binding upon the parties merely because the action of the Board of Equalization has not been reviewed under a writ of certiorari. The rule relied on by the defendants hence does not apply to a case of this character, where it is not sought to correct the action of the board for mere irregularities, but the binding force of its action is contested upon the specific ground that it is entirely void for want of authority.

CLOQUET LUMBER CO. v. BURNS.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1913.)

No. 3,883.

1. REPLEVIN (§ 9*)—POSSESSION OF PLAINTIFF.

Plaintiff being in the lawful possession of land and of trees standing thereon, the unlawful severance of the trees by defendant did not deprive plaintiff of possession of the logs made therefrom; but when defendant removed them from the land it took them from his possession, as regards his right to maintain replevin therefor.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 69-82; Dec. Dig. § 9.*]

2. REPLEVIN (§ 8*)—TITLE—TIMBER ON HOMESTEAD—RIGHTS ACQUIRED AGAINST TRESPASSERS.

Plaintiff, who had entered on land of the United States for the purpose of acquiring it under the homestead laws, as he had a right, and who had continuously occupied it as such homestead for nine years, when defendant, without right, cut down trees thereon, then had sufficient interest in the logs to enable him to maintain replevin then brought for the logs, and this though the land was unsurveyed, and though he had made no entry in the land office.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 45-68; Dec. Dig. § 8.*]

3. REPLEVIN (§ 8*)—OCCUPANCY OF PUBLIC LAND—RIGHTS ACQUIRED BY PLAINTIFF—LOSS OF RIGHTS.

Plaintiff's right of action—complete when, after he had entered on land of the United States for the purpose of acquiring it under the homestead laws, as he had a right, and had continuously occupied it as such homestead for nine years, defendant, without right, cut down trees thereon—was not defeated by his subsequently acquiring title to the land from the government by the use of scrip, he, when applying to enter the land with scrip, not having abandoned it, but still insisting on his homestead right; the government, under these circumstances, having no right of action for the logs or their value.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 45-68; Dec. Dig. § 8.*]

4. REPLEVIN (§ 108*)—DAMAGES—WILLFUL TRESPASS.

Whether or not defendant was a willful trespasser, as regards the damages which plaintiff is entitled to recover, where, defendant having cut down trees on plaintiff's land, plaintiff brought replevin for the logs, and defendant gave a bond and converted the logs, must be determined by what it knew, or ought to have known, at the time of the cutting, and what it thereafter learned, though before the conversion, is immaterial. Carland, Circuit Judge, dissenting.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 422; Dec. Dig. § 108.*]

5. TRESPASS (§ 45*)—DAMAGES—WILLFUL TRESPASS.

Though the fact that defendant, in cutting down, without right, trees on plaintiff's land, acted on advice of counsel is not conclusive on the question of willful trespass, as regards the measure of damages, it is competent evidence of good faith.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 116-122; Dec. Dig. § 45.*]

6. JURY (§ 37*)—TRIAL BY JURY—INFRINGEMENT OF RIGHT—DIRECTING VERDICT.

Where, had plaintiff, before the jury retired, waived all damages above a certain amount, the court could have ordered verdict therefor, it could

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

do so after the jury having retired and failed to agree, plaintiff then made such waiver; this not being a re-examination of a fact tried by a jury, in violation of Const. U. S. Amend. 7. And this is so although one juror refused his consent to the verdict ordered.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 220; Dec. Dig. § 37.*]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by Granville A. Burns against the Cloquet Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

William B. Phelps, of Duluth, Minn., for plaintiff in error.

Burt F. Lum, of Minneapolis, Minn., and R. R. Briggs, of Duluth, Minn. (John R. Van Derlip and George P. Wilson, both of Minneapolis, Minn., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. This is an action of replevin for 1,500,000 feet of logs. It was brought by Burns, the defendant in error, against the Cloquet Lumber Company, the plaintiff in error. The logs were cut from land around Cedar Island Lake or Ely Lake, in St. Louis county, Minn.

Controversies relating to these lands have at various times appeared in the federal and Minnesota courts. *Kirwan v. Murphy*, 83 Fed. 275, 28 C. C. A. 348, decided Sept. 27, 1897; *Murphy v. Kirwan* (C. C.) 103 Fed. 104, decided July 5, 1900; *Kirwan v. Murphy*, 109 Fed. 354, 48 C. C. A. 399, decided May 20, 1901; *Kirwan v. Murphy*, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698, decided April 6, 1903; *Security Land & Exploration Co. v. Burns*, 87 Minn. 97, 91 N. W. 304, 63 L. R. A. 157, 94 Am. St. Rep. 684, decided July 11, 1902; *Security Land & Exploration Co. v. Burns*, 193 U. S. 167, 24 Sup. Ct. 425, 48 L. Ed. 662, decided Feb. 29, 1904; *Murphy v. Tanner*, 176 Fed. 537, 100 C. C. A. 125.

The facts relating to the two surveys appear in the reports of these cases, and need not be repeated here. In March, 1892, Burns settled upon what afterwards became lots 11, 12, 13, 14, 19, and 20 of section 4, containing about 135 acres. This land lies between the lake and the Howe meander line. Burns built a house on the land in the spring of 1892, and in the fall of the same year he built and moved into another house on what is now lot 14, in which house he is now living. He has resided upon the land continuously since 1892, and has cleared and cultivated parts of it. His purpose in entering upon the land in 1892 was to secure it as a homestead. In July, 1893, Burns and others applied to have the land surveyed. On July 24, 1896, he applied to the proper land office to enter the land as a homestead, and tendered the fees. On March 24, 1905, the land being still unsurveyed, owing to the litigation above referred to, Burns applied to locate it with Valentine scrip. In his affidavit of that date he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stated that he had continuously resided on the land for more than 12 years, and he added:

"That in the month of March, 1892, he was a citizen of the United States over 21 years of age, and qualified and entitled to make homestead entry on its public lands; that in said month he settled upon the lands above described, which were then wholly unoccupied and unappropriated and were unsurveyed, and claimed the same under the homestead laws of the United States, intending to make a homestead entry thereof as soon as the same should be surveyed and open to such entry; that ever since he established such settlement upon said lands he has continuously resided thereon, and has occupied the same exclusively under said claim of homestead right and said intention of making homestead entry; that he is entitled to the exclusive possession of said lands, and every part thereof; that the application to locate said lands which is attached hereto is not made for the purpose of fraudulently obtaining title to saline or mineral land, but with the object of securing said land for agricultural purposes; that affiant's post office address is Eveleth, St. Louis county, Minn."

The land was finally patented to him under his location with Valentine scrip.

The defendant at one time claimed title to the timber on Burns' land by virtue of the purchase of it from the owner of the lots bounded by the Howe meander line, alleging that these lots extended to the lake. After the decision in the United States Supreme Court of February 29, 1904, it abandoned that claim, and now admits that it never had any title to the timber nor any right to cut it. The cutting was done in the winter of 1900 and 1901, and the logs were put in the lake, where they were when the plaintiff commenced this action of replevin on August 1, 1902. The defendant by giving a bond retained possession of the logs, and afterwards converted them to its own use. The court below directed a verdict for the plaintiff for \$18,952.38. The case presents three questions: (1) Was Burns entitled, at the time he commenced this action, to maintain it? (2) Was the defendant entitled to have submitted to the jury the question as to whether or not it acted in good faith in cutting and banking the logs? (3) Did the lower court err in instructing the clerk to enter a verdict without the consent of all the jurors, and notwithstanding the refusal of one of them to agree to the verdict?

[1-3] (1) Did Burns, at the time he commenced this action on August 1, 1902, have sufficient interest in the logs to enable him to maintain it against the defendant?

What was his situation at that time? He had entered upon the land for the purpose of acquiring a homestead under the laws of the United States. He had continuously occupied it as such homestead for nine years. There was valuable pine timber standing thereon. The defendant, without any right whatever, entered upon the land, with actual knowledge of Burns' claim, and against his protest cut down and carried off the logs, which in the standing trees were worth more than \$6,000. Under these circumstances was Burns bound to remain quiescent, and witness this spoliation, without any right of action against the trespasser? We think not.

He was then in the lawful possession of the land and of the trees standing thereon. The unlawful severance by the defendant of these

trees did not deprive Burns of the possession of the logs made therefrom, and when the defendant removed the logs from the land it took them from the possession of Burns.

The fact that the land was unsurveyed is immaterial. Though unsurveyed, Burns had a right to initiate a homestead thereon. *St. Paul, Minneapolis & Manitoba Ry. Co. v. Donohue*, 210 U. S. 21, 30, 28 Sup. Ct. 600, 52 L. Ed. 941.

That this action can be maintained, although the legal title to the land stood in the United States, we think is settled by the adjudicated cases.

Atherton v. Fowler, 96 U. S. 513, 24 L. Ed. 732, was an action of replevin brought by Page, the plaintiff's intestate, to recover hay cut by the defendants. Two cases brought by Page against Fowler appeared several times in the Supreme Court of California. *Page v. Fowler*, 28 Cal. 605; *Page v. Fowler*, 37 Cal. 100; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Atherton v. Fowler*, 46 Cal. 320; *Atherton v. Fowler*, 46 Cal. 323. From the facts stated in these reports it appears that Vallejo sold a part of the Soscol ranch in 1851 to the plaintiff Page, who in 1860 inclosed parts of it with a substantial fence, and used and occupied the rest for cultivation and pasturage. In the spring of 1862 Vallejo's title under the Mexican grant was finally rejected by the Supreme Court of the United States. On March 3, 1863, Congress passed an act (12 Stat. 808, c. 116) authorizing the Commissioner of the General Land Office to extend the public surveys over the Soscol ranch, and providing that, after the return of the approved plats of the surveys to the district office, bona fide purchasers from Vallejo might enter, according to the lines of the public surveys, at \$1.25 per acre, the land so purchased, to the extent to which the same had been reduced to possession. The defendants, claiming the right to pre-empt this land, under the general pre-emption law, entered thereon, and in May, 1863, cut the hay which was the subject of the controversy. This action was commenced on May 25, 1863. *After that date* the public surveys were extended over the lands, and the plaintiff, in accordance with the act of March 3, 1863, applied to the land office to pre-empt the tract purchased from Vallejo. A patent was afterwards granted to him in pursuance of this entry. When the hay in controversy was cut, the defendants knew or should have known that they were mere trespassers on the lands of Page, and had no right to the hay. The Supreme Court of the United States said, in 96 U. S., on page 520, 24 L. Ed. 732:

"It follows that the defendants could not have made any lawful entry on the lands where the hay was cut in this case; that no law existed which gave them any right to make such an entry; that they were mere naked trespassers, making an unwarranted intrusion upon the inclosure of another—an inclosure and occupation of years, on which time and labor and money had been expended—and that, in such a wrongful attempt to seize the fruits of other men's labor, there could be no bona fide claim of right whatever. The instruction of the court that this could be done, founded on an erroneous view of the pre-emption law, was itself erroneous, and the judgment founded on it must be reversed."

There are many points of resemblance between that case and the one at bar. In both the plaintiff was in the lawful possession of the land; in both the trespasser entered upon the land and cut in one case trees and in the other case hay; in both the land was at that time unsurveyed. In both the plaintiff at the time of the trespass had made no entry in the land office, but in that case he had the right to enter the land and to acquire the title thereto under a special law, and in this case he had a right to enter the land and acquire title thereto under the general homestead law. In both the action was replevin, and in each case it was brought before the plaintiff had secured recognition from the government of his right to the land, except as it came from the laws allowing him to acquire title thereto, and in pursuance of which he was in possession. The Supreme Court having held in that case that replevin could be maintained, it necessarily follows that it can be in this case. In *Sturr v. Beck*, 133 U. S. 541, on page 547, 10 Sup. Ct. 350, on page 352 (33 L. Ed. 761) it appeared that Smith made a homestead filing on certain land in Dakota Territory on March 25, 1879, having settled thereon in March, 1877, that he made final proof on May 10, 1883, and later received a patent for the land. Beck, the defendant, claimed under him. Sturr, the plaintiff, made a homestead entry on adjacent land on May 15, 1880, having settled thereon in June, 1877, made final proof on May 10, 1883, and received a patent for the land thereafter. On May 15, 1880, Sturr entered upon the land of Smith and located a water right, and thereafter constructed a ditch across Smith's land to his (Sturr's) adjacent land. This action was brought by Sturr to enjoin Beck from interfering with his ditch. It is to be noticed that the interference by Sturr with Smith's land was before Smith had made final proof thereon. The court said:

"If, however, Smith obtained a vested right to have the creek flow in its natural channel, by virtue of his homestead entry of March 25, 1879, and possession thereunder, or if his patent took effect as against Sturr by relation as of that date, then it is conceded that Sturr cannot prevail, and the judgment must be affirmed.

"The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor or a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year."

And, again, the court said, on page 551 of 133 U. S., on page 354 of 10 Sup. Ct. (33 L. Ed. 761):

"When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow ut currere solebat, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

And the court made the following declaration, on page 552 of 133 U. S., on page 354 of 10 Sup. Ct. (33 L. Ed. 761):

"Thus, under the laws of Congress and the territory, and under the applicable custom, priority of possession gave priority of right. The question is not as to the extent of Smith's interest in the homestead as against the government, but whether as against Sturr his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the Supreme Court to that effect."

In *Shiver v. United States*, 159 U. S. 491, on page 499, 16 Sup. Ct. 54, on page 57 (40 L. Ed. 231), the court said:

"While we hold in this case that, as between the United States and the settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, we do not wish to be understood as expressing an opinion whether, as between the settler and the state, it may not be deemed the property of the settler, and therefore subject to taxation. *Carroll v. Safford*, 3 How. 441 [11 L. Ed. 671]; *Witherspoon v. Duncan*, 4 Wall. 210 [18 L. Ed. 339]; *Railway Co. v. Prescott*, 16 Wall. 603 [21 L. Ed. 373]; *Railway Co. v. McShane*, 22 Wall. 444 [22 L. Ed. 747]; *Wisconsin Central Railroad v. Price County*, 133 U. S. 496 [10 Sup. Ct. 341, 33 L. Ed. 687]."

In *Red River & Lake of the Woods Ry. Co. v. Sture*, 32 Minn. 95, on page 98, 20 N. W. 229, on page 230, it appeared that Sture had resided on the land as a homestead settler since May 1, 1879. The railway company condemned the land in 1882, and therefore before Sture became entitled to a patent. It was held, nevertheless, that he was entitled to damages for the land taken in an amount practically the same as if he were the owner of the land. As to the rights of a homesteader after entry, the court said:

"But a homesteader, after entry, occupies an entirely different position. He has in fact purchased. His entry, which is made by making and filing an affidavit, and paying the sum required by law, is a contract of purchase, which gives him an inchoate title to the land, which is *property*. This is a substantial and vested right, which can only be defeated by his failure to perform the conditions annexed. It is true no certificate or patent can be issued until the expiration of five years from the date of the entry; the United States retaining the legal title to insure performance of these conditions. But the vested right of the settler attaches to the land at the time of his entry, and is liable to be defeated only by his own failure to comply with the requirements of the law. If he complies with these conditions, he becomes invested with full ownership and the absolute right to a patent, which, when issued, relates back to the time of the entry, and, under the act of May 14, 1880 (21 U. S. St. 140, c. 89 [U. S. Comp. St. 1901, p. 1393; Supp. to U. S. Rev. St. 525]), his right under the entry relates back to the date of the settlement. Until forfeited by his own failure to perform the conditions of his purchase, this right of property acquired by his entry must prevail, not only against individuals, but against the government itself. This is the view expressed in an opinion of the Attorney General of the United States, addressed to the Secretary of War, in July, 1881. See 1 Copp, Pub. Land L. 387."

In *Peyton v. Desmond*, 129 Fed. 1, on page 12, 63 C. C. A. 651, on page 662, this court said:

"It conclusively appears, as before shown, that the timber was severed from the land after the initiation and during the maintenance of the plaintiff's homestead claim; in other words, while he had a conditional or inchoate right to the land, which was capable of perfection through compliance with the homestead law, and which in due course ripened into a full, legal, and equitable title before the commencement of this action. This conditional or

inchoate right included an exclusive right to the possession so long as the plaintiff should comply in good faith with the requirements of the law controlling homestead claims, and included a further right to earn and receive the title. This right to the possession and to earn and receive the title extended to everything which was part of the land—timber as well as soil. The severance of the timber from the soil was a violation or infraction of the plaintiff's right to the possession, and of his right to earn and receive the title. It was an injury to both. It may be that the conditional or inchoate right of a homestead claimant is subject to a power in Congress to terminate it in whole or in part—as to the land or only as to the timber—at any time before it is perfected into a vested equitable estate by full compliance with the requirements of the law; but it is not terminable or subject to impairment by third persons."

In *Shea v. Cloquet Lumber Company*, 97 Minn. 41, on page 43, 105 N. W. 552, on page 553, the Supreme Court of Minnesota, in speaking of the rights of *Shea*, a neighbor of *Burns*, to the timber cut by it under the same circumstances under which it cut the timber in question in this case, said:

"The next assignment of error is that the court erred in refusing to give to the jury the defendants' first request, which was this:

"Timber growing on unsurveyed government lands belongs to the United States, and a squatter on such lands has no interest in or title to such growing timber.

"As against the United States it is true that a squatter has no title or interest in the land. The evidence, however, tended to show that the plaintiff settled upon the land some nine years before his arrest; that he made application to enter the land under the homestead laws, which was refused; that 'plaintiff believed in good faith that he was entitled at least to the possession of the land, that he would ultimately acquire it from the government, and that he was the owner of the timber growing thereon.' See [*Shea v. Cloquet Lumber Co.*] 92 Minn. 348, 100 N. W. 111 [1 Ann. Cas. 930]. This evidence tended to show that as against a trespasser the plaintiff had an inchoate interest in the timber growing on the land he was so in possession of. *Hastay v. Bonness*, 84 Minn. 120, 86 N. W. 896. In view of this evidence, the requested instruction, if given, would have been misleading, for the reason that the jury might infer therefrom that the plaintiff had no right as against trespassers to protect the timber growing on the land in his possession. The court did not err in refusing to give the instruction."

Plaintiff's right of action was complete in August, 1902, and nothing has happened since that time to defeat it. The United States has conveyed the land to him. It seems to be admitted by the defendant that if this conveyance had been made by the government under the homestead laws the plaintiff would prevail in this action. But it says that, because *Burns*, acting under the advice of counsel, instead of taking the land under his homestead claim, secured title from the government by the use of *Valentine scrip*, he has lost his right of action for the value of this timber. To this we cannot agree. The affidavit made by him when he applied to enter the land with *Valentine scrip* shows that he had not abandoned it, but was then insisting upon his homestead right. The government, instead of giving the land to *Burns* as it was bound to do, secured what amounted to a cash payment for it. So far from being damaged by the change in the method of acquisition, it benefited by it.

In *Ard v. Brandon*, 156 U. S. 537, on page 541, 15 Sup. Ct. 406, on page 408 (39 L. Ed. 524), it appeared that *Ard* entered upon the land

in question for the purpose of securing it as a homestead. He made application to enter it as a homestead, which application was denied. Under the advice of the local officers he entered it under the pre-emption law. His application under that law was rejected. He was denied the right to change his entry to a homestead entry; but he continued to reside upon the land, which was afterwards patented by the government to the grantor of Brandon, who brought this action in ejectment. It was held that Ard was entitled to the land. The court in this case said:

"But we are of the opinion that the testimony shows a right anterior to his pre-emption entry—a right of which he was deprived by the wrongful acts of the local land officer, and which he did not forfeit or lose by virtue of his subsequent efforts to pre-empt the land."

And, again, on page 543 of 156 U. S., on page 409 of 15 Sup. Ct. (39 L. Ed. 524):

"Such wrongful rejection did not operate to deprive defendant of his equitable rights, nor did he forfeit or lose those rights because, after this wrongful rejection, he followed the advice of the register, and sought in another way to acquire title to the lands. The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application."

And, again, on page 544 of 156 U. S., on page 409 of 15 Sup. Ct. (39 L. Ed. 524):

"Doubtless the error could have been corrected by an appeal, and perhaps that would have been the better way; but when, instead of pursuing that remedy, he is persuaded by the local land officer that he can accomplish that which he desires in another way—a way that to him seems simpler and easier—it would be putting too much of rigor and technicality into a remedial and beneficial statute like the homestead law to hold that the equitable rights which he had acquired by his application were absolutely lost."

The case at bar is much stronger than the case of *Ard v. Brandon*, for in that case Ard never acquired a patent from the government, but another did; while in this case Burns secured title from the government, but in another way than by his homestead claim.

In *Preston v. Cloquet Tie & Post Co.*, 114 Minn. 398, 131 N. W. 474, it appeared that the plaintiff applied to enter the land as a homestead on July 12, 1902. This application for no fault of his was rejected, and on October 3, 1907, he filed a new homestead entry on the same land. A final certificate was afterwards issued to him. Prior to 1903, Randall, the grantor of the defendant, entered upon the land and cut the standing timber thereon. It was held that Preston was entitled to recover the value of the timber thus cut and removed. It will be noticed that it was cut prior to the homestead entry made in 1907, under which Preston acquired his title.

The court said, on page 401 of 114 Minn., on page 475 of 131 N. W.:

"The first and second alleged reasons here urged by the defendant why the facts do not sustain the judgment are to the effect that they show that the United States, and not the plaintiff, was the owner of the timber claimed to

have been converted, and, further, that the filing of the second application was a waiver of all rights, if any, acquired under the first application, and that the final certificate and patent relate back only to the second application. It is to be noted in this connection that the plaintiff was in the actual possession of the timber, which is the subject-matter of this action, as it was severed from the soil and banked on the land of which he was in the exclusive possession, and, further, that the defendant is a stranger to the title of both the timber and the land whereon it was cut and piled. Such possession was prima facie sufficient to enable the plaintiff to maintain this action against the defendant, who took and carried away the timber from his possession without any lawful right thereto. *Stitt v. Namakan Lumber Co.*, 95 Minn. 91, 103 N. W. 707.

"It is true, however, that the legal title to the land was in the United States when the timber was cut, and also when the defendant carried it away; but it is clear, from the facts found by the trial court, that the plaintiff's possession of the land, from September, 1902, down to the time when the patent therefor to him was ordered to be issued, and the granting of the final certificate, was continuous and exclusive under his homestead entry. The fact that the land department erroneously rejected his first application, evidently for the reason that the land was claimed by the Northern Pacific Railway Company, did not affect his substantial rights and equities as against the defendant, a stranger to the title. He settled upon the land, claiming it as a homestead under his first application, which was in fact and law valid, although by reason of the mistake of the land department he was obliged to make a second application. He did all that he could do to protect his rights in the land and the growing timber thereon, and they are not affected by the mistake of the land officers. *Roy v. Duluth & I. R. Ry. Co.*, 69 Minn. 547, 72 N. W. 794."

In *Potter v. United States*, 122 Fed. 49, on page 53, 58 C. C. A. 231, on page 235, this court said:

"It is contended, however, that the commutation of Byerla's homestead entry to a cash entry, the sale of the land to him thereunder by the government, the issue of the final certificate, and the acceptance by the United States of the purchase price of the property in February, 1896, estopped the government from maintaining an action against the defendants for the timber taken from the land by Byerla or for its value, and that upon this ground the defendants were entitled to a peremptory instruction in their favor. The position would be sound if the sale of the land by the United States and its issue of the final certificate had not been induced by fraud, or if, by act or acquiescence, the government had condoned or waived that defect. The acceptance from the purchaser by the United States, or by any other vendee, of the price of the land of which he has been in possession under an offer or contract of sale estops the vendor from recovering damages of the vendee or of his grantee for timber or ore taken from the land by them during the pendency of the offer or contract. *Teller v. United States*, 54 C. C. A. 349, 117 Fed. 577; *United States v. Ball* (C. C.) 31 Fed. 667; *United States v. Freyberg* (C. C.) 32 Fed. 195."

In *United States v. Ellis* (C. C.) 122 Fed. 1016, the facts were similar to those in the case at bar, with this difference, that in that case the United States attempted to recover the value of the timber from the grantee of the homestead settler.

The court said, on page 1017 of 122 Fed.:

"The timber taken from parcel 1 was purchased in good faith from J. B. Stoddard, who was at the time a settler on the land as a homesteader. Thereafter, and before a full compliance with the homestead laws, so as to entitle him to title, Stoddard relinquished his homestead for the purpose of acquiring title by entry with forest reserve scrip, and simultaneously with his relinquishment he did make such entry, and acquired title. Had he completed his title under the homestead laws, neither he nor his vendee would have been

liable, under the rule of *United States v. Ball*, for timber cut and sold in the meantime. Does it alter the case that he abandoned one method, and acquired title by another? It is clear that, as to the willfulness of what was done, it does not do so. Upon principle, it makes no difference whether a person who goes into possession of real property under a contract of purchase acquires his title under such contract, or under a new and substituted contract. There was no abandonment of the entry, or relinquishment of the purpose for which it was made. The substituted method of acquiring title was in operation from the moment the first method was relinquished. The possession was at all times lawful. There was no damage to the government in the substituted contract. It may be open to question whether the title acquired under the scrip purchase can be said to relate back to the homestead entry; but, with or without such relation, the consequence is the same. There was no trespass in either case. The reason why a person who goes into possession of real property under a contract of purchase, and abandons or fails to comply with his contract, is liable in trespass for the profits of the land, or waste committed, is because the vendor has the property thrown back on his hands, impaired in value. And this event must happen before a right of action arises. There has been no moment of time when the government has been damaged. It has been threatened with damage in the risk mentioned, and it would have had good right to an injunction restraining the act which threatened its interests. But its interests have not been impaired, and without this, or damage or injury, it cannot recover as for damage or injury."

Under these circumstances, the fact which appears in evidence that the United States also is suing the defendant for the value of this timber is no defense. That action cannot be maintained by the government.

From the letter presented in evidence written by the government counsel in charge of that suit, it is apparent that such is their opinion, in case the defendant pays Burns for the timber.

[4, 5] (2) The court instructed the jury that the defendant was a willful trespasser, and that the plaintiff was entitled to recover as damages the value of the logs in the lake. In this we think that there was error. In what we here say we do not at all mean to indicate that the evidence showed that the defendant was not a willful trespasser. We hold only that the question whether it was or not should have been left to the jury to decide.

Whether the defendant was or was not a willful trespasser must be determined by what it knew or ought to have known at the time of the cutting, which was in the winter of 1900 and 1901. What it learned after that is immaterial. At that time it had been decided by Judge Morris in the state district court that the defendant's rights went to the Howe line only, and that it had no right to cut on the land of Burns.

This decision was made July 13, 1896, and Hornby, the defendant's manager, then knew it. The action being in ejectment, a second trial was demanded and granted in accordance with the practice of Minnesota, and the judgment entered on this decision was vacated. Some months prior to September, 1897, Judge Lochren in the United States Circuit Court upon a motion for temporary injunction held, contrary to the decision of Judge Morris, that the title of the owner of the lots bounded by the Howe line did extend to the lake, and that therefore the defendant under its timber deed had the right to cut on Burns' land. This decision was affirmed by this court on September 27, 1897,

and it was expressly declared in that decision that the grantor of the defendant, and not Burns, was the owner of this land. *Kirwan v. Murphy*, 83 Fed. 275, 28 C. C. A. 348. At the final hearing in the Circuit Court Judge Lochren again made the same ruling on July 5, 1900. 103 Fed. 104. Hornby knew of all these decisions as they were made, and they were all made before the cutting commenced. The next decision agreeing with that of Judge Morris was made by Judge Cant, in the state district court, who held that the defendant's grantor took only to the Howe line; but this decision was not rendered until September 4, 1901, after the cutting had been done. The judgment in that case was afterwards affirmed by the Supreme Court of the state of Minnesota, and by the Supreme Court of the United States. Hornby testified that he was kept informed by his counsel of the progress of the litigation. He knew that this court had decided that he had the right to cut this timber. If that decision had been right, the defendant would have prevailed in this action. It was the highest court that had passed upon the question at the time of the cutting. Within the decisions of this court as to what is a willful trespass in this class of cases, that question should in this case have been left to the jury. *Central Coal & Coke Co. v. Penny*, 173 Fed. 340, 97 C. C. A. 597; *Liberty-Bell Gold Mining Co. v. Smuggler-Union Mining Co.* (C. C. A.) 203 Fed. 795.

In view of another trial of this case, we will say that while the advice of counsel is no defense, and is not conclusive upon the question of willful trespass, yet it is competent evidence upon the question of good faith, and it would be error to exclude it.

[6] (3) The only question left to the jury when they retired was as to the value of the logs, and they were instructed that they must return a verdict for the plaintiff for some amount between \$8 and \$11 a thousand. After being out two days, the jury reported that they could not agree. The plaintiff thereupon waived all damages above \$8 a thousand, and a verdict for that amount was directed by the court and signed by a juror. Upon being asked by the clerk of the court if that was their verdict, 11 of the jurors responded that it was, and one juror responded that it was not. Thereupon the court ordered the clerk to enter and record the verdict as signed. In this there was no error. If, before the jury had retired at all, the plaintiff had waived all damages above \$8, the court could then have ordered such a verdict. *Slocum v. New York Life Ins. Co.*, April 21, 1913, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, and the objection made by a single juror could not have prevented it. *Cahill v. C., M. & St. P.*, 74 Fed. 285, 20 C. C. A. 184.

When the court did direct the entry of judgment, the jury had not passed upon any questions submitted to them. Ordering a verdict after the jury has deliberated and has been unable to agree is not a re-examination of a fact tried by a jury, in violation of the seventh amendment of the United States Constitution.

However, for the error in taking from the jury the question of good faith, the judgment must be and it is reversed, and a new trial ordered.

CARLAND, Circuit Judge. I dissent from so much of the opinion as holds that it was error not to submit to the jury the question as to whether the lumber company cut and converted the logs to its own use in good faith. The claim that the ravishment of virgin pine by the lumber company under the facts in this case was in good faith strikes one as so incongruous as to immediately challenge attention.

What constitutes good faith? It has been defined as follows: Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms and technicalities of law, together with absence of all information and belief of facts which would render the transaction unconscientious. The facts as they appear in the record, and they are undisputed, fall very far short of entitling the lumber company to the protection of the grateful shade of good faith. I cannot agree that whether or not the lumber company was a willful trespasser must be determined by what it knew or ought to have known at the time of the cutting. The logs were actually taken from the lake about four years after they were cut, and long after there had ceased to be any question whatever as to the validity of the lumber company's claim to the same. The undisputed testimony has convinced me that the lumber company was determined to take the timber at all hazards, regardless of the rights of Burns or any one else. This being so, there is no room for the plea of good faith.

The judgment, in my opinion, should be affirmed.

THE SAO PAULO.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 194.

SHIPPING (§ 132*)—DAMAGE TO CARGO—LIABILITY OF VESSEL—EVIDENCE CONSIDERED.

Evidence considered in a suit to recover for damage to a cargo of Brazil nuts by heating or burning on a voyage from Para to New York, and held insufficient to establish negligence on the part of the vessel in stowage or ventilation, or in failing to shovel the nuts over during the voyage in the usual manner; it further appearing that they were subjected to worse conditions when being brought down the Amazon in river steamers and that the injury might have been sustained during that time.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

Liabilities of vessel owners for loss or injury from improper stowage, see note to *The Gualala*, 102 C. C. A. 553.]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in admiralty by William Hills and William Hills, Jr., against the steamship *Sao Paulo*, Lloyd Brasileiro, claimant, for damage to cargo, and cross-libel for freight. Decree for respondent, and libelants appeal. Affirmed.

These causes come here upon appeals from decrees of the District Court, Southern District of New York, dismissing libels which were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

brought to recover damages to consignments of Brazil nuts through heating or burning, which it is alleged were caused by reason of the "fault and negligence of the steamship Sao Paulo."

The following is the opinion of the District Court, by Hand, District Judge:

This is a libel in rem in the admiralty against the Steamship Sao Paulo under a bill of lading of a cargo of Brazil nuts consigned from Para to New York. The libel is based upon the negligence of the carrier in failing to take care of the nuts, on account of which they were damaged in the voyage. The ship cross-libels the libelants for the freight, no part of which has been paid.

A firm of brokers in Para, named Gruner & Co., bought the nuts there on the 8th day of June, 1910, on behalf of Poel & Arnold in New York and for the account of the libelants, and consigned them to the claimant, Lloyd Brasileiro, to be shipped on the steamer in question. The ship left Para on June 8, 1910, and reached New York on June 20th. The bill of lading did not recite that the nuts were received in good order and contained affirmative exceptions against any damage except from lack of care, bad stowage, etc. The libelant concedes that it must prove that the nuts were injured through the negligence of the ship itself. On arrival and discharge of the nuts at the Bush Terminal Docks in Brooklyn, N. Y., on the 21st and 22d days of June, 1910, it was found that they were in bad condition and that a certain percentage, which it is not now necessary to ascertain, had been, in the language of the trade, "burnt" or "cooked." Although there is some vagueness in the testimony as to just what this process is, the most reasonable interpretation seems to be that, as the meat of the nuts is extremely oily, their decomposition, which starts spontaneously, creates heat, and this heat will generate a vapor or steam, the nuts being usually moist, and, if this steam be not released, it will in turn accelerate the decomposition of the nuts, which find in the moist and heated atmosphere the best surroundings for decay. The precautions used in the care of the nuts are all devised to relieve them of the moist vapor so created. It is conceded that, when the nuts are surrounded by dirt and have become wet, the mud so created greatly increases their liability to spoil. From the testimony it also appears that the cargo in question was somewhat more dirty than usual because of the fact that the nuts were taken toward the end of the season when the trade does not expect them to turn out so well and when they are more apt to be covered by dirt.

The nuts are gathered from the forests bordering on some of the smaller tributaries which empty into the Amazon river from the north about 800 miles from its mouth. The natives gather them and carry them in canoes to well-known gathering places, where they store them on the shore generally on a rough platform covered with a roof of leaves or sometimes on the shore itself. The river steamers leave Para, ascend the Amazon, and stop at various places on its tributary, the Trombetas, taking on board the nuts as they find them. These they, for the most part, put into the holds, carrying the balance upon deck. Usually the last stopping place for gathering nuts is Obidos, but some of the nuts in the case at bar were taken by one of the river steamers between 50 and 100 miles further down. After they are carried to the mouth of the Amazon they are discharged from the river steamer and put into lighters and then loaded into the holds of steamers plying either to New York or Europe.

It is while lying in the hold of a steamer that the nuts are peculiarly subject to become "cooked," as already mentioned, so that there are several well-recognized precautions adopted to prevent it. These are substantially three: First, the hold is not to be loaded too full; second, an abundant supply of fresh air is continuously injected into the hold and the hot air allowed to pass off; third, the top of the nuts is continually furrowed by spading, so that the heat generated in the lower part shall escape and the crust which would otherwise form shall be continually broken up. The first of these requirements is met if a headroom of four feet between the ceiling of the hold and the level of the nuts is maintained. The second is insured (a) by keep-

ing the hatches always open except when absolutely necessary to close them through stress of weather, and in case of rain by building awnings over the hatches, and (b) by always carefully turning the fixed iron ventilators into the wind and supplementing with sail ventilators the standing ventilators, as will be hereafter mentioned more in detail. The third requirement is answered by sending men, at least once and usually twice a day, into the holds to run furrows two or three feet deep in the surface of the nuts, first forward and aft, then athwartships. If all the precautions be observed, it is not unusual to deliver the nuts in New York in a less heated condition than they were received at Para.

The greater number of the nuts in question were gathered along the bank of the Amazon river and its tributary, the Trombetas, during the month of May, 1910. Nothing is known of the particular antecedents of this special cargo before it reached the river steamers, Sapucaia and Perseveranca, in which the nuts were brought down the Amazon to Para. The Sapucaia left Para on May 7th, passed Obidos, the mouth of the Trombetas, five days later, and began to load nuts shortly thereafter. The Perseveranca was three days behind her. Each vessel had received all of her nuts some four or five days before she reached Para, where the Perseveranca arrived on June 1st and the Sapucaia on June 2d. The greater part of the nuts had therefore been in the holds of the two steamers for a period of from one to two weeks. In the harbor of Para they remained in the same hold from the date of the arrivals, June 1st and 2d, until the discharge began, which was on June 4th. There were two holds and no 'tween decks in the Perseveranca in which the nuts were stored; a forward hold having a capacity of 16,800 cubic feet and an after hold with a capacity of 6,800. Each hold was divided amidship from keels on to ceiling by a solid partition, so that in fact the ship had four holds, two forward and two aft. Into each of these holds there opened a hatchway which was located within a few feet of the vessel's rail. The ventilation in each of the forward holds consisted of one cowl ventilator 16 inches in diameter and one mushroom exhaust ventilator. The cowl ventilators each went down to within about a foot of the bottom of the hold. In the after hold there was the same ventilation except that instead of two 16-inch exhaust ventilators there was one 18-inch ventilator, which was exactly divided in two by the fore and aft partition already spoken of. The holds of the Perseveranca were kept open during the trip and the common sort of sail ventilator was put into each hatch.

The Sapucaia had a forward and after hold like the Perseveranca and no 'tween-decks; the forward hold having a capacity of 11,600 cubic feet and the after hold of 9,400. Like the Perseveranca also, each hold of the Sapucaia had two hatches near the sides of the vessel $4\frac{1}{2}$ feet by 12 feet. The forward hold was divided fore and aft by a partition running amidships from keelson to ceiling, and another partition athwartships, cutting the hatches about in two. The after hold was divided by a fore and aft partition only. The ventilation in the Sapucaia for the forward hold consisted of a 12-inch cowl ventilator and a 12-inch exhaust ventilator aft and in the after hold the same. However, owing to the partitions just mentioned, both port divisions of the forward holds of the Sapucaia were without ventilators, and on the starboard partitions the forward one had one cowl ventilator going down to within a few inches of the bottom of the hold, and the after starboard division had only the exhaust ventilator. Likewise, because of the division of the after hold, the port division had only the cowl ventilator extending down nearly to the bottom like the rest, and the starboard division had only the exhaust ventilator. The hatches were, however, kept open as in the other case, and in each a sail ventilator was inserted. Such at least is the most reasonable construction to put upon the testimony in this case.

The holds of both vessels were filled to within not more than 24 inches of the ceiling, and the Perseveranca also carried a considerable deck cargo. During this trip on the Amazon the nuts were not shoveled and the climatic temperature was hot.

On arriving at Para the nuts were offered for sale. This was done as follows: An employé of Cohen, an auctioneer, took one basket of nuts from the forward hold and one from the after hold of each steamer, making four in all.

These he took from the top of the heap just beneath the hatch opening. They were carried to the auctioneer's shop and exposed as samples of the cargo. Various proposed purchasers were at liberty to take from these baskets 100 nuts, crack them, and learn how great a percentage was bad. The nuts are then sold in accordance with the sample, subject, however, to a test by the buyer at the time of their delivery. This is the universal practice in the sale of nuts at Para and is the only available way of ascertaining their quality. It is universally accepted by persons dealing in such nuts as the proper way to buy and sell them.

This cargo amounted to 500 tons, some 25 tons being ex barge San Salvador, hereafter mentioned; and, as it was larger than is usual in Para, there were only three firms who would buy the nuts: First, the libellant's agents, Gruner & Co.; second the firm of R. O. Ahlers; and, third, the firm of Adelbert H. Alden. Each of these were bidders at the sale, but, thinking that they could do better by private competition, they abandoned the bidding when the price got to be about 15 mil reis. The auctioneer, seeing the larger bidders leave, withdrew the nuts from the sale and waited for a separate bidding. Both the libellant's firm represented by Gruner, and Alden's firm, represented by one Neale, bid 18 mil reis. Eventually the nuts were sold to the libellant for 18 mil reis, 200 reis. Before making the bids both Gruner and Neale had made a crack of the nuts from samples taken from the baskets. These had exhibited in no case more than 13 per cent. bad, and, as the sale was on a 15 per cent. basis, both bidders were contented. Neither found any "burnt" nuts in their examination. It does not appear exactly how many Gruner cracked except that he took a certain number from each basket; Neale took 100 nuts out of each of the four baskets. Before offering the nuts for sale, Cohen likewise made a crack which he found to average for both vessels 11½; the highest being 14 from the Perseveranca. It does not certainly appear how many nuts he used for his crack. He thought the cargo to be of good size and in good condition, but did find, unlike the other two, some "burnt" nuts in the samples which he examined.

After the cargo had been struck down to Gruner, he arranged with the claimant's agent, Pardo Vieira, that the nuts should be carried by the Sao Paulo, which was to furnish the lighters to take them from the river steamers aboard the ship itself. The first cargo from the lighters was brought to the Sao Paulo on the 5th of June, and the work was carried on continuously until she sailed, which was on the evening of the 8th. Stevedores employed by the claimant did the work, taking the nuts out in baskets which were dumped into a hectolitre measure that was afterwards emptied over the side into the lighter.

While the nuts were being loaded into the lighters to be carried aboard the Sao Paulo, Gruner had three men present who kept tally of the crack of the nuts, as they went over the side of the river steamer. Of these three, two were called and the third was in Manaos. Their names were Curado, Mendes, and Vinagre. The books in which they kept a part of the tally were put in evidence. Curado examined 1,450 hectolitres ex Sapucaia on the 4th of June, and on the 5th, 245 ex Sapucaia and 442 ex San Salvador. On the 6th Mendes examined 988 hectolitres ex Perseveranca and Vinagre 1,000, though the latter's tally books were not in evidence. On the 7th Mendes examined 1,645 hectos ex Perseveranca. The total number of hectolitres of which the tally was in evidence was 4,770, to which may be added Vinagre's 1,000, making in all 5,772 hectolitres, or somewhat more than half the cargo of all three vessels. Curado was 22 years old and had been four months in the employ of Gruner; this was his fourth crack at the most. He testifies that he examined 100 nuts for every 20 hectolitres, but his books represent the percentage to be for every 100. Mendes was 19 and had never examined nuts before. Machado, Gruner's foreman, was present at the time of the crack and said that it was made at every 100 to 200 hectolitres, and that the percentage of bad nuts was not more than 12. He had had a long experience, having been engaged in the business for 30 years, but it did not appear to what extent he actually took part in making the tally, though he appears to have personally cut the nuts and made some of the tests. He likewise testifies that there were no burnt nuts in either cargo. Two employes of Mendonca Ribeiro & Co.,

the seller, were also called, who testified that they made a test of the nuts as they were discharged. Their books were put in evidence, but in some way have now been lost, and the highest crack which the books showed was 11. Pereira, one of them, in only a few cases made the test himself; the foreman of the stevedores, perhaps Machado, cutting the nuts and counting the percentage while another man made the tally, so that the principal part of his work was to count the hectolitres. Oliveira, the other employé, found the crack above 10 but found no burnt nuts in the cargo, and, although he did not cut the nuts himself, they were cut in his presence by a sailor. He supervised 1,738 hectolitres and occasionally examined the nuts which were set aside as bad.

After the lighters were loaded from the river steamers, they were brought along the side of the Sao Paulo and the nuts were taken out and dumped into two of the four holds of that vessel, No. 2 hold just forward of the engine space, and hold No. 4 just forward of the poop. The exact stowage and condition of the nuts when laden was a subject of dispute in the testimony and will be considered in the opinion. It is conceded, however, that some of the nuts were placed in the hold itself and some in the 'tween-decks. No other cargo was in either holds 2 or 4, but in the forward part of each 'tween-decks was placed some plants. The cubic capacity of the holds was: For hold No. 2, 4,799 hectolitres; for 'tween-decks No. 2, 6,573 hectolitres; hold No. 4, 5,485 hectolitres; 'tween-decks No. 4, 5,113 hectolitres. The capacity of lower hold No. 2 was 16,200 cubic feet; of the 'tween-decks No. 2, 22,150 cubic feet; of the lower hold No. 4, 18,640 cubic feet; and of the 'tween-decks No. 4, 17,550 cubic feet. The total cargo measured 10,083 hectolitres. The distribution of these nuts between the holds and the 'tween-decks is a matter of dispute between the parties. The steamer was discharged at New York on the 21st and 22d of June. The nuts were spread upon the dock and at once found to be in an injured condition.

Just what was done on the voyage is a matter in dispute, but it is conceded that no sail ventilators were put into either hatch. The ventilation of the hold was as follows: In the second hold there was one 12-inch cowl ventilator on the starboard side and one on the port side; the diameter of the cowl in each case was 21 inches and it was five feet above the deck. Into the 'tween-decks of No. 2 went one 18-inch cowl ventilator, the cowl of which was 30 inches in diameter, and two mushroom exhaust ventilators with a 12-inch pipe 13 feet from the after bulkhead. Into hold No. 4 there were two 12-inch cowl ventilators, one on the port and one on the starboard side, 18 inches from the forward bulkhead, the cowl of each of which was 18 inches in diameter. There was also one 14-inch cowl ventilator, the cowl of which was 36 inches in diameter, which was 25 feet from the after bulkhead and entered the hold through the poop. In the 'tween-decks of No. 4 went one 10-inch cowl ventilator, the cowl of which was 18 inches, which was 26 feet aft of the forward bulkhead, and two 6-inch ventilators through the bits of each side of the ship. Also there was one ventilator on the poop with a 20-inch pipe 25 feet from the after bulkhead. The hatches into hold No. 4 were 12 feet by 12 feet, and into hold No. 2, 13 by 14. Into the 'tween-decks of No. 2 they were 19 by 14. Calculations were made of the amount of air that would enter the holds through this ventilation system at various rates of speed, the result of which was that, at a speed of ten knots with no wind, the air in all the holds would be changed in 12 minutes.

The specific charges against the steamer by the libellant are as follows: That sufficient space was not left above the nuts; that the nuts were not shoveled; and that no sail ventilators were used in the hatches.

Mr. Harrington frankly concedes that the burden rests upon him of showing some negligence on the part of the ship, and that the only negligence would be in one of the three respects: The absence of sail ventilators, the improper stowage, and the failure to shovel the nuts. On the other hand, the claimant insists that, whatever the conditions on board the Sao Paulo, a fortiori the conditions on the Amazon would "cook" the nuts still more. When faced with the fact that a crack was made at Para, Mr. Haight insists that the crack was not such as to make it certainly represent the facts, because as to the crack of Gruner, Neale, and the auctioneer it came from baskets taken just below

the hatches, and as to the crack of Gruner's and Ribeiro's employes they are not reliable. Further he insists that the important testimony of Chaves & Silva shows that a disinterested person found not only 15 per cent. bad but 8 per cent. in addition in the process of becoming burnt. As to the sail ventilators, he insists that a sail ventilator contributes nothing more than any other ventilator of the same size, and that the proof distinctly shows that there was adequate ventilation without it.

To take up first the matter of shoveling the nuts, it appears by uncontradicted testimony that this was done twice a day for every day. Moreover, the testimony of the crew and officers is supported by that of several passengers. I do not mean that such passengers can say with certainty that shoveling was done twice each day throughout the voyage, but they do corroborate the statements that this was the fact by swearing that they frequently saw men shoveling nuts in the hold. Of course the cargo owner's position is one of great difficulty in such a matter and the testimony of the crew is certainly open to the suspicion of interest, but in this case I could not find that the shoveling did not take place without disbelieving a number of persons whose veracity was unimpeached. The issue is not like that of the headroom, on which men's recollections may well differ, and it is impossible to suppose that men could testify innocently that the nuts were shoveled twice a day, if such were not the fact. Either the shoveling took place or the witnesses were deliberately perjured. So that item of supposed negligence I will dismiss.

The second point is the item of ventilation. All the Booth captains, the only experts called, testify that it was the custom of their company at least in recent years to use sail ventilators, but they differed somewhat as to the importance they attributed to them. Thus Couch answers that he always carries wind sails and considers that they are the best to give proper ventilation. He concludes his testimony by saying that they are the "finest" things to have in the holds because you can always trim them to the wind and they are above everything on the deck; that they are practically much better than other ventilators. Steer, the other Booth captain called by the libellant, says that he uses wind sails of two feet six inches in diameter, the flaps of which extend out six feet, and the tube of which extends to within two feet of the top of the nuts. He says that he does not think that ordinary ventilators are half enough and so he supplies the deficiency by wind sails. This is strong testimony certainly, but the two Booth captains called by the claimant hardly bear it out. The first one, Coxon, had not had much recent experience in carrying nuts, but had carried them in the past and was now dock superintendent of the line. He thought that, with adequate headroom, wind sails would probably be unnecessary; that, however, wind sails did make a difference; that the difference between the cowl ventilator and the wind sail is merely in the size of the tube; and that on the whole, size for size, the stiff ventilators were better. On his cross-examination he reiterated that he did not regard them as necessary if there were ample other ventilation. Bennett, the other captain, said that he considered their use necessary because the more wind you could get down into the hold the better, but that it was not absolutely necessary if there were other ventilation. In such cases he would not consider them necessary. The only reason why they put them in was because it was a rule of the company.

In this view of the testimony I think it may fairly be said that although it is a customary precaution, and that the absence of the wind sails *prima facie* is negligence on the part of the ship, nevertheless it by no means necessarily follows that it is an absolute *sine qua non* of proper care. As Coxon says, the matter must be one of common sense, and the real question is as to the best way to get air into the hold. A sail ventilator having a tube of two feet six inches in diameter and an area of about five square feet will carry into the hold as much air as six ventilators having a tube 12 inches in diameter and an area of about four-fifths of a square foot, and it will carry down about three times as much as a ventilator having a diameter of 18 inches and a sectional area of $1\frac{1}{2}$ square feet. However, this of course depends upon the relative size of cowl and wings, which is not given, and also it is plain enough, as Coxon says, that the straight metal shaft, other things being equal, will offer less resistance to the down-pouring air than the flexible sides of a

canvas tube. The two ventilators into hold No. 2 of the Sao Paulo would theoretically carry down only about half the air which a sail ventilator would carry down, and the single 18-inch cowl ventilator into the 'tween-decks of hold No. 2 would carry down only one-third of the air which would be carried into that hold by a sail ventilator. Similarly the three ventilators into the No. 4 hold would carry down not much more than one-half the air carried in by a sail ventilator, and the two 18-inch ventilators into the 'tween-decks of No. 4 would carry down only two-thirds of the ventilation of a sail ventilator. The two six-inch ventilators that went into the No. 4 'tween-decks hardly count. Two of the Booth captains seem to concede, and this must be accepted as in accordance with common sense, that if there be other sufficient ventilation, there is no magic in the wind sails. On the three Booth ships, the Cearense, Ucayali, and Dominic, the fixed ventilation to the holds and 'tween-decks was in all cases considerably less than that upon the Sao Paulo. In the case of the Cearense, with the exception of hatch No. 1, it was not more than half as much. In the case of the Ucayali, much less than that; and in the case of the Dominic, just about half. Moreover, the calculations of Martin, the well-known naval architect, of the amount of air that would pass into the holds and 'tween-decks at given rates of speed showed that at ten knots an hour, which was the ordinary speed of the vessel, a complete change of air would take place in the holds in every 12 minutes. This everybody concedes is enough, if it actually takes place, and Martin considered the ventilation quite enough for any cargo except bananas. If the speed against the wind were reduced to four knots an hour, the air would completely change about every half hour. Moreover, there is another consideration which ought not to be forgotten, which is that in the system of ventilation on board the Sao Paulo the heat was to go out of the hatches and the fresh air was to go in by the ventilators. To combine sail ventilators with cowl ventilators is to disturb that system somewhat, just how much is not ascertainable from the evidence.

While, therefore, the ship is primarily at fault for violating this customary regulation in the carriage of such nuts, I cannot find that there is a sufficient case made to show that under the circumstances that disregard caused any damage. No doubt it would have been safer to put up the sails, but we must remember the facts which I have enumerated: First, it is unsafe to compare by sectional area only the amount of air which will pass down a canvas tube with that which will pass down a steel tube; second, that a canvas tube would almost certainly disturb the upward current of hot air from the hatch upon which the ventilation in the Sao Paulo depended; third, that at least theoretically there was adequate ventilation in any case, according to Martin's testimony on that point, which stands uncontradicted; fourth, that the ships on which wind sails were used, so far as appears, had much less ventilation than the Sao Paulo; finally, that the matter after all is one of sound common sense in which the captains, who know the most about it, are by no means united in regarding the sail as a necessity. I do not think that the libellant has shown that the injury to the nuts was in any part caused by the absence of the ventilators.

The remaining question is whether adequate headroom was maintained over the nuts. Now there is some divergence of opinion between the Booth captains as to the amount which is necessary, but I think on the whole the best standard to apply is that of four feet, and this test the libellant substantially accepts. Was four feet of headroom left over the nuts in all the holds? There is undoubtedly plenty of testimony in the case that there was not. Those of the longshoremen discharging the vessel called by the libellants all testify that there was very much less than that. Moreover, it is evident that it is possible to stow the nuts with only two feet of headroom, and to trim them as well, because this was done on the Amazon steamers. Furthermore, there are some of the witnesses called by the claimant himself who put the headroom at less than four feet. This was the judgment of Lima, who thought that the distance was only 2½ feet in the No. 4 hold and that in the 'tween-decks it was not much more. Souza, another employé of the claimant, puts it at one meter or three feet three inches. Xavier says in hold No. 4 it was only high enough for men to crawl around on their knees,

which would be not over three feet. On the other hand, Mello says that in hold No. 2 the nuts were between one and two meters high, which would seem to be at least four feet. Silva says you could walk on the top of the nuts in hold No. 2. Alves says a man could easily walk on the nuts in hold No. 4, and he was five feet seven inches in height. Alfonso da Silva says that in the hold No. 2 you had to stoop in going under the beams but between them you could stand erect, and he was five feet nine inches. Willington says that between six and seven feet was left in all cases and also that he divided the entire cargo into four parts more or less equally according to the size of the holds. I think that Mr. Haight was justified in criticising the longshoremen of the libellant in that they all very positively testify that they were there on St. John's Eve when it was proved without question that at that time the ship was all discharged. It is inconceivable that they were all mistaken on a thing like that; they must have agreed with each other and miscalculated the date. This, combined with the fact that the names of none of them appeared on the time sheets of the claimant, satisfies me that their testimony is not reliable. On the other hand, I am disposed to attach importance to the testimony of Crooks. He talked quite frankly, saying that the highest ridge of the nuts in the 'tween-decks was not more than two feet from the ceiling, and that in other places the space was greater than his height. The average height in hold No. 2 he puts as between three feet six inches and four feet; in the No. 2 'tween-decks he thought the shortest space was three feet or three feet six inches; and in other places there was room for a man to work without difficulty. The conditions in hold No. 4 he found to be similar to those in hold No. 2. The longshoremen called by the claimant put the space as between four and five feet or more. The differences in all this testimony arise, I think, first from the necessary infirmity of human recollection as to such matters, and next to the inevitable discrepancy between estimates of space or time. No one who has had any adequate experience of trials can fail to be impressed with the astounding inaccuracy of the estimates of illiterate, and also of literate, witnesses in such matters. Especially this is true as to the estimates of time, and in regard to space men are only a little more reliable. When in addition it is remembered that the witnesses were probably speaking in some cases of the tops of the ridges, sometimes of the furrows, there is certainly an innocent interpretation possible for even the diversity that exists. However, with all this difference of testimony the fact stands out that men had spent four hours a day in the hold shoveling the nuts. It is quite clear that they could not have done this if the space was only two feet and a half. I think that Crooks' testimony is by far the most probable; i. e., that the nuts were not accurately trimmed, but that enough space was left in every hold to enable the men with some readiness to dig the necessary furrows. It is not as though the ship had been overladen, for confessedly the hold capacity was more than twice what she carried. It would have been an absurd and unreasonable distribution of the cargo to put more than four-fifths in the hold and leave only one-fifth in the 'tween-decks. It is very difficult to work with shovels in a less space than four feet; and, while much consideration for the crew is unfortunately not to be necessarily presupposed, it would be an almost wanton disregard of the ordinary economy of navigation, when there was plenty of space to use, not to distribute it with some degree of equality. The holds were 12 feet deep and the 'tween-decks 8. It is most likely that the captain's testimony was right and that he divided the cargo equally as nearly as he could. Mr. Harrington's calculations through Drake were based upon the testimony of those witnesses of the claimant who said that in both hold and 'tween-decks the space was five feet seven or nine inches. Now I do not believe that these men were right, and if I were obliged to guess at the height I should say that it was nearer four feet or three feet six inches, but it certainly must be clear that it cannot be legitimate to assume that these men were right in their estimate of the space in the 'tween-decks and then to show mathematically that the hold was overfilled. They were as wrong about the 'tween-decks as they were about the holds and their testimony must be considered throughout as inaccurate. In the face of all the diversity of testimony, I cannot find that the claimants have established that the stowage was imperfect.

This disposes of all three of the items of carelessness on which the libellant relies, but in fact their chief reliance still remains unassailed, which is that, in spite of all oral testimony, it is impossible that the nuts could have spoiled as they did upon the voyage if the necessary precautions had been maintained, and that therefore, if the nuts were sound when shipped, the precautions could not have in fact been taken, or at least they could not have been adequate. In spite of the burden of proof, Mr. Harrington thinks that the divergence of testimony and the source from which it comes would justify me in accepting that portion which is favorable to him and in disregarding that portion which is not, providing the nuts were sound when they started. If the crack at Para were necessarily accurate, there would be much force in his argument, but I do not think that this is so. In the first place it is very hard to see how the nuts could have been burnt during the 12 days they were on the Sao Paulo and not have been much worse burnt on the Amazon steamers. All the conditions were worse there than at sea; they were piled to within 24 inches of the deck; in many of the compartments there was absolutely no ventilation; in those in which there was any it was of small consequence; there was no pretense of shoveling; and the climatic temperatures were presumably higher than at sea. The libellant must concede all this but puts his faith on the crack at Para.

Now, as far as concerns the crack made by Neale, Gruner, and Cohen, I think that little can be inferred from it. Cohen's man says he took four baskets where it was most handy; that is, right beneath the hatch opening. As there had been a wind sail ventilator on the Amazon, the nuts which were under the hatches had been constantly fanned by the only air which any part of the steamer received at all. To get four baskets he did not have to dig deep and there is every reason to suppose that the only nuts which he got were those which had received plentiful ventilation. Even among these Cohen thought he discovered some burnt ones. I do not think, therefore, that there is any reason to suppose that these were accurate tests of the cargo. The test taken as the nuts went over the side of the river steamer was of a different character, and there can be no question but that if an accurate test, taken for every 100 hectolitres, in fact showed no greater damage than 10 or 11 per cent., the damage must have occurred upon the ship. The evidence depends wholly upon the employés of Gruner and Ribeiro. Gruner's men kept track together of only about 6,000 hectolitres. One of them had never examined nuts before, and the other had only been with Gruner four months. Their judgment of nuts which had begun to be burnt was certainly not the most reliable. Machado was with them and he testifies as to his recollection, but he kept no tally, nor do I understand that it was he who passed upon the condition of the nuts and told the two younger men what to tally. Had that been so, it would have been proper to attribute to the tally his own larger and sounder experience, but I cannot find it as a fair inference from the testimony. His testimony I cannot therefore accept as more than either his recollection of the tally itself or his remembered estimate from his own experience. If it be the first, it adds nothing to the testimony of the inexperienced men; if it be the second, it is subject to the general doubt of any such estimate not at the time embodied in permanent form and not, even when made, so thorough and complete as entitles it to the credibility of a tally.

Ribeiro had two employés present at the time whose tests are also given in evidence. Their duty, however, was to see that Gruner's men were not making the percentage too high, and they were interested, therefore, only in examining the nuts thrown aside as bad to see whether Gruner was not rejecting good nuts. If Gruner's men were accepting bad nuts, it was not an affair of theirs and they undoubtedly did not examine the nuts which passed as good. Thus Oliveira himself says that he personally examined the nuts which were set aside as bad. I do not think their testimony, therefore, is of any consequence upon the present issue.

On the other hand, the testimony of Seligmann's employé, Chaves & Silva, is here pertinent. He made an independent examination of the nuts at some time not accurately fixed and found a percentage of 15 bad and of 8 which were, as he expresses it, beginning to get burnt. The witness James testifies

that in the first stage of burning the nuts change to a somewhat yellower color than the normal, and that this color increases as the process continues. Just what the condition was of those nuts which *Chaves é Silva* placed within the 8 per cent., it is impossible to say, but it is quite possible that *Curado, Mendes, and Vinagre* failed to notice a considerable change in color, which would have been apparent to a more experienced person. The libelant says that *Chaves é Silva's* test, the extent of which does not appear, may have been made only to answer his principal for the loss of a good bargain, but this seems to me a rather far-fetched explanation. Why should *Seligmann* have lost the bargain if he thought the nuts were good? He was concededly advised of the sale, attended the auction, and was actively in touch with the possibility of buying the cargo. A more reasonable explanation is that he let the bargain go because he found the nuts bad. It is quite true that the time of this examination does not appear except that it must necessarily have been between the 2d and the 8th of June, but I cannot see that anything turns on that. *Seligmann's* good faith seems to me to be strongly corroborated by the fact that he sent the result at once to his principal in New York. That *Laing* did not suspect *Seligmann's* good faith originally is, I think, pretty obvious from the fact he was alarmed by it when he got the news of the telegram. This is a matter upon which I do not lay great stress, yet from the whole of *Laing's* conduct it seems to me most likely that his concern about the cargo was due more to his knowledge of the telegram than to anything else. I mention this as important only as showing that, although the crack is *prima facie* accepted as an accurate test, *Laing* then recognized the possibility that it might have been wrong and was concerned at that possibility.

The testimony that when the nuts came over the side of the *Sao Paulo* they were either steaming or hot, I do not believe, because it is not substantiated by more reliable persons who were there at the time and who would, I think, have seen it, if it had happened. It is, however, the undisputed testimony, supported by that of disinterested passengers, that within a few days after the ship left *Para* the steam and stench from the holds became noticeable and the great bulk of the testimony is that both steam and stench decreased after the ship left the *Barbadoes*. Now it is hardly possible that the same treatment would have made the nuts steam during the early part of the voyage and cooled them off at the end. On the other hand, it is most likely that if they were delivered in a hot condition they would steam at first and proper treatment would cool them. Thus the *Booth* captains say they can deliver nuts in a better condition than they receive them. Both *Woodward* and *Alexander*, passengers on the *Sao Paulo*, noticed the vapor in the vicinity of the *Barbadoes*, but they cannot say on which side. The two Brazilian officers say they noticed the steam after the ship left *Para* but just when they do not state.

It is true that the goods are bought and sold on the *Para* crack, and indeed it is necessary that this should be the case, because if the buyer has had his opportunity to examine the nuts and has accepted them, it is too late for him thereafter to refuse because the examination was insufficient. On the other hand, it does not appear that in New York on the subsequent sale of the nuts the *Para* crack is accepted or that it is regarded as binding on third persons. It seems to me rather that the conclusiveness of this crack arises from the fact that it is all that the buyer can do at the time and that what he does then is necessarily a final acceptance. Therefore, in view of all these considerations, the inexperience of the men employed by *Gruner*, the position of *Ribeira's* employes upon the test, the crack of *Chaves é Silva*, the care of the nuts on the voyage, some of it attested by disinterested persons, the conceded conditions upon the *Amazon*, and the history of the nuts on the voyage down that river, I am disposed to regard the crack at *Para* with enough doubt to prevent its overcoming in my mind the other testimony which I have detailed at such length.

Perhaps if the burden had been upon the steamer to establish that the damage had been done on the *Amazon*, she would have failed, but the burden is the other way. It is upon the libelant to establish that it was not upon the *Amazon*, and under all the circumstances I am not satisfied that this was not the case. With all the confusion of testimony and the difficulty of reaching any certain conclusion as to what did happen, he must lose on whom

the burden rests. Fortunately, perhaps, it is not necessary to form a certain conclusion upon either side. I must confess that, with all its possibility of error, the Para crack still seems to me a stumbling block in the way of an affirmative conviction. All I mean here to say is that it was not necessarily accurate, and that, in view of the other proof, it does not carry conviction in my mind. It is undoubtedly a hard position for a cargo to be in, when it must prove what took place on the ship, but the ship is badly off also when it seeks to prove what was the condition of the cargo before it was delivered. Whatever the difficulties, I must take the law as I find it, and it requires the cargo to satisfy me upon the probabilities that there was lack of care. I am not satisfied.

Let a decree pass dismissing the libel and for the freight upon the cross-libel, with costs.

Harrington, Bigham & Englar, of New York City (Howard S. Harrington, of New York City, of counsel, and T. Catesby Jones and Kenneth M. Gibson, both of New York City, on the brief), for appellants.

Haight, Sandford & Smith, of New York City (Charles S. Haight, John W. Griffin, and J. Dexter Crowell, all of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The damage was undoubtedly by "deterioration," which is among the exceptions in the bills of lading, and concededly the burden rests on the cargo owner to show that the ship's negligence caused or promoted such deterioration. The case is a very close one but on the whole we concur with Judge Hand's conclusion for the reasons he has expressed that such negligence is not established by a preponderance of proof.

Decrees affirmed, with costs of this appeal.

GRIFFIN v. ALLEN et al.

(Circuit Court of Appeals, Eighth Circuit. July 14, 1913.)

No. 3791.

1. APPEAL AND ERROR (§ 673*)—RECORD—MATTERS TO BE INCLUDED.

Where, on plaintiff's appeal from a judgment dismissing his bill, it appeared that his only rights against defendant were under a contract, the provisions of which did not appear in the record, the judgment must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2873; Dec. Dig. § 673.*]

2. APPEAL AND ERROR (§ 909*)—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

Where, on an appeal by plaintiff, it appeared that, subsequent to the contract relied on by him, he failed to comply therewith and suit was brought against him, which was compromised by the giving of a new contract, it might be inferred, in the absence of any evidence as to the terms of the new contract, that it superseded the first contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3675; Dec. Dig. § 909.*]

Appeal from the District Court of the United States for the Western District of Missouri; Smith McPherson, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit by George M. Griffin against Thomas M. Allen and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Roland Hughes, of Kansas City, Mo. (Halbert H. McCluer, of Kansas City, Mo., on the brief), for appellant.

E. P. Mann, of Springfield, Mo., and O. L. Cravens, of Neosho, Mo., submitted a brief for appellees.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. Griffin, the appellant, brought this suit for the purpose, among other things, of having the defendant Allen enjoined from foreclosing certain mortgages on land in which Griffin was interested on the ground that when Allen bought the mortgages he acted as the agent of Griffin and should not be allowed to foreclose them against him. After final hearing the court below dismissed the bill.

The amended bill alleged, among other things, that Griffin and the defendant S. M. Mitchell were the owners in equal shares of all the capital stock of the Cedar Valley Stock Farm Company; that the company in 1908 was the owner of 185 acres of land, subject to two mortgages, one for \$3,000 and one for \$300 made by Joslin, a former owner; that in June, 1909 (it appears that the true date was May 10, 1909), Griffin made a written contract with the company and Mitchell whereby it was agreed that Griffin should assign and relinquish to the company all his stock therein, and in consideration thereof the company would convey to Griffin all of the 185 acres of land except the north 45 acres, and that the mortgage for \$3,000 should be paid, one-half by Griffin, and the remaining incumbrances should be paid by Griffin, Mitchell, and the company; that, pursuant to the terms of this contract, Griffin made an assignment of his stock to the company and the company executed a deed to Griffin of the 140 acres of land, and the assignment of the stock and the stock itself and the deed were delivered to E. Frost to be held by him in escrow until the mortgage had been paid off pursuant to the agreement, when the stock was to be delivered to the company and the deed was to be delivered to Griffin.

The amended bill then alleged that Griffin procured a loan of \$2,800 wherewith to pay his half of the mortgage and certain other of his debts as set forth in the contract; that Mitchell employed Allen to represent him in paying off the portion of the incumbrance to be paid by Mitchell and the company; that Allen agreed to advance the money for this purpose; that Allen failed to advance this money; that Mitchell did not, and for that reason the \$2,800 which Griffin had secured could not be used and was returned to the loan company.

The amended bill further alleged that Allen had purchased the two mortgages for \$3,000 and \$300 and was attempting to foreclose them; it also contained allegations with regard to other claims against Griffin which Allen had purchased and was seeking to enforce, and with regard to another mortgage on the land of \$2,500, which the defendant the Barry County Bank, of which Allen was the cashier, was proceeding to foreclose, and which the amended bill alleged had been paid.

It also alleged that by agreement of the parties, after the death of Frost, Allen and C. M. Landis were substituted as parties to hold the said papers in escrow, and that they were at the time the bill was filed in the possession of Allen and Landis; it alleged an offer by Griffin to Allen to pay his part of the mortgage and asked for an injunction and an accounting as to the amount due from Griffin under the mortgages, which amount when ascertained Griffin offered to pay.

The answers of Mitchell and of the company asserted that Griffin had not carried out the terms of the contract of May 10, 1909.

[1] It seems that this contract was presented in evidence, as was the contract by which Allen and Landis were substituted in the place of Frost. Those are apparently the two most important pieces of evidence in the case, but neither one of them is printed in the record which is returned to this court. Other evidence which the court below had before it when it decided the case is not in the record. Under these circumstances, the decree might well be affirmed without further consideration of the case. We have, however, examined the evidence returned and are satisfied that the bill was properly dismissed. It appears therefrom that Allen never agreed to furnish any money to Mitchell to pay his part of the incumbrances; that Frost acted as the attorney for Griffin when the contract of May 10, 1909, was made; that Allen was never in any sense the lawyer or agent of Griffin; and that the only obligation which he ever assumed to Griffin was contained in the contract of July 19, 1910, by the terms of which he with Landis was to hold the papers in escrow. But the provisions of that contract nowhere appear, and it cannot therefore be said that he did not faithfully fulfill all obligations thereby imposed upon him.

[2] From what can be gathered from the evidence of the terms of the contract of May 10, 1909, it seems that Griffin agreed within 90 days from that date to indemnify Mitchell against loss from certain debts created by Griffin. This Griffin never did. The contract of May 10, 1909, not having been carried out, the company sued Griffin for \$700. In that suit Allen was the lawyer for the company and Landis was the lawyer for Griffin. During the trial the case was compromised and resulted in the contract of July 19, 1910, by which Landis and Allen were authorized to take possession of the papers. It might well be inferred, in the absence of evidence with regard to what the terms of that contract were, that it superseded the contract of May 10, 1909.

From the evidence before us it does not appear that Griffin has any rights in the land in controversy, except such as he may have by virtue of his ownership of stock in the company, which stock is apparently in the hands of Allen and Landis, under the contract of July 19, 1910. As the terms of this contract nowhere appear, no relief can be granted to him in this action with regard thereto, even if it were otherwise possible. The bill was not framed for the purpose of securing a return of this stock, under the theory that the contract of May 10, 1909, had been abandoned, but it was brought to enforce that contract.

The decree of the court below is affirmed, without prejudice, however, to any right which Griffin may have in the stock deposited in escrow.

McWILLIAMS v. DELAWARE, L. & W. R. CO.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 260.

COLLISION (§ 66*)—MEETING TOWS—NEGLIGENCE OF TUG.

Allegations of fault on the part of a tug whose tow came into collision with that of a meeting tug *held* not sustained by the evidence either on the ground that the length of her tow was the cause of the collision or that she did not give sufficient room in passing.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 84; Dec. Dig. § 66.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by Owen J. McWilliams against the Delaware, Lackawanna & Western Railroad Company. Decree for respondent, and libellant appeals. Affirmed.

The following is the opinion of the District Court, by Hand, District Judge:

This is a libel in admiralty in personam against the Delaware, Lackawanna & Western Railroad Company on behalf of the owner of the barges Baxter and Vaux for a collision between those barges and the barge Pohat-kong at that time in tow of the tug Lackawanna. The collision took place on the 25th day of August, 1907, at about 11:30 in the morning. At that time there was a fresh northwesterly breeze and the tide was substantially slack. The scows Baxter and Vaux were in tow of the steamtug Zouave, which was coming from Bridgeport and shortly before the accident was about halfway between the Stepping Stone Light and Throggs Neck. The Zouave had in tow at that time 13 light barges which were bunched in four tiers; the first three tiers being four boats abreast and the fourth tier consisting of one boat on the port side of the port barge of the third tier. Between the tug and the first tier was a hawser of some 60 fathoms in length. The barges drew substantially 2 or 3 feet of water and had a freeboard under the circumstances of about 12 feet. The tug Lackawanna had come through Hell Gate with three loaded coal barges in tow. These at that time were in one tier and abreast and upon a short hawser. She wished to pick up at Hammonds Flats, which is just to the west of Throggs Neck, a fourth barge, and in order to do this she swung to the northward under a starboard wheel until she faced the tide; she then took onto the rear the fourth barge and still under a starboard wheel swung to the southward and again faced the east, which was the course on which she was bound. She then proceeded along her course, dropping off the barges upon hawsers of substantially 175 fathoms in length. She rounded Throggs Neck and had proceeded so that the second barge was about opposite the buoy off the neck when the collision occurred. At that time she had not quite full headway on all the barges, but her engines had been for some ten minutes at full speed, and the speed of the tow was probably about four miles through the water. When the tug Lackawanna had come about the length of the first hawser beyond the neck she blew one whistle, indicating that she would keep to starboard, and repeated that, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

got no answer. The Zouave continued, however, on her course, making the buoy and turning the neck as close as might be. On account of the high freeboard and light draft of the scows, these were blown off the course of the Zouave around the buoy, just how far the witnesses differ, but I prefer to accept the testimony of the captain, which is to the effect that when about opposite the buoy the scows strung off some four points or more from his course and into the channel. After rounding the buoy he went as close in-shore as possible, and shortly before the accident, seeing that it was inevitable, he brought the starboard barge of his first tier almost into collision with a barge which was at the end of a dock on the west side of the neck. This did not avail him, however, and the port barge of the second tier swung into the hawser between the first and second barges of the Lackawanna's tow, broke it, and swung against the port bow of that barge, causing the damage in question. At the time when the Lackawanna, still with a bunched tow, turned to the southward to string out her tow, she saw, coming westward from down the channel, the tug Staples with some three or four barges likewise upon a long hawser. She turned and faced westward, but, being delayed by the dropping off of her barges, the Staples and her tow passed her so that, at the time the Lackawanna rounded the buoy, the tug Staples was considerably in advance of her and she was lapping the first or second of the Staples' barges. The Staples took a course some 600 or 700 feet south of the buoy, and there was ample water to the south of her in which she could have navigated had she chosen. The Lackawanna kept as close on the port hand of the Staples as safety permitted, probably not more than 100 feet away. This brought her about 500 feet from the buoy at the time she rounded the buoy. There is some controversy as to whether the barges which followed the Lackawanna succeeded in keeping off the buoy as far as the tug herself. As to that I conclude that the barges did keep at least in the wake of the tug; possibly they succeeded in making a course somewhat to the southward of the tug herself.

These being the facts, the scows charge against the tug as faults: First, the length of the tow itself. Second, that she did not keep far enough off shore. If I thought that the length of the tow in any sense contributed to the accident, I might hold the tug in fault. Further, unless I was assured affirmatively that the length of the tow had nothing to do with the collision, perhaps I should hold the tug. However, although the courts have too often condemned tows of this length, still no case has been cited which throws upon such a tow the fault arising from such length of hawser. That question, however, I need not decide, because, as I have stated, I believe that the barges at least kept in wake of the tug, and, if that be true, the length of the tow had nothing whatever to do with the collision. Indeed, if the hawsers had been shortened each by one-half, the whole length of the tow would have been divided in half on either side of the neck and the light barges would have swung into the coal barges of the Lackawanna as they did.

There remains, therefore, only the question of whether the captain of the Lackawanna should have permitted himself to take a course which brought him so near to the buoy and which would expose such a tow as that of the Zouave, navigating in a wind of that strength, to be blown against him. At the time when the captain chose to go on the port hand of the Staples' tow, and not to wait as he might for her to pass, the Staples' tow had not chosen her course in the channel itself. It is true that the captain of the Lackawanna might have inferred that the Staples' tow would probably crowd him on the shore of the neck, but I do not think he was called upon to anticipate that this would be the fact. As matter of fact, the Staples did not crowd him upon the neck so near as to cause danger. Whether he was obliged to anticipate a tow of that character might be there or not, I do not decide. I think he was not obliged to anticipate that the Staples would not give him more room to windward than he did. If so, he was not at fault in not permitting that tow to pass him. The channel is some 3,000 feet in width and there was ample room for the navigation of all the tows which in fact occupied it at the time in question.

These being the only two faults which I think can be alleged against the Lackawanna with any show of success, and neither of these being in fact borne out by the testimony, I direct that the libel be dismissed.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a libel brought to recover damages sustained by two of libelant's barges in tow of the tug Zouave in consequence of a collision with two barges in tow of respondent's tug Lackawanna. The opinion of the District Judge fully sets forth all the facts, which need not be here repeated.

James J. Macklin, of New York City (De Lagnel Berier, of New York City, of counsel), for appellant.

J. L. Seager, of New York City (Austin J. McMahon, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The district judge did not, as was suggested on the argument, hold that this was a case of inevitable accident; the Zouave was not brought into the case and it was not necessary to discuss the question whether her navigation was faulty.

As will be seen from the narrative of the transactions, the critical point in the courses of the respective boats was the buoy off Throggs Neck. That point was reached and passed by the Lackawanna while the Zouave was some distance to the eastward of it. The Lackawanna cleared it by 500 feet and could not have safely given a wider clearance because she had been overtaken and passed 100 feet to starboard by another tug, the Staples, with a long tow, which had not yet passed the Lackawanna. The two charges of negligence against the respondent were fully considered by Judge Hand, who held them both to be unproved.

That is the only navigation which need be considered, and since we concur in his reasoning and conclusions, the decree is affirmed, with costs.

THE LEWIS LUCKENBACH.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 188.

INDEMNITY (§ 8*)—LIABILITY INCURRED BY CHARTERER THROUGH DEFECTS IN VESSEL'S FITTINGS—RECOVERY FROM OWNER.

Libelant chartered a steamship from respondent, which was to deliver and maintain it in a thoroughly efficient state in hull and machinery and pay and provision the officers and crew, while libelant was to load and discharge. A stevedore employed by libelant in loading was injured without fault on his part by the giving way of a crossback crossing a hatch by reason of the rusted and defective condition of the socket which supported one end, which defective condition had existed for a considerable time and could have been discovered by a reasonable inspection which libelant did not make. The stevedore brought an action against both libelant and respondent which they settled separately out

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of court, each receiving a receipt in full. *Held*, on the facts stated, that, while libellant was liable to the stevedore because of setting him to work in a dangerous place without proper inspection, the primary liability was that of respondent for failing to maintain the vessel in an efficient state as required by the charter; that the settlement did not debar libellant from the right to recover over against respondent on proof of such facts; and that the injured stevedore would have been entitled to recover at least the amount received in the settlements.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 10-15; Dec. Dig. § 8.*]

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Suit by the American-Hawaiian Steamship Company against the Steamship Lewis Luckenbach, Edgar F. Luckenbach, claimant. Decree for respondent, and libellant appeals. Reversed.

For opinion below, see 203 Fed. 76.

Burlingham, Montgomery & Beecher, of New York City, for appellant.

Peter S. Carter, of New York City (Everett Masten, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The suit is brought by the charterer of the steamship. The charter did not constitute a demise of the vessel; her officers and crew remained in charge and were paid by the owners, who agreed to maintain the ship "in a thoroughly efficient state in hull and machinery."

One Borst, a stevedore employed by the charterer, while seated on one of the strongbacks crossing the hatch for the purpose of assisting in the removal of the fore-and-aft pieces, was injured by reason of the strongback upon which he was sitting falling into the hold. He brought an action against the owners and the charterer, alleging that the owners had allowed the sockets which supported the strongback to become badly rusted and in such condition that they could not properly support the strongback. He further alleged that the charterers had failed to make proper inspection to see whether the place at which they set him to work was a safe one. This action was settled by the two defendants independently but "at the same time"; the owners paid Borst \$1,000, the charterers paid him \$5,000, and he gave a separate release to each of them.

The present libellant, the charterer, alleges that the accident to Borst was due to the failure of owners to maintain the ship in a thoroughly efficient state and asks to be reimbursed for the money it had to pay him for the damages he sustained.

From an examination of the record we are satisfied that the following facts are clearly established by the testimony; the District Judge apparently reached a like conclusion as to the facts: The strongback gave way because its supports, however good originally, had for a considerable time been defective and insufficient to support the weight

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which they might be expected to bear. Such defect would have been apparent on inspection, but the charterer made no such inspection. Borst himself was not in any way negligent. His injuries were of a very serious character; his leg had to be amputated above the knee; and the amount \$6,000 is a reasonable compensation for such injuries.

Had Borst tried his action he could undoubtedly have recovered against the charterer for putting him to work in an unsafe place, whose condition it might have discovered by the exercise of reasonable care. Under the charter party the primary duty to keep the supports of the strongback in repair rested upon the owners. They failed in their duty, and because of such failure Borst was injured. That he or some one else doing his work might be injured by the defect in the supports was a consequence reasonably to be anticipated by the owners. The parties are not in *pari delicto* and the libelant is entitled to recover from defendant the damages which it may have had to pay Borst in consequence of the unseaworthy condition of the supports. These propositions are abundantly supported by authority. *Mowbray v. Merryweather* (1895) 1 Q. B. D. 857, affirmed (1895) 2 Q. B. D. 640; *Scott v. Foley*, 5 Commercial Cases, 53; *Boston Woven Hose Company v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478; *Brooklyn v. Brooklyn City Railway Company*, 47 N. Y. 475, 7 Am. Rep. 469.

The trial judge dismissed the libel because the charterer had settled the case with Borst out of court, without giving notice to respondent that it proposed to settle, assuming that thereby the owner was deprived of the opportunity of litigating Borst's right to recover. We are unable to concur in this view of the situation. By settling the former action without notice or a trial, the charterer is in no position to contend that it has any adjudication or finding binding upon the owner as to any of the facts averred as a ground for recovery. The owner, however, had his day in court to litigate in this case every question as to Borst's right to recover at all and the measure of such recovery. The libelant assumes the burden of proving that Borst was not himself negligent; that he could have recovered against libelant if his cause had been tried; and that he would have recovered at least \$6,000 as his damages. We think, however, that the libelant has sustained that burden of proof and has established these propositions.

The decree is reversed, with costs of this appeal, and cause remanded, with instruction to decree in favor of libelant for \$5,000, with interest and costs.

THE THOMAS W. ROGERS.

(Circuit Court of Appeals, Second Circuit. June 12, 1913.)

No. 242.

MARITIME LIENS (§ 28*)—REPAIRS—REPRESENTATION OF OWNERSHIP BY CHARTERER.

A charterer in possession of a vessel under a charter which is in fact a conditional bill of sale, the title to pass on full payment and which represents itself as owner, has power to create a lien thereon for repairs.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 46, 47; Dec. Dig. § 28.*]

Appeal from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Suit in admiralty by the John W. Sullivan Company against the steam tug Thomas W. Rogers; John C. Rogers, claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 197 Fed. 772.

On appeal from a decree of the District Court for the Eastern District of New York in favor of the libelant for \$913.31 for repairs furnished the steam tug Thomas W. Rogers, owned by the claimant John C. Rogers. At the time in question the tug was chartered to the Waterfront Company, a New Jersey corporation.

James J. Macklin, of New York City (De Lagnel Berier, of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Mark Ash and William Ash, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The tug Rogers, while under charter by the owner John C. Rogers, to the Waterfront Improvement Company, a New Jersey corporation, had \$913.31 worth of repairs put upon her by the libelant, the Sullivan Company, for which sum the tug was libeled. The District Court held that the libelant was entitled to recover. The charterer made default and the tug was taken back into the possession of the owner. There was sufficient proof to show that the repairs were ordered by the improvement company and that the work was done on the credit of the vessel. The repairs were made in New York by a New York corporation. The New Jersey corporation represented itself to be the owner and it certainly was in possession of the vessel at the time the repairs were ordered. The repairs went to enhance the value of the vessel. They were placed thereon upon the order of Martin, the president of the New Jersey corporation, after stating that he had bought the boat. The district judge is correct in saying that the charter party was in fact a conditional bill of sale, the title to pass on the payment of the last installment.

The charterer had power to create a lien for repairs. The George Farwell, 103 Fed. 882, 43 C. C. A. 373.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There can be little doubt that the Waterfront Company was in a position to bind the Rogers for repairs. All of the bills for repairs were made out to the "Tug T. W. Rogers and Owners Waterfront Improvement Co." No complaint was made of the form of the bills, on the contrary, the improvement company retained them and, in February, 1911, entered into an agreement with the libellant in which it is recited that the John W. Sullivan Co. has a lien against the tug Thomas W. Rogers amounting in the aggregate to \$778.45, which it agrees to pay in weekly installments of \$100. The agreement concludes as follows:

"Nothing herein contained shall be construed as a waiver by the John W. Sullivan Co. and its heirs aforesaid for said claims for repairs against said vessels, but the same shall remain unimpaired against said vessels until the full amounts of said claims are paid."

We have no doubt that the repairs were made upon the credit of the tug with the full knowledge and assent of both parties and that a valid lien was created.

It is said that the act of Congress of June 23, 1910 (36 Stat. 604, c. 373 [U. S. Comp. St. Supp. 1911, p. 1191]), relating to repairs on vessels and providing for a lien upon a vessel, whether foreign or domestic, for repairs ordered by the managing owner, ship's husband, master or any person to whom the management of the vessel at the port of supply is intrusted, is unconstitutional. If we assume this to be true, it does not aid the appellant in the present controversy. The act enlarges the scope of the lien law but the libellant had a lien prior to the date of its passage and would have had a lien after that date if the act had never been passed. Upon what theory the law can be held unconstitutional we are at a loss to conjecture, but we forbear to decide the point, for the reason that the act creating this court provides that an appeal or writ of error in any case in which the constitutionality of any law of the United States is drawn in question must be taken direct to the Supreme Court.

The decree is affirmed.

TWEEDIE TRADING CO. v. CLAN LINE STEAMERS, Limited.

(Circuit Court of Appeals, Second Circuit. June 12, 1913.)

No. 240.

SHIPPING (§ 43*)—CHARTER—SUIT BY CHARTERER FOR BREACH.

A steamship *held* not liable to a charterer because of delay caused by the refusal of the master to load a full cargo before crossing a dangerous bar, at a port where there were no tugs, and where stranding would have seriously endangered both vessel and cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 165-168; Dec. Dig. § 43.*]

Appeal from the District Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in admiralty by the Tweedie Trading Company against the Clan Line Steamers, Limited. Decree for respondent, and libellant appeals. Affirmed.

Ralph James M. Bullowa, of New York City, for appellant.

Convers & Kirlin, of New York City (John M. Woolsey, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The steamship Clan MacIntyre was chartered to the Tweedie Trading Company by her owner, the Clan Line Steamers, Limited, upon the government form of time charter for one round trip. The steamer was—

"to load and/or discharge at safe port and/or ports in the United States (Atlantic-Gulf) for one round trip to the West Indies, and/or Gulf of Mexico, and/or Caribbean Sea, and/or Venezuela, and/or Guiana, and/or Central or South America east coast, but not south of Demerara."

The first controversy between the parties relates to the price of coal, 170 tons, on board the steamer when she was delivered to the libellant at Philadelphia. It was the duty of the libellant to pay for this coal at the current market price at Philadelphia. The libellant was charged \$3 per ton and the trial judge held that this was a fair price for coal "delivered in the stream, laden on board and trimmed in the bunkers."

The charter provided for the delivery at the designated port, which was Philadelphia, and the agents for the libellant and respondent signed a certificate in which they agree that the vessel's time "commenced 1 o'clock p. m., Thursday, November 8, 1906, at the port of Philadelphia, with 170 tons of coal in bunkers." The respondent was not required to deliver the vessel at the coal chutes or at any particular dock and the price of coal was to be fixed not in relation to any particular dock, but according to its market value at Philadelphia. There was a difference of opinion upon this point among the witnesses, some placing the price as high as \$3.25, others as low as \$2.55, depending upon the place of delivery. It appears that at Philadelphia a coal carrier at the chutes is given a lower price for bunker coal than a vessel carrying general merchandise.

The District Judge, who saw most of the witnesses, was better able than an appellate court to solve this question of fact and we find no error in his conclusion that \$3 per ton was a fair price for the coal in the bunkers.

The libellant's claim for delay at Laguna, from December 2d to December 8th, cannot be sustained. In fact, we think the conduct of her master in this regard was not only prudent but to be commended. The MacIntyre was probably the largest vessel that had ever crossed the bar at this port, and the master was justified in taking every precaution to prevent her from grounding, where, owing to the fact that there were no tugs to assist her and where violent storms were to be expected, serious results were certain to follow if she got aground. Although the witnesses do not agree as to the exact depth of water on the bar, they all agree that it was perilously near the draft of the MacIntyre even at high water and that her flat bottom construction made

it much more dangerous for her to attempt to cross than for an ordinary round bottom ship. We agree with Judge Hough in the following statement:

"It is also obviously more dangerous and expensive for a vessel to go aground laden with cargo than it is when light. The steamship's master had been instructed by libelant's letter of November 12, 1905, to come out of Laguna on 'an exact even keel,' and when his ship was loaded to the depth of 12 feet on an even keel he refused to take on any more cargo. In my judgment he was not only excusable but praiseworthy for doing this. No charter party required him to hazard his vessel, and according to libelant's own showing he was expected to go on an even keel with a loaded ship over a mile of bar, dragging for an unknown portion of the way through six inches of mud or sand, with a flat-bottomed vessel whose propeller was quite half out of water. It seems to me that the statement of this proposition is its own refutation."

The decree is affirmed with costs.

THE KENNEBEC.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 269.

TRUSTS (§ 44*)—AGREEMENT—EVIDENCE.

Evidence considered, and *held* not to establish the claim of the mortgagor of a vessel that its purchase by the mortgagee, when it was sold under superior liens, was on an agreement to hold it in trust for the benefit of both parties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, in favor of libelant for an amount due for repairs made to claimant's vessel, the Kennebec. There is no question as to these repairs; the only question raised upon this appeal being whether the claimant is entitled by way of counterclaim to damages for alleged "conversion" of the steamer Felix Carbray.

H. L. Cheyney, of New York City, for appellant.

Haight, Sanford & Smith, of New York City (Clarence Bishop Smith, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Claimant was heavily indebted to the dry dock company for repairs on the Kennebec, the Carbray, and a third steamer owned by him. In order to secure it he gave a mortgage upon the Carbray for \$15,000. He subsequently sold the Carbray to the Atlantic Equipment Company, subject to the mortgage, which, however, had been reduced to \$10,000. The Atlantic Company, dissatisfied with its bargain, subsequently took the Carbray to the yard of the libelant and left it there; it being agreed by the parties that the Dry Dock

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company should accept the surrender for the benefit of Chesbrough and itself. This left the situation as it was at first, title in Chesbrough and a valid mortgage for \$10,000 owned by libelant.

The vessel had become incumbered by liens for certain supplies while in possession of the Atlantic Company, liens were filed, decrees obtained, and the vessel was exposed for sale by the marshal. There is no contention that these lien claims were not bona fide ones; they were properly prosecuted and the sale was duly had. Since such a sale would give a clear title and the lienors would probably not bid much more than the amount of their claims, Chesbrough could only protect his equity by bidding in his own interest. Similarly the dry dock company could protect its mortgage only by having some one present to bid in its behalf. A representative of the respondent (Chesbrough) and a representative of the libelant were both present at the sale; the former did not bid; the latter bought the boat for \$4,250. Thereafter it treated the boat as its own, refusing to admit that Chesbrough had any further interest in it.

It is the contention of respondent that at interviews had before the sale it was agreed between representatives of the parties to this suit that the representative of libelant should bid the vessel in for the "joint interests" of both. In other words, that although respondent then owed it considerable money, had been a difficult debtor to get money from, and had even failed to keep the mortgaged vessel insured so that libelant had to take legal proceedings to prevent her from proceeding to sea uninsured, nevertheless libelant for no suggested consideration agreed to buy the vessel in, as trustee for the mortgagor putting up on his behalf a few thousand dollars additional and trusting that he would pay up some time.

There is considerable evidence, some of it conflicting as to what took place at various interviews before the trial. No useful purpose would be served by discussing that branch of the case; it is sufficient to say that it does not satisfy us, as it did not satisfy the District Judge, that any agreement of the sort alleged by respondent was entered into or that there was any unfair dealing on the part of the libelant which would support the contention that upon the purchase he became a trustee ex maleficio.

The decree is affirmed, with interest and costs.

NEW ENGLAND S. S. CO. v. NEW YORK DOCK CO. et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 252.

ADMIRALTY (§ 118*)—REVIEW—SUFFICIENCY OF EVIDENCE.

A decree dismissing a libel for collision cannot be reversed where the testimony on which the right to recover depended was directly contradicted by other witnesses, all of whom testified before the court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758-775, 794; Dec. Dig. § 118.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a libel brought to recover damages sustained by the libellant's barge while lying at Pier 12, Brooklyn. It was contended that while lying there she was in collision with a car float of the dock company in tow of its chartered tug Timmins. That, while the tug was bringing the car float into the bridge of the company's slip, she first ran into the rack and then, rebounding therefrom, struck the barge.

J. T. Kilbreth, of New York City, for appellant.

Haight, Sandford & Smith, of New York City (Henry M. Hewitt, of New York City, of counsel), for appellee New York Dock Co.

Burlingham, Montgomery & Beecher, of New York City (C. I. Clark, of New York City, of counsel), for appellee Timmins.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. We do not see how the decree appealed from can be reversed. There are four witnesses who testified as to the alleged collision. They are flatly opposed to each other (two to two), with no theory which can harmonize their conflicting stories. The District Judge who saw them all states squarely that he believed two of them and, inferentially, that he did not believe the other two. We can find nothing in the record to convince us that he was mistaken in his judgment of the value of their testimony.

The decree is affirmed, with costs.

EQUITABLE TRUST CO. OF NEW YORK v. POLLITZ.

(Circuit Court of Appeals, Second Circuit. June 18, 1913.)

No. 266.

COURTS (§ 508*)—CONFLICTING JURISDICTION—FEDERAL AND STATE COURTS—INJUNCTION BY FEDERAL COURT.

Where a federal court has possession of the res, it may enjoin proceedings in a state court which affect such possession, but other questions which do not involve or threaten its possession may properly be litigated in the state court which first acquired jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Equitable Trust Company of New York, as trustee, etc., against James Pollitz. Complainant appeals from an order denying a motion for preliminary injunction. Affirmed.

Appeal from an order of the District Court, Southern District of New York, denying a motion for a preliminary injunction to restrain

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the defendant from taking certain proceedings in an action pending in the Supreme Court of the state of New York.

Murray, Prentice & Howland and Pierce & Greer, all of New York City (George Welwood Murray, Lawrence Greer, and Rush Taggart, all of New York City, of counsel), for appellant.

J. Aspinwall Hodge, of New York City, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Assuming that the federal courts have possession of the res, it follows that they should enjoin proceedings in a state court affecting such possession. But questions not involving such possession may properly be litigated in the court which first acquires jurisdiction. There is nothing in the present record to show any disposition on the part of the state court to go outside its proper province. Indeed, it has already refused to interfere with the litigation in the federal courts. When it changes its attitude, it will be time enough to go into the interesting questions of law presented upon the briefs and to see whether, upon the merits, an injunction should be granted. Now it is sufficient to say that the complainant's rights are not shown to be in danger.

The order appealed from is affirmed, with costs.

WESTINGHOUSE MACH. CO. et al. v. GENERAL ELECTRIC CO. et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 257.

PATENTS (§ 79*)—RIGHT TO PATENT—USE OF INVENTION IN FOREIGN COUNTRY.

Under Rev. St. § 4923 (U. S. Comp. St. 1901, p. 3396), which expressly provides that a patent shall not be held to be void on account of the invention or discovery, or any part thereof having been known or used, in a foreign country before the patentee's invention or discovery thereof, if it had not been patented or described in a printed publication, for the purpose of defeating a patent application a previous reduction to practice of the invention in a foreign country is a nullity unless it was patented or described in a printed publication.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 101; Dec. Dig. § 79.*]

This cause comes here upon appeal from a decree of the District Court, Northern District of New York dismissing a bill in equity. The bill was brought under section 4915, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 3392), which provides that whenever a patent on application is refused either by the Commissioner of Patents or by the Court of Appeals of District of Columbia, upon appeal from the Commissioner, the applicant may have remedy by bill in equity, and that in such suit the court may adjudge that such applicant is entitled to receive a patent for his invention.

The opinion of Judge Ray in the District Court will be found in 199 Fed. 907; that of the Court of Appeals of the District of Columbia in *De Kando v. Armstrong*, 169 O. G. 1185.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Gifford & Bull, of New York City (J. Edgar Bull, of New York City, of counsel), for appellants.

Charles Neave, of New York City (Albert G. Davis and A. A. Buck, both of Schenectady, of counsel), for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. This case grows out of an interference in the Patent Office entitled *De Kando v. Armstrong*, which was decided adversely to De Kando and his assignee, the Westinghouse Machine Company. The interference was between an application of De Kando filed July 3, 1906, and a patent to defendant Armstrong No. 811,758, dated February 6, 1906, on an application filed June 28, 1905.

There is controversy as to some of the important facts, but in view of the disposition we make of this cause we shall state them as they are found by the Court of Appeals, District of Columbia, and by the District Judge, with some additional statements of them which complainant claims are established by the proof. In thus restating them it must be understood that we have not examined into the conflicting evidence or reached our own conclusions as to whether the testimony supports the findings of fact; our view of the law making it unnecessary for us to do so.

Quoting from the opinion below the facts there found are:

"(1) That De Kando actually made his invention in a foreign country and reduced it to actual practice and put it in actual use, prior to the spring of 1904 on the Valtellina Railway in Italy.

"(2) It was therefore an invention which could be and was seen, understood, and known to be practical. There was not only the patentable conception but the idea of means and means.

"(3) That on March, 1904, Waterman went from the United States to Europe and met De Kando at Budapest, where the details of the invention were explained to him, and then, proceeding to Italy, Waterman saw the invention in actual use. In addition De Kando then furnished Waterman with an elaborate written description of the invention.

"(4) It appears from the evidence that Waterman was learned and skilled and fully capable of fully understanding and that he did understand the invention.

"(5) Waterman therefore 'knew' that the invention had been conceived and actually made and reduced to actual and successful practice.

"(6) That Waterman not only brought the information he had gained in Europe with him to the United States, when he arrived May 5, 1904, but also the said written description of such invention and notes which he had made relating to such invention while in Europe.

"(7) That Waterman made a written report as to this invention to Stillwell June 7, 1904, and during the year following he described same in the United States to a number of electrical engineers of standing, all capable of understanding same, and June 19, 1905, Waterman explained the invention to the American Institute of Electrical Engineers in the United States.

"(8) Prior to 1901 or 1902 Armstrong had conceived the same invention and in * * * June, 1905, he filed his application for a patent. There is no claim or pretense that Armstrong exercised reasonable diligence, or any diligence, or that he made any effort whatever to reduce his invention to practice prior to filing his application for a patent."

Defendants, it may be noted, especially controvert the findings 3, as to what Waterman saw in Italy, and 8, as to the date of Armstrong's conception and the measure of his diligence. Waterman was an emi-

nent electrician who went abroad to inform himself as to De Kando's invention on behalf of parties here who contemplated buying it. The testimony warrants a further finding of fact which complainant suggests, viz., that:

"(9) The knowledge of De Kando's invention and its use abroad was communicated by De Kando to Waterman for the specific purpose of introducing such knowledge into the United States and of having the invention put into use in the United States."

Whatever other questions there are in the case, and many have been argued, it is manifest that the fundamental and crucial one is whether upon the facts shown Armstrong was entitled to the grant of his patent; it not being disputed that his invention and De Kando's are substantially the same, nor that the invention of each was made independently of any knowledge of the other's. If Armstrong's patent was properly issued, that ends the cause. The question thus presented involves the construction of two sections of the United States Revised Statutes, which have been frequently before the courts:

"Sec. 4886. Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

"Sec. 4923. Whenever it appears that a patentee, at the time of making his application for the patent, believed himself to be the original and first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been known or used in a foreign country, before his invention or discovery thereof, if it had not been patented or described in a printed publication." U. S. Comp. St. 1901, pp. 3382, 3396.

The proposition of law for which complainants contend is that De Kando's date of invention in this country is May, 1904, when Waterman, arriving here with knowledge of the completed invention, disclosed that knowledge to others here skilled in the art capable of understanding the same. That by reason of his knowledge and disclosures to others in this country prior to June 28, 1905, the invention was "known" in the legal sense in this country before Armstrong's application was filed. This proposition has been discussed at great length in the opinions of the two judicial tribunals which have had to do with this case; we are inclined to affirm on the opinion of the Court of Appeals of the District of Columbia, which, in substance, holds that, for the purpose of defeating a patent application, reduction to practice in a foreign country is a nullity unless the invention is patented or described in a printed publication.

If section 4886 stood alone, we might be inclined to the conclusion that upon this record Armstrong was not entitled to a patent because although, prior to his date, his art or machine had not been used here, it was known by others in this country. A machine is certainly knowable when its various component parts are brought together and, co-

operating with each other, function successfully. De Kando's device was knowable in this sense when it was installed in Italy. It would become known to any competent person who examined it, saw what its component parts were and what function it performed. Waterman, upon the facts as found above, acquired that knowledge and he carried his knowledge with him wherever he went. When he was here he was a person in this country by whom the De Kando device was known. And when he imparted his knowledge to others here they also became persons in this country by whom the De Kando device was known. Considering this section only, it might seem to make little difference where the knowable machine be located, provided the persons who know it are themselves in this country.

But the Patent Law is contained in many sections, and they must be construed together to get at the precise code which they set forth. Section 4886 states generally the conditions which must exist in order to entitle an inventor to the grant of a patent. Section 4923 deals specifically with the effect of knowledge and use in a foreign country, and it makes no distinction whether such use is made or such knowledge is acquired by persons who, after using the thing or acquiring the knowledge, remain abroad or come here. This section (4923) provides that the patent taken out by an applicant for the same thing here shall not be void on account of such knowledge or use unless the invention had been patented or described in a printed publication. As we construe this section, reduction to practice in a foreign country can never operate to destroy a patent applied for here, however widely known such reduction to practice may be, either among foreigners or among persons living here, unless the invention be patented or described in a printed publication. To that extent section 4923 qualifies the language of section 4886, which without such qualification might well lead to a different result.

The decree is affirmed, with costs.

NEW YORK CENT. & H. R. R. CO. v. HENNEY.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 256.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—OZONIZER.

The refusal of requested instructions, in an action for infringement of the Henney patent No. 974,789 for an ozonizer, *held* not error, and a judgment for plaintiff, based on a verdict finding validity and infringement, affirmed.

2. ATTORNEY AND CLIENT (§ 22*)—COUNSEL TESTIFYING AS EXPERT.

For counsel for a party in an infringement suit to testify as an expert and afterward argue the case to the court or jury is a practice which is unseemly and not to be approved.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 30; Dec. Dig. § 22.*]

This cause comes here upon a writ of error to review a judgment of the District Court, Southern District of New York, entered upon a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

verdict in favor of defendant in error, who was plaintiff below. The action is one at law for the infringement of United States Letters Patent No. 974,789 for an ozonizer, issued to plaintiff November 8, 1910. Upon a motion for a new trial the District Judge wrote an exhaustive opinion ([D. C.] 200 Fed. 960), which may be referred to as sufficiently setting forth the details of the patented structure.

J. D. Morgan, of New York City, for plaintiff in error.

F. W. Wright, of New York City (Fred Francis Weiss, of New York City, of counsel), for defendant in error.

Before LACOME, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. [1] The plaintiff in error has argued this cause as if it were an appeal in equity, discussing all the aspects of the patent and all the questions which are concerned with the prior art, invention, equivalency, and infringement. This is a mistaken conception of the situation. The cause was tried with a jury whose decision on all issues of fact is not reviewable here. There is no exception to any refusal to direct a verdict in favor of the defendant; no exception to the admission or exclusion of any testimony. All that has been brought here is found in two assignments of error in charging the jury. There are really three assignments, but the second is practically a duplication of the first and need not be separately discussed. The only claim in controversy is the third, which reads as follows:

"The herein described apparatus for the production of ozone, comprising two similarly shaped open-end glass cylinders of different diameters, each cylinder provided with openings in its wall near one end, each cylinder provided with a layer of foil, one of said cylinders being of a less size than the other and occupying an inverted position with relation to the other, the smaller within the larger, means for closing one end of the device, means for admitting air to the other end of the device and an electrode within the inner vessel."

We may first consider the third assignment of error, which is to the court's refusal to charge a request of defendant, as follows:

"If you find plaintiff's patent embodies but one in a series of improvements, all having the same general object and purpose, the claims of his patent must be restricted to the precise form and arrangement of parts described in his specifications."

The trial judge at first declined to charge this. Thereafter, it being again called to his attention as a deliverance of the Supreme Court, he read it to the jury as an addendum to an instruction as to when a change of form would avoid infringement, telling them that it was a correct statement in many cases. He then left it to them to say whether the prior patents in the case at bar had the same general object and purpose that Henney had, and whether they were directed to the same specific thing.

Just before the jury retired defendant noted "exceptions to those charges which (the court) declined to give to the jury." This certainly did not refer to the request quoted above, because the court did finally give it to the jury. To the instruction that they were to look into the

prior patents to see if they did have the same general object and purpose as Henney had, no exception was reserved. It was a matter for the jury to look into. We find no merit, therefore, in the third assignment of error.

The first assignment of error is to a refusal to charge. After the judge had concluded his charge, various requests were made by the defendant; one being that:

"If the jury find that the defendant's device in operation takes air in at one end and discharges it at the other, then defendant does not embody means for closing one end of the device."

This was refused, the court stating that the jury had the evidence, the description of what the device does and how it does it, and exception to the refusal was reserved. Thereafter the court remarked that he thought he could make a device which would infringe both plaintiff's and defendant's. This language is criticised; it seems harmless to us; certainly it was not excepted to and no error can be predicated on it.

As to the refusal of the request. This matter was elaborately discussed in the opinion filed upon denial of the motion for a new trial; it will be necessary for us to add but little to that discussion. The claim contains no statement that air enters at one end and is discharged at the other. It says merely that there is means for closing one end of the device and means for admitting air to the other end. The specification says that one "end is plugged to prevent egress of air," and elsewhere:

"An annular plug 27 closes the space between the two vessels at their top. The blower 5 directs air through the neck of the outer (sic. should read 'inner') vessel, the air passing upwardly and through the holes 21 in the wall of such vessel, then down between the walls of the two vessels and out the holes 18 at the base of the outer vessel. I am thus enabled to keep all surfaces cool by the air blast, thus securing ozone in the improved manner known to the art without danger of puncturing the walls."

There is nothing in the specifications to show that it is a matter of any importance at which end of the device the air enters and at which end it leaves. The function sought to be secured is that the ozonized air shall be discharged, not mixed with nonozonized air, and that the air in motion shall not pass in a direct course through the device but shall be so diverted that its course will be a tortuous one, thereby tending to keep surfaces cool. The course of the air which passes through defendant's device when mounted as described in the testimony is a tortuous one partly through the space between the two vessels partly through the inner vessel. Additional air which enters the inner vessel through the top does not pass through it, being stopped by a diaphragm, but is in constant motion being heated, rising and giving place to other cooler air.

There was much controversy in the case as to the "closing of one end" of the device. In the patent this closing of the inner vessel and of the space between the vessels is effected in the same plane; in defendant's device the diaphragm which closes the inner vessel is located above the holes in such vessel, while the block, which it is contended closes the space between the two vessels, is located some distance be-

low the diaphragm. But this question, whether or not defendant's device was in fact closed at one end, was left to the jury, whose function it was to decide it under careful instructions, to which no exception was taken or error assigned. They were told that "if (they) do not find in defendant's device means for closing one end of the device they must find for the defendant." Their verdict shows that they found defendant's device was closed at one end. This must be taken as conclusive on us; and, the end being closed, a tortuous course functioning as complainant's does, perhaps not so perfectly, is found in defendant's device. This being so, defendant was not entitled to an instruction that admission of air at one end and its discharge at the other would avoid infringement.

[2] The counsel for plaintiff who tried this cause below, who addressed the jury, and who has argued the writ of error before us, himself testified as an expert witness as to the advantages possessed by the device of the patent over the devices of the prior art. Similar instances of such a practice have recently come within our observation. The practice is one which should be discontinued. It is unseemly for a member of the bar voluntarily to place himself in a position where his duty to his client requires him to address court or jury on the question what decree of credibility should be given to his own sworn testimony.

The judgment is affirmed, with costs.

ARCHER et al. v. IMPERIAL MACH. CO.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 251.

1. PATENTS (§ 328*)—INVENTION—MACHINE FOR PEELING POTATOES.

The Archer patent No. 999,478 for a machine for peeling potatoes, consisting of a metal cylinder having a revolving metal disk near the bottom by which the potatoes are moved, and its inner surface coated with a granulated abrading material, such as emery, is void for lack of invention; the only material change over the machines of the prior art being the substitution of well-known abrading material for roughened or striated surfaces, which produced better results but not sufficiently better to constitute invention.

2. PATENTS (§ 21*)—INVENTION—SUBSTITUTION OF MATERIALS.

A change of material may evidence invention, but in order to do so it must produce a result so much better as to be novel and unexpected.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. § 21.*]

Coxe, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Samuel B. Archer and others against the Imperial Machine Company. Decree for defendant, and complainants appeal. Affirmed.

For opinion below, see 202 Fed. 962.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 207 F.—6

Duell, Warfield & Duell, of New York City, for appellants.

Samuel B. Archer, of Saratoga Springs, N. Y., in pro. per.

H. S. MacKaye, of New York City (C. H. Duell, F. P. Warfield, and H. S. Duell, all of New York City, and R. W. France, of Sidney, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. [1] The patent shows first a metal cylinder, preferably of iron or steel, which is open at the top and in which the potatoes are placed. The cylinder has openings at the bottom to allow water and peelings to pass out. At the bottom of the cylinder is a metal disk upon which the potatoes rest and which revolves at an angle to the vertical walls of the cylinder. The cylinder is lined with patentee's "improved granulated abrading material." The "articles to be peeled are constantly agitated (through the rotation of the disk) in such a manner as to bring all the parts of every article in contact with the abrading surfaces," so that the peel is removed by a scouring action.

Similar cylinders and revolving disks having abrading surfaces of punctured metal, and of striated or grooved metal, were old in the art, and the patentee refers to them, stating that his invention "relates essentially to the abrading material used in lining or coating such parts of the machine as come in contact with the article to be peeled." He states that he believes himself to be "first to use granulated flint, emery, corundum, carborundum, and other like substances as an *abrading surface for this class of machines.*"

The record shows that it was old in the art to secure an abrading surface by the attachment of emery and the like to a metal backing or base, and the district judge held that the employment of a granulated surface made of emery or any similar substance for the cylinder and disk of these machines instead of the roughened metal already in use was a "mere obvious equivalent for other methods of roughening the surface."

The patentee asserts that the articles to be peeled are agitated against the abrading surfaces by centrifugal force when the disk is rotated. We find it difficult to understand how such rotation, when many potatoes are in the cylinder, can produce the successive displacement necessary to bring each potato in turn to an abrading surface. In other machines, as the record shows, this movement is accomplished by a so-called "agitator," or hump, located either on disk or cylinder. Such agitator is not shown in the patent in suit. We do not ground our decision on the absence of that element, which seems to have been well-known in the art, but find lack of patentable invention, as Judge Holt did, in the mere substitution of material for the abrading surfaces; the substituted material not itself being new.

The "mere carrying forward of * * * more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means *with better results*, is not such invention as will sustain a patent." *Smith v. Nichols*, 21 Wall. 119, 22 L. Ed. 566.

[2] Sometimes, it is true, a change of material will produce a novel, an unexpected result, which might evidence invention. It is further argued that the result here, although not strictly novel, is so notably and vastly superior to the old one that it may be properly classed as an unexpected result. It was upon this theory that the Board of Examiners in Chief granted the patent. Their opinion is quoted in Judge Holt's. We think they were misled as to the facts because they had before them the results of tests made by the Navy Department, without being informed, as we are by this record, of the circumstances under which the tests were made. The reported test gave for one of plaintiff's machines a loss of weight in paring of 7.88 per cent., the potatoes of all shapes and sizes being cleaned evenly, while one of defendant's machines with striated metal on the surface of disk and cylinder showed 25.52 per cent. loss of weight in paring, while some of the potatoes were not peeled at all, others were peeled twice, and all of them much worn down and bruised. Such an enormously better result seemed to the board to be one which might fairly be classed as "unexpected." It appears by the proof in this record, however, that in this particular machine submitted for test by defendant the "agitator" had been made very much larger than usual in the hope that it would produce better results. Such change of size on the contrary operated disastrously. The test of another of defendant's machines with normal agitator brought the loss in paring down to 10.85 per cent.

The change effected by substituting well-known granulated surfaces for those of roughened or striated metal does, as this record shows, produce "better results"; but we cannot see that they are so much better that they can be fairly classified as novel or unexpected, and, unless they are such, the substitution of emery or the like for roughened metal does not under the authorities evidence invention.

Decree affirmed, with costs.

COXE, Circuit Judge (dissenting). The novel feature of Archer's combination is the "granulated abradant" which was first applied by him to the potato peeling art. It was this substitution, simple in itself, which made a commercially successful potato peeler. The prior machines, using striated metal and similar devices, were practical failures. As pointed out in the opinion of the court, the fact that the patented structure does not show "agitators" is unimportant for the reason that they were well-known devices for bringing all the potatoes against the abrading surface. To Archer belongs the credit of using "granulated flint, emery, corundum, carborundum, and other like substances as an abrading surface" in potato peeling machines. This was not an obvious thing to do; to the ordinary lay mind it seems chimerical, but it solved the problem.

Even if the question of invention were involved in doubt, I think it should be solved in favor of the patent.

RAJAH AUTO SUPPLY CO. v. GROSSMAN.

(Circuit Court of Appeals, Second Circuit. June 12, 1913.)

No. 261.

PATENTS (§ 326*)—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION—PUNISHMENT FOR CONTEMPT.

Punishment of a defendant for contempt for violation of an injunction against infringement of a patent is not warranted where the question of the violation of the order is doubtful both on the law and facts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Rajah Auto Supply Company against Emil Grossman. From an order denying a motion to punish defendant for contempt, complainant appeals. Affirmed.

E. R. Newell, of New York City, for appellant.

C. C. Gill, of New York City, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. This is an appeal from an order, which the complainant contends is a final decree, denying a motion to punish the defendant for contempt for an alleged violation of an injunction which enjoins the defendant from infringing the claims of complainant's patent No. 825,856 for improvements in spark plugs. The defendant is not charged with making or selling the patented device but it is charged with contributory infringement in making and selling porcelain shells which can be used not only in connection with the complainant's spark plug but also in connection with many other spark plugs dealt in extensively by those engaged in furnishing automobile supplies. The defendant asserts that the District Court was correct in denying the motion for the following reasons: First. The decree appealed from is not final. Second. There is no pretense of direct infringement and the selling of the conical porcelains with the intent that they be used in the complainant's spark plugs is not proven. Third. The evidence of infringing sales, upon which complainant relies, was obtained by letters induced by it which were answered by a typewriter in the defendant's office without the knowledge or consent of defendant. Fourth. The matter of which the complainant complains is too trivial to justify the drastic remedy which the complainant invokes.

We do not deem it necessary to enter upon an extended discussion of these questions or to decide them. It is enough that the complainant's case is too doubtful, both on the facts and the law, to warrant the court in punishing the defendant for contempt.

The order appealed from is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KRYPTOK CO. V. STEAD LENS CO.

(District Court, W. D. Missouri, W. D. July 17, 1913.)

No. 3,489.

1. PATENTS (§ 81*)—PRIOR USE—EVIDENCE TO ESTABLISH.

Oral testimony of a prior use is always open to suspicion and cannot prevail over the legal presumption of validity which accompanies a patent unless it is sufficient to establish such a use beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*]

2. PATENTS (§ 168*)—VALIDITY—CANCELLATION OF CLAIMS IN PATENT OFFICE.

The cancellation of a claim in an application for a patent which is substantially identical with a remaining claim does not affect the validity of the latter.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.*]

3. PATENTS (§ 167*)—ANTICIPATION—PRIOR PATENTS.

That a drawing of a patent, through an error of the draftsman, shows a construction evidently not contemplated nor claimed by the inventor does not give the patent effect as an anticipation of a subsequent patent in that particular.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

4. PATENTS (§ 62*)—ANTICIPATION—MEASURE OF PROOF.

Anticipation must be proved by evidence so cogent as to leave no reasonable doubt in the mind of the court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. § 62.*]

5. PATENTS (§ 66*)—ANTICIPATION—ACQUIESCENCE IN ACTION OF PATENT OFFICE.

That an applicant for a patent acquiesced in the suggestion of the Patent Office that a feature of his device was shown in a prior patent does not estop him from denying the pertinency of the prior patent as an anticipation in other particulars.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. § 66.*]

6. PATENTS (§ 26*)—ANTICIPATION—PATENT FOR COMBINATION.

A patent for a combination is not anticipated nor invalid for lack of invention because an expert may be able to build up the patented device by selecting parts taken from the prior art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

7. PATENTS (§ 35*)—INTENTION—EVIDENCE.

While great utility and extensive use will not alone sustain a patent, they constitute persuasive evidence of invention where the question is in doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*]

8. PATENTS (§ 157*)—CONSTRUCTION—RULES GOVERNING.

That interpretation which sustains a patent should be preferred to that which defeats the grant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229-232; Dec. Dig. § 157.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

9. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—EYEGLASSES.

The Borsch patent No. 637,444 for bifocal eyeglasses in which the lens is made of two pieces of glass of different indices of refraction, the smaller being mounted in a recess of the larger and exposed on one face thereof, and the Borsch, Jr., patent No. 876,933 for similar eyeglasses with the added improvement that the two parts of the lens are united by fusing, were neither of them anticipated and both disclose patentable invention. The devices also held capable of conjoint use and both patents infringed.

In Equity. Suit by the Kryptok Company against the Stead Lens Company. On final hearing. Decree for complainant.

William M. Stockbridge, of New York City, and John H. Atwood, of Kansas City, Mo., for complainant.

Theoph. D. Carns and Washington Adams, both of Kansas City, Mo., for defendant.

VAN VALKENBURGH, District Judge. Complainant, a New York corporation, is the owner of letters patent No. 637,444, issued November 21, 1899, to John L. Borsch, and of letters patent No. 876,933, issued January 21, 1908, to John L. Borsch, Jr.; both for new and useful improvements in bifocal lenses. It alleges that the inventions and improvements set forth in said letters patent, respectively, are capable of conjoint use in one and the same bifocal lens, and that complainant and its licensees make, use, and sell bifocal lenses embodying the conjoint use of said inventions and improvements. It charges infringement on the part of defendant, and prays injunction, accounting, and damages.

To the bill the defendant, a Missouri corporation located at Kansas City, Mo., interposes the following defenses: (1) That both patents in suit are void for want of patentable novelty. (2) That both patents in suit are void for want of patentable invention. (3) That defendant has not infringed either patent. (4) That the patents in suit are not capable of conjoint use, and the defendant has not infringed said patents conjointly. (5) That complainant is not a bona fide corporation and was not incorporated in good faith and for a lawful purpose; that its organizers are engaged in unlawful combination in restraint of trade; and that it does not come into court with clean hands. Incidentally to these defenses, it is claimed that the alleged inventions and discoveries of the patents in suit were all anticipated in the prior art by patent and publication; and a prior use fatal to the second patent in suit is likewise asserted. The first patent contains but a single claim. In the second patent claims 1, 2, 3, 7, and 8 are the only ones in issue, and of these claim 3 has been selected as typical of the group of claims in said patent.

At the outset it may be said that, if the patents are valid and susceptible of conjoint use, it cannot be doubted that defendant's device constitutes an infringement, because, for the purposes of this case, the two lenses are practically identical. The defense of unlawful combination in restraint of trade may likewise be disregarded. There is no

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

substantial showing of any tendency toward monopoly, except such as inheres in the very nature and theory of the patent law; nor was this defense, if it be one, given prominence or emphasis at the hearing.

The defense of prior use may be dismissed with brief mention. It rests mainly upon the testimony of one Hoffman, an optician, of Minneapolis, Minn., who states that within a somewhat indefinite period, approximating the date of the Borsch, Jr., experiments, he made a very few pair of fused bifocal lenses, which he sold to customers. His testimony is uncertain and indefinite as to time and essential detail. In itself, as well as in its attempted corroboration, it is unsatisfactory and unconvincing. The record persuades me that Borsch, Jr., was the first to conceive this specific improvement, and that he prosecuted his experiments to final completeness and patent with reasonable diligence.

[1] Such oral testimony of a prior use is always open to suspicion, and it cannot prevail over the legal presumption of validity which accompanied the patent, unless it is sufficient to establish such a use beyond a reasonable doubt. This feature of the case falls within the principles announced in many decisions. *National Hollow Brake-Beam Co. et al. v. Interchangeable Brake-Beam Co.* (C. C. A.) 106 Fed. 693, 694, 703, 45 C. C. A. 544; *Parker v. Stebler et al.* (C. C. A.) 177 Fed. 210, 101 C. C. A. 380; *Albright v. Langfeld* (C. C.) 131 Fed. 473; *Continental Rubber Works v. Single Tube Automobile & Bicycle Tire Co.* (C. C. A.) 178 Fed. 452, 101 C. C. A. 436; *Laas v. Scott* (C. C.) 161 Fed. 122-126. I shall address myself, therefore, to a consideration of the defenses of anticipation and lack of patentability.

The first patent in suit, No. 637,444, recited that:

"Heretofore bifocal lenses have been frequently formed by matching and uniting edge to edge two pieces of lens glass, each constituting but part of a complete lens, and respectively suitably ground, the one for distant and the other for near vision, and various forms have by different constructors been given to the respective elements or sections of the lens; the only fixed requirement as to such sections being that they should when united present as to their combined outer edges the usual oval outline of a lens."

"In whatever forms the respective independent sections or elements of a bifocal lens of this character have been made, however, they have been united by bringing the respective edges of said sections or elements into contact and cementing the abutting edges by any suitable balsam or uniting medium or maintaining them in their assembled position by an inclosing lens frame."

The aim of the proposed patent is thus stated:

"This construction has been objectionable, however, by reason of the fact that, however carefully the sections are assembled and cemented, a minute cement-filled space exists between the abutting edges, and the cement which is present of course on both surfaces of the lens in time becomes slightly worn away under the action of heat and the attrition to which it is subjected in the cleaning of the lens, with the result that the permanence of the union between the elements or sections is impaired; furthermore the line of connection between the two sections of a bifocal lens as heretofore constructed as described is always visible and not only detracts from the appearance of the lens but is an annoyance to the wearer."

"Broadly stated, it is the object of my invention to produce a bifocal lens of an attractive efficient, and durable character, in which the objections hereinbefore stated to the existing forms of such lenses shall be obviated."

As described in the patent, this is done by taking a lens of crown glass suitable for far vision purposes, producing in one face thereof a recess of such form as to be adapted to receive and accommodate a smaller near vision lens of flint glass, having an index of refraction different from that of the larger lens, and securing this smaller lens within the recess of the larger by means of balsam or other suitable material, the result being a compound bifocal lens uniform in curvature and integral in structure from edge to edge, the minor lens not being visible to others than the wearer except on very close inspection; a crevice or joint between the elements, with its accompanying disadvantages, being entirely absent.

The claim declared was as follows:

"A bifocal lens formed of two pieces of glass of dissimilar index and size placed and secured face to face, the smaller of said lenses being mounted in a recess in the larger of said lenses, and exposed upon one face of the latter, substantially as set forth."

The essential novelty and invention claimed for this patent is that it for the first time discloses the use of glass of different indices of refraction in such combination as to permit a completed integral bifocal structure of the same thickness and uniformity of surface as a lens composed of but one kind of glass and having a single focal point. In this way the unsightliness, instability, and other infirmities pointed out as existing in former structures were either entirely removed or reduced to a more desirable minimum. If this device presents novelty and invention, its utility and desirability can hardly be disputed; but defendant contends that it presents neither the one nor the other.

In support of the defense of anticipation, something like 27 patents are cited as references. A number of these exhibit the development of the bifocal eyeglass or spectacle from its crude origin up to the application of the first patent in suit; others have to do with globes, lamp chimneys, photographic camera lenses, reflectors, and other articles of remote analogy. Others deal with achromatic lenses intended for the elimination of chromatic aberration caused by the dispersion of rays of light into their component colors. We are, however, relieved of any extended consideration of the greater number of these cited references, because it was conceded at the hearing that the defendant relied for substantial anticipation of the first patent in suit upon the British patent issued to Henry Edward Newton in 1866 for improvements in optical instruments; that to Nathan Lazarus in 1881 for improvements in the manufacture of achromatic lenses; and letters patent No. 392,053 issued to August Morck, Jr., in 1888 for improvements in spectacles or eyeglasses. With respect to the first two, it is sufficient to state that they concededly recognize the use of two kinds of glass, crown and flint, in the manufacture of lenses; as their titles indicate, they concern eyeglasses either incidentally or remotely and bifocals not at all. It is upon the Morck patent that defendant mainly relies for its defense of anticipation of the first patent in suit; and, if the claimed invention of the latter is not disclosed by the Morck patent, then it is not anticipated by any of the other references cited.

The Morck patent No. 392,053 dealt specifically with eyeglasses employed for combined near and far range purposes. Its invention—"consists in securing upon the lower surface of the selected far-vision lens a spherically-ground lens of about one-fourth to one-third of the surface of the larger lens, and which is selected with a view to near-vision purposes, and when combined with the larger lens in the manner stated produces a glass adapted for use for both close and distant range. When the two lenses are united, as stated, the larger or far-vision lens extends to the lower rim of the inclosing frame on both sides of the near-vision lens. * * * It will be seen that the near-vision lens 8, while having its edge bounded by a curved line of which every part is equally distant from a center, which is preferably just outside of the rim at the lower side of the frame, is made to taper to a feather edge along the segmental line, and therefore the lens 8 has its thickest part along the lower edge. This construction obliterates the surface line 9 to the sight, while giving a perfectly defined area of near vision. It avoids the objection of a horizontal straight projecting ledge, which forms a shelf for the collection of dirt and dust when such near-vision lens is formed thickest at such straight line; and it makes the change from a far-vision to a near-vision lens gradual as the eye crosses the segmental line at its highest point on the surface of the far-seeing lens."

When the first patent in suit was originally presented to the patent office, it was rejected by the examiner in the following language:

"The claims of the above-entitled application are rejected in view of patent to Morck, Jr., No. 392,053, October 30, 1888, optics, eyeglasses."

Thereupon the applicant made the following amendments: He erased the word "preferably," as used in the specification describing the minor lens, making it described as "formed of flint glass" and of "glass of different index" instead of as "preferably formed of flint glass" and "preferably glass of different index." He also erased claims 2 and 3; there being three claims in the patent as originally filed. Original claim 1 was left without a numeral as the sole claim of the patent. Defendant contends that the use of the word "preferably" in the original specification indicated that Borsch did not then have in mind the use of glass of different index inbedded in a recess as the central idea of his invention. I think, however, that the specification as a whole clearly indicates that he had such structure in mind, and that the word "preferably" was erased in order that there might be no doubt respecting it, also to exclude any claimed interference with the Morck patent which might be predicated upon the use of projecting glass of the same index.

[2] No point is or can be made of the fact that claim 2 was canceled, because it obviously did not cover the full invention claimed; but defendant insists that the cancellation of claim 3 in response to this objection limited and narrowed original claim 1, now the contested claim of the first patent in suit. Claim 3 reads as follows:

"A bifocal lens consisting of a major lens embodying a recess in one face and a minor lens conformed to said recess and mounted and secured in place therein; said lenses being of glass of different index, substantially as set forth."

A comparison of this claim with the remaining claim of the first patent in suit, heretofore quoted, will disclose that in all particulars substantial to this controversy they are the same. This being true, the

cancellation of the superfluous third claim, substantially identical with the first, would not affect the latter. *Bullock Electric Mfg. Co. v. Crocker-Wheeler Co.* (C. C.) 141 Fed. 101-110. It has not been, nor to my mind can it be, pointed out in what possible way the cancellation of claim 3 was materially responsive to the examiner's objection nor in what way the erasure of that claim could narrow or restrict the claim which was left unchanged. With no other changes than those specified, Borsch again submitted his application with the nature of his claims thus specifically emphasized:

"The fact that Morck constructs both elements of glass of the same index, while applicant constructs his two elements of glass of dissimilar index, constitutes a distinction between Morck's structure and applicant's structure, which is fundamental and vital."

"By the use of glass of different index, applicant is enabled to provide a construction of bifocal lens in which both faces are, so to speak, smooth; that is to say, a construction in which the small minor lens does not project beyond the plane of the surface of the major lens."

"This construction, which is a very desirable and valuable one in the optician's art, would not be possible were both pieces of glass of the same index, as in such construction the result would be the same as though the whole lens were formed of one integral piece of glass throughout and there would not be two distinct focal points."

To this the examiner replied as follows:

"The present claim has been considered in connection with applicant's argument. It appears that the terms of the claim cover all of the views shown, but it is believed that the only construction illustrated which would be operative for use in a bifocal spectacle lens is that shown in figures 1 and 2, inasmuch as the difference in refractive power between glass of the lowest refractive power known and glass, or quartz, of the highest power known would not be sufficient to make a practical bifocal lens wherein the difference in magnifying power were dependent wholly upon the different indices of refraction of the glass. Therefore it is believed that applicant would be compelled to depend upon the difference of curvature of the major and minor lenses for all practical effect. Furthermore it is not considered invention merely to make a bifocal lens wherein the major lens is of a different kind of glass from the minor lens, in view of the fact that the difference in power secured thereby would be inappreciable."

"It is believed that applicant might be entitled to a patent if he were the first to insert in the concavity of a major lens a small or minor lens, and thereby obtain greater security in the junction of the two lenses so that they would be less likely to be displaced by the friction of spectacle wipers or of accidental contact with surrounding objects. But the Morck patent, cited, shows a small lens inserted in a concavity in a larger lens, the two combined forming a bifocal lens, and having, so far as the firmness of union is concerned, exactly the same advantages as are obtained by the construction of applicant. To make the two parts of different kinds of glass, having different refractive powers, is believed not to be invention in view of the common knowledge among opticians of the uses of the different kinds of glass, and particularly inasmuch as it is believed that in a spectacle the difference in refractive power would be practically insufficient to produce any appreciable difference of focus. It is thought, therefore, that the claim should be rejected."

There is no hint in this that the examiner thought that Morck was using glass of dissimilar index. There is every indication that he thought just the opposite in so far as the essentials of the invention are concerned, because he doubts the effectiveness of the combination when the minor lens is reduced so much in size. He does think that

the Morck patent discloses a small lens inserted in a concavity in a larger lens. He thinks that important only from the standpoint of firmness of union and decides that Borsch could not claim any invention by reason of that alone. He believes, in view of the common knowledge among opticians of the uses of different kinds of glass, that it is not invention to make the two parts of different kinds of glass having different refractive power; he bases this upon the assumption that in a spectacle the difference in refractive power would be practically insufficient to produce any appreciable difference of focus. Thereupon, without change of specification or claim, in letter or in syllable, the applicant combatted the views of the examiner and made practical demonstration of the efficiency of his invention; and the necessary inference from the record is that the examiner receded from his position, for the patent was allowed without further objection.

Now, from all this, counsel for defendant argue that complainant, because of this reference and the views expressed by the examiner, is estopped from claiming anything disclosed by the Morck patent and contend that the Morck patent teaches not only the use of a recess, but also the employment of different kinds of glass having different refractive power. It is doubtful if this contention should be sustained. The patentee firmly stood upon his specification and claim without change. The examiner receded and allowed the patent. It may well be doubted whether any of his objections can operate to narrow the import of either specification or claim. Certainly they could have no such effect upon the use of glass of different index. If such a limitation can be raised, it must be from the disclosures of the patent itself, independently of anything said or done in the Patent Office. Defendant's experts and its counsel then attempt by elaborate and ingenious argumentation to make the Morck patent disclose not only a recess in which the minor lens is imbedded, but the necessary employment of different kinds of glass of different index of refraction. In my opinion, this effort fails utterly. Neither in specification nor claim is any reference made to such a use, and the inventor must necessarily have considered it of prime importance, if he had it in mind at all. The entire argument is based upon the alleged formation of figure 4 of the Morck patent; and, to make their theory consistent, experts and counsel are compelled to reconstruct the entire drawing. They first discover a depression where it has at least doubtful existence; and then, to make this depression pertinent, they are compelled to pare away an obvious excrescence upon the face of the same figure of the drawing. Thus they argue that the minor lens, according to this reconstructed drawing, is wholly imbedded in a recess in the major lens; and as it would then be inoperative, unless made of glass of different index from that of the major lens, why, of necessity, they say, glass of different index must have been used. This is not only in defiance of the drawing itself but of the spirit of the specification as well. The latter specifically seeks to get rid of the sharp horizontal line of separation existing in prior structures. It therefore describes the minor lens as segmental instead of horizontal in outline and makes it taper to a so-called feather edge at its upper point of contact; its

thicker portion being at the lower edge of the glass. If the entire minor lens was to be imbedded, why emphasize the thinner portion at point of contact, and confess the objectionable thickness at the lower portion? Obviously, if the glass were imbedded, there would be no appreciable edge upon the surface of the major lens, nor would the lens, as a whole, vary in thickness because of the junction of the two lenses. Throughout the entire specification and its accompanying claims, the language aptly describes a minor lens placed upon and not within the major lens. No mention whatever is made of any recess or of glass of different index, nor is any function or utility ascribed to either. Clearly neither the drawings nor the body of the Morck patent disclose either recess or the use of different kinds of glass. The drawings are crude, and the examiner appears to have thought that he detected a recess. He suggested this as an objection, and, because of an implied acquiescence in this suggestion, it may be that Borsch and his assigns are estopped to deny that there was a recess of some kind disclosed in this drawing. This consideration, and this only, could have the effect of narrowing the Borsch claim in any degree. Glasses purporting to be made in accordance with the teachings of the Morck patent have been submitted. In them the edge of the minor lens projects distinctly beyond the surface of the major lens, presenting in smaller degree the very defect which Morck was seeking to minimize. If he had in contemplation a recess at all, it is impossible to explain why he did not bury the minor lens completely, and thus fully attain the desired end. The conclusion is irresistible that his invention did not embrace the conception of a recess with a minor lens of different index imbedded therein; but, on the contrary, that his vision stopped with grinding the minor lens at its point of contact to what he terms a feather edge, which should stand out from the surface of the major lens in the smallest practicable degree.

[3] The disclosure of a recess in figure 4 of the drawings of the Morck patent, if it be a disclosure at all, was purely accidental. It was certainly not appreciated by the inventor. It is well settled that it is no anticipation that by a mistaken showing in the figure of a preceding patent, by the error of the draftsman, the structure of the patent appears contrary to the conception of the inventors and the reading of the patent. *Edison Electric L. Co. v. Novelty Incandescent Lamp Co.* (C. C. A.) 167 Fed. 977, 93 C. C. A. 387; *Gray Telephone Pay Station Co. v. Baird Mfg. Co.* (C. C. A.) 174 Fed. 417, 98 C. C. A. 353; *Beckwith v. Malleable Iron Range Co.* (C. C.) 174 Fed. 1001; *Brill v. Third Ave. R. Co.* (C. C.) 103 Fed. 289.

"When it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. They cannot be reconstructed in the light of the invention in suit and then used as a part of the prior art." *Naylor et al. v. Alsop Process Co.* (C. C. A.) 168 Fed. 911-920, 94 C. C. A. 315, 324.

"A prior publication, referred to as an anticipation, must be given effect in accordance with what it actually communicates to the public, and expert testimony cannot be received for the purpose of showing that statements therein made were erroneous, and to give it the effect it would have if reconstructed so as to disclose matters which it might or should have stated,

but which it in fact did not." *Badische Anilin & Soda Fabrik v. Kalle & Co., et al.* (C. C. A.) 104 Fed. 802, 41 C. C. A. 201; *American Thermos Bottle Co. v. Vacuum Specialty Co.* (C. C. A.) 178 Fed. 552, 101 C. C. A. 232.

The disclosures of the Morck patent, as interpreted by defendant, are at least vague and uncertain, and skilled experts differ radically as to their import.

[4] Anticipation must be proved by evidence so cogent as to leave no reasonable doubt in the mind of the court. The defendant has failed to carry the burden imposed upon it. *Underwood Typewriter Co. v. Elliott-Fisher Co.* (C. C.) 165 Fed. 927; *Underfeed Stoker Co. v. American Ship Windlass Co.* (C. C.) 165 Fed. 65; *Beckwith v. Malleable Iron Range Co.* (C. C.) 174 Fed. 1001; *Victor Talking Machine Co. v. Duplex Phonograph Co.* (C. C.) 177 Fed. 248; *Hillard v. Fisher Book Typewriter Co.* (C. C. A.) 159 Fed. 439-441, 86 C. C. A. 469; *Mueller Mfg. Co. v. Glauber* (C. C. A.) 184 Fed. 609-620, 106 C. C. A. 613; *Cimiotti Unhairing Co. et al. v. Comstock Unhairing Co.* (C. C.) 115 Fed. 524.

[5] But conceding that because of the suggestion made by the examiner, and the asserted acquiescence of the applicant, complainant is precluded from claiming the recess as a substantive part of the Borsch invention, nevertheless it is not estopped from claiming everything Borsch, Sr., actually did invent nor from denying the pertinency of the Morck patent as an anticipation, with this exception: That it cannot maintain that the claim of the first patent in that particular covers the construction of the Morck patent. *National Hollow B. B. Co. v. Interchangeable B. B. Co.* (C. C. A.) 106 Fed. 693-714, 45 C. C. A. 544; *Owens Co. v. Twin City Separator Co.* (C. C. A.) 168 Fed. 259, 93 C. C. A. 561; *Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co.* (C. C. A.) 168 Fed. 271-279, 93 C. C. A. 573; *Vrooman et al. v. Penhollow et al.* (C. C. A.) 179 Fed. 296, 102 C. C. A. 484; *Bossert Elec. Const. Co. v. Pratt Chuck Co.* (C. C. A.) 179 Fed. 385, 103 C. C. A. 45; *U. S. Peg-Wood, Shank & Leather Board Co. v. Sturtevant Co.* (C. C. A.) 125 Fed. 382, 60 C. C. A. 248; *Albright v. Langfield* (C. C.) 131 Fed. 473; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139-144, 14 Sup. Ct. 295, 38 L. Ed. 103. The presumption of validity of the first patent in suit is strengthened by reason of its original rejection on the Morck patent. *American Stove Co. v. Cleveland Foundry Co.* (C. C. A.) 158 Fed. 978-983, 86 C. C. A. 182; *United States Fastener Co. v. Bradley* (C. C.) 143 Fed. 523-529; *Hale & Kilburn Mfg. Co. v. Oneonta, C. & R. S. Ry. Co.* (C. C.) 129 Fed. 598.

Let us now consider the defense of anticipation as applied to the second patent in suit. In this discussion we may disregard all the cited references but three. The defendant avowedly relies upon the Newton and Lazarus patents heretofore referred to and upon that issued to Leon Kokocinski July 28, 1896, for improvements in spectacle lenses. This patent had to do with welding together two sheets of glass, one colored or shaded and the other transparent, so that the upper portion of the lens might protect the eye from light. All that can be claimed for these three patents, cited against the Borsch, Jr., invention, is that they refer to the union of different pieces of glass by

the action of heat. As we have seen, the Newton patent deals with optical instruments in general, and describes a process not at all adapted to producing the delicate result required in an eyeglass lens, and particularly in a bifocal lens. The Kokocinski patent had, of course, an entirely different object in view; and the Lazarus patent was for the manufacture of achromatic lenses, which, as we have seen, deal with dispersion and not with refraction. However, it may be freely conceded that the welding or annealing of glass, under certain conditions, was known at the time of this alleged invention and had been known for many years. Despite that fact, no one had ever conceived of the happy expedient of applying this process to the perfection of a bifocal lens, nor, in fact, to any lens, except crudely to counteract dispersion; and the reason for this appears clearly from the testimony. Moreover, the bifocal lens is biaxial. The two lenses of which it is composed are not concentric. Both must be preserved in their true curvature, and the highest degree of precision is necessary. The comparative minuteness of the parts, and the great delicacy of adjustment required, had created an accepted belief that such a process was impracticable even after its first suggestion by Borsch, Jr. He himself required years of experimentation before success was approximated. The old lens, even as improved by Borsch, Sr., still contained imperfections. Up to this point Canada balsam, or some other kind of cement, had been necessary to hold the lenses together. This was essentially less stable than a glass made integral by fusing. Time alone, together with the slight but continuous application of pressure incidental to cleaning, would cause the parts to separate. The cement itself contained imperfections and was subject to disintegration. The fusing process was a distinct advance from the standpoint of clearness of sight, stability, and appearance. By it the presence of the minor lens was rendered still more imperceptible. Therefore the combination of fusion with the prior structure of the Borsch, Sr., patent marked a distinct and important advance in the art. Here again I think the defense of anticipation must fail, and the support of this conclusion by the decided cases is so closely allied with the announcement of principles establishing invention that it is deemed unnecessary to duplicate citations.

[6] This is a product patent. The thing produced was clearly unknown before, and it is therefore immaterial that the separate features of the invention may be found in the prior art.

"It constitutes no anticipation and no defense to a claim of infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent or publication, and others in another, and still others in a third. It is indispensable that all of them, or their mechanical equivalents, be found in the same description or machine, where they do substantially the same work by substantially the same means." *Owens Co. v. Twin City Separator Co.* (C. C. A.) 168 Fed. 259, 93 C. C. A. 561; *National Hollow B. B. Co. v. Interchangeable B. B. Co.* (C. C. A.) 106 Fed. 693-706, 45 C. C. A. 544; *Eldred v. Kirkland* (C. C. A.) 130 Fed. 342, 64 C. C. A. 588; *Knickerbocker Co. v. Rogers et al.* (C. C.) 61 Fed. 297; *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54; *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275.

The presumption of invention is not overcome by the fact that an expert is able to build up the patented device by selecting parts taken from the prior art. *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *McMichael & Wildman Mfg. Co. v. Ruth* (C. C. A.) 128 Fed. 706-708, 63 C. C. A. 304; *Thomson-Houston Elec. Co. v. Ohio Brass Co.* (C. C.) 129 Fed. 378.

[7] That there was invention in the Borsch, Jr., patent is evidenced and emphasized by the number of patents set up by defendant as anticipations, all of which, where pertinent at all, lack some element which the successful patent they are alleged to anticipate possessed, also by the fact that the defendant has appropriated bodily the substantial structure of the Borsch patent. *Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co.* (C. C.) 168 Fed. 77; *Naylor v. Alsop Process Co.* (C. C. A.) 168 Fed. 911-917, 94 C. C. A. 315; *Edison Electric L. Co. v. Novelty Incandescent Lamp Co.* (C. C. A.) 167 Fed. 977-982, 93 C. C. A. 387. We must remember that appropriateness and obvious usefulness have an important bearing upon the question of invention; that simplicity does not detract from its merit; that, while great utility and extensive use will not alone sustain a patent, nevertheless, "where the question of novelty is fairly open for consideration under the law, the fact that a patented device or combination has displaced others which had previously been used to perform its function, and has gone into immediate and general use, is pregnant and persuasive evidence that it involves invention. *National Hollow B. B. Co. v. Interchangeable B. B. Co.* (C. C. A.) 106 Fed. 693-707, 45 C. C. A. 544. These principles have been forcibly announced in the following cases: *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54; *Loom Co. v. Higgins*, 105 U. S. 580-591, 26 L. Ed. 1177; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139-144, 14 Sup. Ct. 295, 38 L. Ed. 103; *Potts v. Creager*, 155 U. S. 597-606 et seq., 15 Sup. Ct. 194, 37 L. Ed. 275; *General Elec. Co. v. Wagner Elec. Mfg. Co.* (C. C. A.) 130 Fed. 772-778, 66 C. C. A. 82; *Perkins Elec. Switch Mfg. Co. v. Buchanan Co.* (C. C.) 129 Fed. 134-137; *McKay & Copeland Lasting Mach. Co. v. Dizer et al.* (C. C. A.) 61 Fed. 102-104, 9 C. C. A. 382; *Doig v. Morgan Mach. Co.* (C. C. A.) 122 Fed. 460-463, 59 C. C. A. 616; *Gould Coupler Co. v. Pratt* (C. C.) 70 Fed. 622-624; *Hardware Co. v. Tabor Sash Co.* (C. C.) 178 Fed. 831-841; *Engineering Construc. Co. v. McMullen* (C. C. A.) 160 Fed. 933-938, 88 C. C. A. 115; *Albright v. Langfeld* (C. C.) 131 Fed. 473-475.

[8] That interpretation which sustains and vitalizes the grant should be preferred to that which strikes down and paralyzes it. *National Hollow B. B. Co. v. Interchangeable B. B. Co.* (C. C. A.) 106 Fed. 694, 45 C. C. A. 544.

[9] The court cannot be oblivious nor insensible to the development that has taken place in the art of bifocal spectacles and eyeglasses as generally known. The production of a glass effective for far and near vision, compact, stable, enduring, and slightly, was the desideratum long aimed at and but gradually realized. The present high degree of success was first obtained by the complainant company through the

patents in suit—a distinct and highly useful advance, which has practically revolutionized the art. The acceptance and adoption of the product was immediate and widespread. While the old-fashioned cemented bifocal is still in wide use because of its comparative cheapness, nevertheless no one who feels able to afford it will accept other than the fused bifocal. I think the conception and successful application of such valuable and elusive improvements rise to the plane of invention as distinguished from mere mechanical skill. While the dividing line between the two is not always sharply defined, nevertheless unyielding strictness should not operate harshly to withhold the reward of merit from marked scientific achievement. The defendant company has made a complete appropriation of complainant's product, and defends itself solely upon the ground of the alleged weakness of complainant's title. This casts upon it the burden of establishing its case to the entire satisfaction of the court. That it has failed to do, and whatever doubt, if any, may exist, must be resolved in favor of the recognized presumption of validity.

It remains only to consider whether these patents are capable of conjoint use, and whether the complainant can maintain its suit upon the bill tendered. Defendant contends that the two patents are inconsistent in that the first calls for two separate pieces of glass, while this element is absent from the Borsch, Jr., patent, as well as from defendant's structure. Each patent is invoked only to the extent that it discloses a distinct step of improvement; that of the first patent narrowed, as contended by complainant, and as conceded for the purposes of this argument, is the employment of glass of different indices of refraction in the combination described. The Borsch, Jr., patent adds the element of fusion as an advance over cement. The complainant owns both features, and it can avail itself of both in the same structure without inconsistency. The first Borsch patent describes a bifocal lens formed of two pieces of glass secured face to face by cement; the second Borsch patent a bifocal lens consisting of a body of glass or similar substance of any refractive power, and a portion of glass or similar substance of different refractive power secured by fusion to the said body of glass or similar substance. Here again two kinds of glass enter into the composition of the lens, the two being made integral by fusion. The one patent supplements the other; the two may be and actually are used in conjunction, and so used are infringed by defendant's structure.

The injunction and accounting prayed will be granted.

ROLLMAN MFG. CO. v. UNIVERSAL HARDWARE WORKS.

(District Court, E. D. Pennsylvania. August 1, 1913.)

No. 633.

1. PATENTS (§ 165*)—CONSTRUCTION OF CLAIMS.

Where a limitation expressly stated in some of the claims of a patent is omitted from others, it cannot be read into them to avoid a charge of infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

2. PATENTS (§ 165*) — CONSTRUCTION OF CLAIMS — STATEMENT OF PREFERRED METHOD OF CONSTRUCTION.

It is proper for an applicant for a patent to point out in his specification the preferred method of operation of his machine, but, in the absence of any expression in his claims making such details elements therein, they are not limited thereby.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

3. PATENTS (§ 129*)—SUIT FOR INFRINGEMENT—ESTOPPEL.

Where a corporation alleged to infringe a patent was organized by the patentee and his family after he assigned the patent, and he has since been its president and active manager, it is bound by his estoppel and cannot deny the validity of the patent but may show the prior art to define and limit the claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½-186; Dec. Dig. § 129.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CHERRY STONER.

The Rollman patent No. 686,139 for a cherry stoner *held* not anticipated, valid and infringed.

5. PATENTS (§ 222*)—SUIT FOR INFRINGEMENT—RECOVERY OF PROFITS—FAILURE TO MARK ARTICLE.

The failure of the owner of a patent to mark the patented article as required by Rev. St. § 4900 (U. S. Comp. St. 1901, p. 3388), does not deprive him in a proper case of the right to an accounting for profits made by an infringer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 352; Dec. Dig. § 222.*]

In Equity. Suit by the Rollman Manufacturing Company against the Universal Hardware Works. On final hearing. Decree for complainant.

John A. Coyle and William H. Keller, both of Lancaster, Pa., and Archibald Cox, of New York City, for complainant.

John A. Hipple, of Lancaster, Pa., Henry P. Brown, of Philadelphia, Pa., and George L. Wheelock, of New York City, for defendant.

THOMPSON, District Judge. This is a suit brought to restrain the infringement of letters patent No. 686,139 for a cherry stoning machine. Michael A. Rollman, who was the inventor, filed his application January 21, 1901, and letters patent were issued November 5, 1901. By assignment dated October 26, 1900, Rollman had assigned to the Rollman Manufacturing Company, a limited liability partnership composed of himself, H. C. Schock, and Clarence Schock, as copartners,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

all of his patentable devices, and on January 26, 1901, he specifically assigned his rights under the application for the patent in suit and in the letters patent to be granted thereon to the Rollman Manufacturing Company. On May 31, 1906, Rollman assigned to Harry C. Schock and Clarence Schock his interest in the Rollman Manufacturing Company, including all of his right or ownership individually and as a member of the company in all patents, together with the right to use the name "Rollman" in connection with such devices and inventions as might be manufactured and sold by the partnership or the members thereof, and, in consideration of the assignment, the other partners paid him the sum of \$1,000 and agreed to indemnify him against any indebtedness of the company upon which he might be liable at the time of the transfer. The cherry seeder made by the complainant under the patent was known and sold under the name of "Rollman" and the business in the cherry seeders became a profitable one.

The defendant is a Pennsylvania corporation chartered March 27, 1912. The incorporators were Michael A. Rollman, the patentee under the patent in suit, subscriber to one share; his wife, Elizabeth E. Rollman, subscriber to one share; and his father-in-law, Henry S. Garber, subscriber to eight shares. Michael A. Rollman is the president of the corporation and the active manager of its business in which he is assisted by his wife. Henry S. Garber takes no part in the business of the company. The defendant, the Universal Hardware Works, manufactures and sells the cherry seeder claimed to be an infringement under the name of the "New Standard" and has stamped upon it the name "M. A. Rollman."

The claims in suit, as set out in the complainant's record, are conveniently stated as follows:

"Claim 8 claims: 'In a seeding machine (1) a seed-extracting knife; (2) a suitable frame in which to reciprocate said knife and (3) means carried by the knife to pick up the pulp; and (4) a stripper plate obliquely disposed in the path of the pulp whereby said plate will deflect the pulp laterally as and for the purpose set forth.'

"Claim 9 claims: 'In a cherry-seeding machine (1) a suitable frame; (2) a plunger carrying (3) a knife reciprocatingly mounted in said frame; (4) said knife being provided with means to pick up the cherry pulp (5) in combination with additional means (a) carried by the standard and (b) obliquely disposed in the path of the knife adapted to strip the pulp therefrom and deflect it laterally as and for the purpose set forth.'

"Claim 10 claims: 'The combination in a cherry-seeding machine of (1) a plunger; (2) a standard forming a support and guide for said plunger; and (3) a stripper plate supported by the standard at an angle oblique to the line of movement of the plunger as set forth.'

"Claim 13 claims: 'In a seeding machine (1) a standard having a pulp stripper disposed at an oblique angle to the plane of the standard (2) and a plunger reciprocatingly mounted in said standard (3) and means to hold the plunger against rotation as set forth.'"

The complainant's cherry seeder is constructed in accordance with the drawings accompanying the patent in suit. The defendant's machine is admitted to possess all of the elements covered by these claims. In construction, however, the machines differ in that the complainant's plunger is made to reciprocate by means of a spring, while that of the defendant reciprocates by means of a crank and cam.

The remaining difference between the two machines is that in the complainant's machine the frame in which the plunger and knife reciprocate is constructed at an incline to the vertical of about 30 degrees, while that of the defendant's machine is constructed horizontally. There appears to be no substantial dispute that, except for the inclined position and action of the complainant's seeder and the horizontal position and action of the defendant's seeder, the various parts of the respective machines are equivalents and the functions performed thereby are identical.

The complainant contends that the claims upon which the suit is based are to be construed as broadly as they read and, if so, include the horizontal position of the frame and horizontal action of the plunger and knife. The defendant contends that the claims in suit are to be construed in the light of the specifications pointing out the patentee's preferred construction and in view of the prior art of which it has introduced proof; as otherwise these claims are invalidated by the prior art and that reading the claims thus in view of the prior art, they must be limited to a construction and operation inclined to the vertical and do not include the horizontal construction and operation shown in the defendant's seeder. The complainant objects to evidence of the prior art to limit the claims upon the ground that the defendant, the Universal Hardware Works, is bound by the estoppel which would apply to Michael A. Rollman, the patentee and assignor of the patent. The defendant contends that, even if the corporation is estopped, that estoppel does not prevent the introduction and consideration of evidence of the prior art to limit the claims in suit. The defendant's position is that, in view of the prior art, the only novelty in the complainant's patent is the standard inclined to the vertical with a horizontal stripper plate at an angle oblique to the line of movement of the reciprocating plunger and knife. It is perfectly apparent that, in the language of the claims in suit, there is no limitation of the invention to any angle of the frame and line of movement of the plunger and knife. The opinion of the defendant's expert is that, if the claims are read as they stand, they are anticipated by the prior art; but, if there is read into them a limitation from the specification to an inclined frame or standard, "then, of course, the prior art does not show such a construction," but then the defendant's machine does not infringe because its frame or standard is horizontal.

[1] From an examination of the specification and other claims in the patent in suit, I think it is conclusively shown that such a construction cannot by the terms of the specification be put upon the claims in suit. For example, as pointed out by complainant's counsel, claim 3 is limited to "a machine comprising an inclined U-shaped standard, a plunger reciprocatingly mounted in said standard and disposed in the same plane of inclination therewith," while the claims in suit call for a frame or standard irrespective of its inclination. The inclined standard is referred to in the specification as being the patentee's preferred construction over a vertical standard; the object being by means of the inclination of the standard to have the pulp of the cherry carried, while impaled upon the barbed end of the knife,

to a point at or beyond a perpendicular drawn from the outward edge of the hopper where the pulp would not drop back into the hopper containing the unstoned cherries, but, by being carried as described and given a lateral motion by contact with the inclined stripper plate, the pulp would be thrown into a proper receptacle outside the machine. The drawing accompanying the application for patent shows this preferred construction. The specification says:

"The inclination, therefore, of the standard 8 is not a mere incidence of the disposition of the hopper section 5 but possesses a functional importance of great value, and I therefore wish to secure in this application said combination and construction of parts, *together with substitutes and equivalents*. * * * It will be understood that various modifications may be made in the construction without departing from the spirit or scope of my invention."

Under the ordinary rule of interpretation, the limitation which is expressed in claim 3 and in the specification cannot be read into claims 8, 9, 10, and 13.

"Where a patent contains specific claims for the one form of structure described in the specification and shown in the drawing and also broad and general claims, the latter are not to be so limited as to make them a mere repetition of the specific claims." *General Electric Co. v. E. H. Freeman Electric Co.* (C. C.) 190 Fed. 34.

"Where a limitation expressly in some of the claims of a patent is omitted from others, it cannot be read into them to avoid a charge of infringement." *Diamond Match Co. v. Ruby Match Co.* (C. C.) 127 Fed. 341; *Boyer v. Keller Tool Co.*, 127 Fed. 130, 62 C. C. A. 244; *Ryder v. Schlichter*, 126 Fed. 487, 61 C. C. A. 469; *Wilson v. McCormick Co.*, 92 Fed. 167, 34 C. C. A. 280; *Metallic Extraction Co. v. Brown*, 110 Fed. 665, 49 C. C. A. 147.

[2] As to the defendant's contention that the claims of the patent are no broader than the details of the patentee's preferred construction described in the specification, it is difficult to see upon what ground this proposition is based. In order to comply with section 4888 of the Revised Statutes (U. S. Comp. St. 1901, p. 3383), it was necessary that in his specification the applicant should explain the principle thereof and the best mode in which he contemplated applying that principle, and it was therefore prudent, if not necessary, for him to point out some practical preferred method for the operation of the machine, but, in the absence of any expression in his claim making the details thus pointed out an element therein, they would not under the ordinary rules be limited thereby. *Eastern Paper Bag Co. v. Continental Paper Bag Co.* (C. C.) 142 Fed. 479.

As was stated by Mr. Chief Justice Fuller in *Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 10 Sup. Ct. 570, 33 L. Ed. 963:

"Doubtless a claim is to be construed in connection with the explanation contained in the specification, and it may be so drawn as in effect to make the specification an essential part of it; but, since the inventor must particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery, the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and certainly not for the purpose of changing it and making it different from what it is. As remarked by Mr. Justice Bradley in *White v. Dunbar*, 119 U. S. 47 [7 Sup. Ct. 72, 30 L. Ed. 303]: 'The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well

as an evasion of the law, to construe it in a manner different from the plain import of its terms.'"

[3] The questions bearing upon the claim asserted by the complainant that the defendant is estopped to limit the claims by evidence of the prior art may be next considered. Rollman was the patentee and was employed by the complainant during his connection with the Rollman Manufacturing Company for about five years after the assignment of the patent to the company. Finally in 1906, for valuable consideration, he assigned to his partners in the Rollman Manufacturing Company all of his interest in the company. The defendant has introduced some evidence tending to show that Rollman was not fairly treated by the remaining partners and that he was forced out of the partnership. This evidence cannot be considered after he has for years remained silent and made no effort to set aside the contract nor offered to return what he received thereunder. The defendant cannot at this late day put itself in a better position by collateral attack upon the consideration for the assignment. The evidence establishes satisfactorily the fact that Rollman controls the defendant company. He was one of the incorporators; his wife was named as treasurer at the time of the incorporation; and his father-in-law was the remaining subscriber to the stock of the company. Rollman is its president and the active manager of its business. His counsel, Mr. Hipple, was called to testify that Rollman was still the owner of but one share of the stock but declined to testify as to the names of the remaining stockholders or as to other facts showing Rollman's connection with the company. The defendant did not call Rollman as a witness. Under these circumstances, there being no evidence to the contrary, it must be presumed that the facts shown to exist at the time of the incorporation of the company continue to exist. If the contrary be true, it was within the power of the defendant to prove it. If Rollman, the patentee, were only a stockholder or officer of the company with no part in its active management, the company would not, in the absence of other facts to show control, be bound by his estoppel. *Babcock & Wilcox Co. v. Toledo Boiler Works Co.*, 170 Fed. 81, 95 C. C. A. 363; *Johnson Furnace & Engineering Co. v. Western Furnace Co.*, 178 Fed. 819, 102 C. C. A. 267. It is apparent from the evidence here, however, that the company was organized by Rollman and the members of his family and that he is in the active control of its business. Under this state of facts, the company is bound by his estoppel. *Time Telegraph Co. v. Himmer* (C. C.) 19 Fed. 322; *Alvin Mfg. Co. v. Scharling* (C. C.) 100 Fed. 87; *Marvel Co. v. Pearl et al.* (C. C.) 114 Fed. 946; *Continental Wire Fence Co. v. Pendergast et al.* (C. C.) 126 Fed. 381; *Mellor v. Carroll et al.* (C. C.) 141 Fed. 992; *Automatic Switch Co. v. Monitor Mfg. Co. et al.* (C. C.) 180 Fed. 983; *Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co.*, 142 Fed. 157, 73 C. C. A. 375.

The question, then, is: To what extent is the defendant estopped? The complainant contends that under the authority of the opinion of Judge Baker for the Circuit Court of Appeals of the Seventh Circuit,

in *Siemens-Halske Electric Co. v. Duncan Electric Co.*, the estoppel applies to the extent of barring the patentee and the company controlled by him not only from denying the validity of the patent but also from limiting its claims by the prior art. The conclusion of the court in that case was that:

"Between contracting parties extraneous evidence is inadmissible if there is no ambiguity or uncertainty in the language of the description and claims, and that, if there is uncertainty, outside evidence is admissible only to make clear what the applicant meant to claim and the government to allow, and not for the purpose of showing, even in the slightest degree, that the applicant had no right to claim and that the government was improvident in allowing what was in fact claimed and allowed."

In the case of *Noonan v. Chester Park Athletic Club Co. et al.*, 99 Fed. 90, at page 91, 39 C. C. A. 426, at page 427, Judge Lurton, now Mr. Justice Lurton, sitting with Judges Taft and Day, said:

"It seems to be well settled that the assignor of a patent is estopped from saying his patent is void for want of novelty or utility or because anticipated by prior inventions. But this estoppel, for manifest reasons, does not prevent him from denying infringement. To determine such an issue, it is admissible to show the state of the art involved, that the court may see what the thing was which was assigned and thus determine the primary or secondary character of the patent assigned and the extent to which the doctrine of equivalents may be invoked against an infringer. The court will not assume against an assignor and in favor of his assignee anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, and will apply to the patent the same rule of construction, with this limitation, which would be applicable between the patentee and a stranger."

As is shown in the exhaustive opinion of Judge Rose in the case of *Automatic Switch Co. v. Monitor Mfg. Co.*, supra, in the Circuit Court for the District of Maryland, the Circuit Court of Appeals for the Sixth Circuit, after the decision in the *Siemens-Halske Case*, followed in the case of *Babcock & Wilcox Co. v. Toledo Boiler Works Co.*, 170 Fed. 85, 95 C. C. A. 363, its prior decision in the case of *Noonan v. Chester Park Athletic Club Co.*, and the position taken by the Circuit Court of Appeals in the Sixth Circuit was that of the Circuit Court of Appeals for the First Circuit in the case of *Martin & Hill Case-Carrier Co. v. Martin*, 67 Fed. 786, 14 C. C. A. 642. If the *Siemens-Halske Case* is to be construed as denying the right to introduce evidence of the prior art except to explain ambiguity or uncertainty in the claims, the weight of authority is undoubtedly in favor of the rule laid down by Mr. Justice Lurton in the case of *Noonan v. Chester Park Co.*

[4] In order to determine the bearing of the prior art upon the claims in suit, it should be borne in mind, as explained in effect by the experts for both parties, that the object involved in a cherry-seeding machine is to take a cherry from the supply of them and deposit the stone or seed in one place or receptacle and the pulp or stoned cherry in a different place or receptacle, and that a successful machine is one which will do this as quickly and certainly as possible and with as little loss of juice or injury to the cherry as possible.

The essential feature of the complainant's claims no doubt consists

in the combination with other elements undoubtedly old of the plunger carrying the knife reciprocally mounted in a standard with a stripper plate obliquely disposed in the path of the knife adapted to strip the pulp from the knife and deflect it laterally. Therefore, in order to determine whether the claims are limited by the prior art, it is necessary to ascertain whether the patents offered in evidence to show the prior art disclose a combination of a reciprocating knife and plunger mounted in a frame with a stripper plate obliquely disposed in the path of the knife, the standard being at an angle other than that designated as the patentee's preferred type, or whether equivalents thereto are disclosed.

The Van Kannel machine shows a plunger moving upon a sliding upright frame; the plunger being provided with needles to force the stone from the cherry, the pulp being removed by the device of an oscillating arm which carries the plunger and needles to one side and then upward through the tines of a claw by which the pulp is pushed off the needles and drops vertically into a discharge spout. It is obvious that the Van Kannel construction does not contain the essential feature of the Rollman patent of the obliquely disposed stripper plate giving a lateral motion to the pulp; whatever lateral motion occurs being prior to the release of the pulp from the needles. In fact, such lateral motion as the oblique stripper plate gives was apparently not contemplated, as a trough is provided below the stripper fork in order that the pulp may drop vertically therein.

Neither has the Gear cherry stoner the standard or frame with a reciprocating plunger and stripper plate oblique to the line of movement of the plunger, but the pulp is dropped perpendicularly into a trough.

The Webster structure is somewhat similar in construction to the Rollman in that the plunger reciprocates in a fixed standard, but the Webster patent lacks in its claims the obliquely disposed stripper plate. Evidence was introduced intended to show that the Webster cherry stoner had been used with the oblique stripper plate, and a photograph of the model deposited in the Patent Office was produced showing the stripper plate in the oblique position shown in complainant's seeder. The evidence as to the use of the stripper plate in the oblique position is not sufficiently convincing to establish such use in the absence of any claims in the Webster patent; neither is the evidence as to the model sufficient in my opinion to establish the fact that the stripper plate was intended to be used otherwise than at right angles to the plane of the frame and plunger. The file wrapper of the patent in suit shows that the Webster patent was considered by the examiner as possibly anticipating the patent in suit. The attention of the examiner was called by the patentee to the fact that in the Webster cherry stoner the stripper plate was not obliquely disposed as in complainant's patent, and the patent was issued. The construction of the model offered in evidence makes it apparent that as constructed the oblique position of the stripper plate was not in contemplation of the original maker of the model nor the patentee. The stripper plate is loosely attached to the standard so that it may be

turned obliquely, but its construction indicates that it was not constructed with that end in view. The holes in the stripper plate through which the knife passes are not elliptical, nor are the sides of the plate within the holes inclined so as to adapt it to the direction of the knife through the plate as it would be if such construction were within the contemplation of the inventor.

In the Buck patent there is no standard or frame within which a reciprocating knife moves and there is no stripper plate obliquely disposed in the path of the knife to release the pulp with a lateral motion from the knife. Neither does the Buck and Kirk patent disclose this essential feature of the patent in suit, but a sliding pan is provided to receive the pulp as it drops from the stripper.

In the Brown patent the pulp is removed by a discharging arm which strikes it from the plunger.

In none of the patents offered to show the prior art is there anticipation of the essential feature of the patent in suit unless it be that any device by which the cherry is pierced, the stone ejected, and the pulp upon the return movement is stripped from the member upon which it was impaled is an anticipation of the pulp-stripping feature of the patent in suit. If the patents relied upon by the defendant show want of novelty or anticipation of the Rollman cherry stoner, they invalidate claims 8, 9, 10, and 13 in their entire breadth.

A careful examination of the testimony of defendant's expert upon these patents has failed to indicate in what respect they anticipate the broad language of the claims in suit and escape anticipating those claims as defendant would limit them. In short, if these patents anticipate complainant's knife and plunger reciprocating in a frame with an obliquely disposed stripper plate, they anticipate in every angle in which the frame can be constructed.

The effect of the prior art, therefore, if defendant's contentions are correct, would be to invalidate the claims in toto. This is exactly what the rule as to estoppel laid down in *Noonan v. Chester Park Athletic Co.* precludes as to this defendant. Without regard to estoppel, however, I have been unable to discover in the evidence of prior art the combination of reciprocating plunger and obliquely disposed stripper plate covered by complainant's claims. The evidence of prior art shows that the same general end and purpose are sought to be accomplished by the devices in the several patents. In the patent in suit, the end or purpose, in addition to those covered by the prior patents offered in evidence, namely, the ejection of the pulp or cherry laterally, was sought to be accomplished. The fact that with this exception the end and purpose of the various devices shown in the prior art are identical with that of the patent in suit is not material. An invention must consist of new and useful means of obtaining an end or purpose.

"In other words, the subject of a patent is the device or mechanical means by which the desired result is to be secured. * * * Tested by these authorities, the validity of the patent in question must be ascertained, not from a consideration of the purposes sought to be accomplished, but of the means pointed out for the attainment thereof, and if such means, adapted to effect the desired results, do not involve invention, they can derive no aid or sup-

port from the end which was sought to be secured." *Knapp v. Morss*, 150 U. S. 227, 228, 14 Sup. Ct. 81, 84 (37 L. Ed. 1059).

The device of the oblique stripper plate, so far as appears, was not present in prior patent devices. Hence the prior art neither limits nor invalidates the claims in suit. Unless the claims of the patent in suit are limited, as contended by the defendant's expert, to a standard inclined to the vertical at less than a right angle, the defendant under the doctrine of equivalents has infringed. "The functional importance of great value," which the patentee described in his specification for the inclination of the standard, consists in the fact that the inclination of the standard carries the stripper plate to a point at or beyond a perpendicular drawn from the outward edge of the hopper. This function would obviously be obtained in a degree proportionate to the extent of the inclination of the standard from the perpendicular. It is obvious, therefore, that when the standard operates horizontally, as in defendant's machine, it is a mere modification or equivalent of the arrangement of the standard described in the specification of the patent. That the functions of the defendant's construction and that of the patented machine are identical in causing the pulp, in coming in contact with the obliquely disposed stripper plate, to be laterally thrown outside of the hopper, and that there is substantial identity of way of performing the function, is too apparent to require elaboration. It is clearly demonstrated in my opinion that the difference in the way of performing the function is a mere difference in mechanical construction, and that the defendant's construction is a colorable change in form of the construction of the complainant. As evidence of prior art cannot be invoked to invalidate the patent, it must be held as to this defendant that the patent in suit is valid and the defendant has infringed.

The defendant in its answer denies the averment in the bill of complaint of marking with notice of patent as required by section 4900, Compiled Statutes (U. S. Comp. Stat. p. 3388). By that section it is made the duty of every patentee or his assigns, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that it is patented by fixing upon the article the word "patented," together with the day and year the patent was granted, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit for infringement, by a party failing so to mark, no damages shall be recovered by the plaintiff, except upon proof that the defendant was duly notified of the infringement and continued, after such notice, to make, use, or vend the article so patented.

In the case of *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426, it was held, in an opinion by Mr. Justice Gray, that damages cannot be recovered without alleging and proving either that the patented articles made and sold or the packages containing them were marked "patented" or else that the plaintiff gave notice to the defendant of his patent and of their infringement.

In order to sustain the burden of proof put upon the complainant,

Clarence Schock, one of the partners of complainant company, was called, who produced a specimen of one of the patent cherry seeders having stamped into the metal upon the top of the knob of the plunger the proper patent notice. Mr. Schock testified that all of the complainant's cherry seeders had been marked with the patent notice, as shown in the exhibit, since the issuance of the patent. The defendant in sustaining the issue as to marking introduced in evidence two of the complainant's cherry seeders without any patent notice fixed thereon, one of which was purchased September 28, 1911, by Michael A. Rollman from a hardware dealer in Lancaster, and the other of which was purchased by the manager of a hardware company at Lancaster from the complainant. The complainant relied in rebuttal upon a stipulation between the parties as follows:

"That if Clarence Schock were recalled as a witness in this case he would testify that every cherry stoner made under the patent in suit and sold since the date of such patent by the complainant herein has had a tag attached thereto, such tag being identical with the tag attached to the machine, 'Defendant's Exhibit Overdeer Seeder,' and would further testify he is in the coal and lumber business and his office is not in the factory and never was; that the cherry stoners are shipped from the factory; and that he does not oversee or attend to the actual packing or shipping."

In view of the positive evidence by the defendant as to failure to mark upon the patented articles produced, the complainant has not, in my opinion, sustained the burden of proof required under the plain language of the statute. The weight of Mr. Schock's testimony in chief is diminished by the fact appearing in the stipulation that the cherry seeders are shipped from the factory and that he does not oversee or attend to the actual packing or shipping. It was open to the complainant to call witnesses who did attend to the work of stamping, packing, and shipping the patented articles, but they failed to do this, and in the state of the evidence I am not satisfied that the cherry seeders were marked as required by the plain language of the act. This is not a case coming within the alternative provision as to fixing a label upon the article or the package when, from the character of the article, the notice cannot be fixed upon the article itself. The attaching of the tags containing the notice is clearly not within the term "fixed thereon." The effect of the failure to mark is that no damages can be recovered "except on proof that the defendant was duly notified of the infringement and continued, after such notice, to make, use, or vend the article so patented."

The complainant relies on the admission in the defendant's answer "that it had notice of said letters patent prior to the commencement of this suit, * * * but it alleges * * * that it immediately referred the question of infringement to its counsel, and has at all times endeavored to avoid any infringement." This admission does not help the complainant to meet the requirements of the act, as it must be proved "that the defendant was duly notified of the *infringement* and continued, after such notice, to make, use, or vend the article so patented." If the admission is sufficient to dispense with proof that the defendant was duly notified of the infringement, the record still lacks proof of the defendant's continuance after such notice to make,

use, or vend the article so patented. True it was stipulated, as appears by complainant's record:

"That the defendant herein made and sold cherry stoners like the cherry stoner marked, 'Complainant's exhibit defendant's cherry stoner' (which is hereby put in evidence), subsequent to the issue of letters patent No. 686,139 of November 5, 1901, and prior to the institution of this suit."

There is nothing on the record, however, to show that the defendant continued to make and sell the cherry stoners after the date of the notice of infringement, if the notice of the patent was notice of infringement. The complainant, having failed to meet the requirements of section 4900, is not entitled to damages.

[5] While the provisions of section 4900, Compiled Statutes, deprive the complainant of the right to recover damages by reason of its failure to mark, it is not thereby deprived in a proper case of its right to an accounting for the defendant's profits. Section 4921, Compiled Statutes, as amended 1897 (U. S. Comp. St. 1901, p. 3395); *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Beach v. Hatch* (C. C.) 153 Fed. 763; *Mast v. Superior Drill Co.*, 154 Fed. 45, 83 C. C. A. 157.

A decree for an injunction and an accounting for profits will be entered for the complainant, with costs to be taxed.

SCHWAB v. MORGAN.

(District Court, D. Rhode Island. August 2, 1913.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—AUTOMOBILE TOOL.

The Bryant patent No. 1,008,694 for a spring contracting and removing device for use as an automobile tool, claims 2 and 3 *held* valid and infringed and claims 1, 4, and 7 valid but not infringed.

In Equity. Suit by Louis Schwab against Bernard Morgan. Decree for complainant.

Andrew Wilson, of New York City, for complainant.

Munn & Munn, of New York City, for defendant.

BROWN, District Judge. The bill charges infringement of letters patent No. 1,008,694, November 14, 1911, to George W. Bryant, for spring contracting and removing device. Claims 1, 2, 3, 4, and 7 are in suit. Claim 3 is the broadest claim and will be considered first.

3. In a device of the character described, the combination of a stock piece having a cylindrical bore, a carrying member to move in said bore and adapted to be inserted therein from either end, forked engaging members carried one by the stock piece and one by the carrying member, and means mounted on the stock piece for moving the carrying member to cause relative approaching and separating movements between the engaging members.

The invention pertains to clamps for compressing and holding springs, and the device is especially designed for use as an automobile tool, in removing or placing in position the valve springs of ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plosion engines. The stems of such valves project outside of the engine casing, and each carries near its lower end a disc which is held up by a pin or key fastened through a hole in the valve stem. A spiral spring surrounds the valve stem and is held under tension between the disc and a bearing on the valve casing. It is desirable at times to release the valves from the control of the spring, and this requires compression of the spring so that the disc may be raised and the key withdrawn, freeing the valve stem and valve.

The device of the patent in suit comprises a stock or body piece of cylindrical form and a carrying rod mounted to move endwise in the bore of the body piece. The carrying rod has at one end a spring engaging member, U-shaped or forked, so that its two sides may be pushed into the spring on either side of the valve stem, being made sufficiently thin to enter readily between the coils of the spring; the prongs or forks being of sufficient width to enable the member to engage properly springs varying considerably in diameter.

The body piece in which the carrying member moves has a U-shaped or forked jaw. The spring may be compressed or extended by the relative movement of the jaw. In claim 3 the means for moving the carrying member to cause relative approaching or separating movements between the engaging members are claimed broadly; the only limitation being contained in the words "mounted on the stock piece."

In none of the devices of the prior art to which the defendant refers is disclosed the combination of elements of claim 3. The feature of clamping jaws intended to enter between the coils of the spring is claimed to be novel with the patentee. It is suggested that the device of the Wickwire patent No. 875,761 might be used in this way, but Wickwire does not suggest such a use, and the device as described in his patent does not seem adapted for this purpose.

Complainant says:

"None of these devices would do what Bryant's tool does and grasp only the spring itself, compress it, and hold it compressed, so that it could be removed and replaced. Bryant did this by inserting the jaws of his tool between the coils of the spring. That has never been done before. And he not only did that, but he so constructed his tool that it could be used to (1) push up the bottom of the spring with the disc; or (2) push out the disc; or (3) to draw the spring together with the disc; or (4) without the disc; and so that (5) its range of operation might be extended by reversing its parts to permit the jaws to be moved wider apart; (6) so that it would be locked against movement from its desired position."

The adaptability for use in different positions, and with its parts in different relative positions, is a feature pointed out and illustrated in the patent. I find nothing in the prior art as cited by the defendant which invalidates claim 3. The means for moving the carrying members to cause relative approaching and separating movements between the engaging members shown in the patent in suit are a rack and pinion; the pinion being moved by a key. Because the operating mechanism is a rack and pinion it is necessary, in order to retain the step by step approaching and receding movements, to provide an automatic locking device whereby the parts may be held from movement under the load strains, which would tend to cause a movement

reverse in direction to that produced by the turning of the key. Bryant shows a stop pawl which serves as a detent and which is reversible to permit movement in one direction and stop it in the other. As it is desired to cause the jaws to approach or recede, the pawl is set in one direction or the other. This feature of a stop pawl is contained in other claims but is no part of claim 3. From the history of the invention it is clear that Bryant well understood the equivalency of the rack and pinion and the screw and nut as means for controlling the movement of the jaws. He made drawings both of the screw and nut and of the rack and pinion as equivalent mechanical means for causing the approach and separation of the jaws.

The defendant's device is illustrated in the patent to Morgan No. 1,050,746, January 14, 1913. Instead of a rack and pinion Morgan uses a screw and nut. As the nut, by reason of the flat thread of the screw, resists reverse strains, it is not essential to provide a detent for this purpose as in the rack and pinion construction, but the rack and pinion, with the detent or stop pawl, and a screw with a ratchet nut operated by a lever, are equivalent mechanical means for controlling relative movements of two parts. In view of Bryant's knowledge of this equivalency, as well as of the expert testimony on this point, and in view of the adaptability of his tool to assume positions of which former tools were incapable, I am of the opinion that he was entitled to claim broadly means for controlling the jaws and to cover both of the well-known forms of appliances for this purpose.

It is objected that the expression, "means mounted on the stock piece for moving the carrying member," is inapplicable to the defendant's device for the reason that the nut rests upon and is sustained by the thread of the screw; but the means includes not only the nut but the means for engaging the teeth on the exterior of the nut, which include a lever handle, and a pawl which engages the teeth. This pawl is reversible, and the nut may be turned in either direction according to the manner in which the pawl is adjusted. The handle and the pawl may, with sufficient accuracy, be said to be mounted upon the stock piece.

The defendant says also that, because the removal of the nut from the screw is a slow process compared with the removal of defendant's rack, his device does not have that adaptability for reversal which is a feature of the complainant's device. By reversing the rack the jaws of the complainant's device may be brought closer together, and this is a feature which is advertised by the defendant as a feature of the Morgan device.

I am of the opinion that claim 3 is valid and infringed.

As to the other claims, the principal contention of the defendant is that he has no element corresponding to the element described as a "reversible stop pawl." The defendant doubtless has a reversible pawl whereby he can control the direction in which the carrying member will move, but the pawl is used by the defendant to perform a different function from the function performed in the complainant's device. The complainant uses it as a detent to prevent movement of the pinion and of the rack. The defendant uses the pawl to make en-

gagement between the ratchet nut and the lever arm which gives motion to the ratchet nut. I have closely followed the argument of the complainant upon this point but am unable to find that the defendant's device contains as a substantial matter an element corresponding to the element "a reversible stop pawl." The functional difference in the use of the pawl in the two devices prevents the acceptance of the complainant's proposition that the defendant's stop pawl is the equivalent of complainant's stop pawl. While the screw, ratchet nut, pawl, and lever on the one hand may be regarded as the equivalent of the rack, pinion, stop pawl, and key on the other hand, yet these are not the same mechanical combinations. They are old combinations differing mechanically, but which as wholes may be substituted one for the other. They are equivalents for producing the relative movements of the jaws, but they are not the same mechanical combinations.

Claim 1 has an element "a reversible stop pawl for preventing movement of the carrying member on the stock piece." I do not think it can be fairly said that the defendant has a stop pawl for this purpose. The fact that when his pawl is set for, say, a right-hand movement, there are no means for turning the nut in the left-hand direction does not amount to a prevention of movement of the nut against the load strains.

In claim 2 the function of the reversible stop pawl is not set forth. There is in the defendant's device a reversible pawl which corresponds to the description in claim 2 and which enables the defendant's device to be set in either of two opposite operating positions. I have some doubts whether the mere use of the term "stop pawl" limits this claim to restrict it to a pawl used for the prevention of motion. It may perhaps be said that this claim is infringed by the use of a pawl for either of the two functions of stopping a reverse movement under load or of selecting and controlling the operating positions. In this latter respect the defendant has closely followed Bryant. In fact, the testimony that the defendant was formerly employed by Bryant to manufacture his device, and the close resemblance of the structures, supports the argument that the use by the defendant of a reversible pawl to perform but one of the two functions of the complainant's pawl does not enable him to escape infringement. If the defendant has appropriated a valuable feature of the complainant's device, he cannot avoid infringement merely because he does not use an element of that combination for all its functions.

While the question as to claim 2 is not altogether clear, I find on the whole that claim 2 is valid and infringed. Claims 4 and 7 I find are not infringed for the reasons heretofore given as to claim 1.

I am of the opinion that claims 2 and 3 are valid and are infringed and that claims 4 and 7 are valid but are not infringed.

A draft decree may be presented accordingly.

GENERAL BAKELITE CO. v. NIKOLAS.

(District Court, E. D. New York. July 29, 1913.)

PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING.

Allegations in a bill for infringement of a patent respecting compliance by the patentee with the statutory prerequisites to entitle him to the patent *held* sufficiently specific under new equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), which requires "a short and simple statement of the ultimate facts," but an allegation merely that defendant infringed by making and offering for sale the patented article is insufficient as consistent with a rightful use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

In Equity. Suit by the General Bakelite Company against George J. Nikolas, trading as George J. Nikolas & Co. On motion to dismiss. Sustained in part.

William H. Davis, of New York City, for the motion.

J. H. Brickenstein, of Washington, D. C., and William G. McKnight, of New York City, opposed.

CHATFIELD, District Judge. The plaintiff (no longer "complainant") has brought suit alleging that the defendant has infringed a certain patent duly assigned to the plaintiff after its issuance by the Patent Office with the usual letters patent. The plaintiff has also alleged the following:

"That on the ——— day of ———, 19——, one L. H. B., being within the meaning of the statutes of the United States then in force, the inventor of certain improvements * * * and being entitled to a patent thereon under the provisions of said statutes, duly filed * * * an application; that on the ——— day of ———, 19——, all of the requirements of the statutes of the United States then in force having been duly complied with, letters patent * * * were duly issued."

The same form of allegation is used with respect to each of the patents included in the complaint, and infringement is charged by alleging that "the defendant has manufactured and offered for sale varnish embodying the inventions."

The defendant has made a motion, under present equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), to dismiss the bill of complaint on the ground that, even if the matters therein alleged were true as alleged, the plaintiff has not stated a case which entitles him to recover in that the bill does not make allegations of fact showing that the prerequisites to the grant of a valid patent have been complied with, and that the allegation charging infringement does not state that it is without authority or grant of right so to do. Other grounds upon which the motion was made are for obvious defects, which have been disposed of upon the argument, and the one stated is the only question to be considered.

Rule 29 provides that demurrers shall no longer be used; that defenses which could have previously been raised by demurrer shall

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be made by motion to dismiss or by answer; and that every such point of law going to the whole or a material part of the cause of action may be disposed of before final hearing, at the discretion of the court. The defendant is therefore justified and correct in his practice in applying to the court, by means of the present motion, with respect to a determination of what facts must be shown in the complaint to constitute a valid cause of action.

The defendant contends that the bill, in the part above set forth, presents no facts, when tested by the standard of previous decision, upon certain prerequisite matters such as are made requisite to the complainant's obtaining and enjoying a valid patent, as set forth in sections 4883, 4886, and 4887, R. S. (U. S. Comp. St. 1901, pp. 3381, 3382), and such as the denial of the right to do the acts charged as infringement. The defendant claims that the facts set forth are insufficient to constitute a cause of action, and that the language which is used, viz., "being entitled to a patent thereon under the provisions of said statutes," "all of the requirements of the statutes of the United States then in force having been duly complied with," and "has infringed," present conclusions that have never been approved of as good pleading and are insufficient from the standpoint of any decisions of the courts. *Moss v. McConway-Torley Co.* (C. C.) 144 Fed. 128; *Elliott & Hatch Book-Typewriter Co. v. Fisher Typewriter Co.* (C. C.) 109 Fed. 330; *Parramore v. Joseph* (C. C.) 109 Fed. 332; *Thomas v. St. Louis & S. F. R. Co.*, 149 Fed. 753, 79 C. C. A. 89.

Equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv) provides as follows:

"Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption: (1) Name, etc. (2) Short statement of jurisdiction. (3) A short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence. (4) Statement as to parties. (5) Prayer for special relief."

The third section involves a serious question as to the present form of bill called for by these rules and is the portion of the rule upon which this motion is based.

It is evident that the decisions of the courts as to what are necessary allegations of fact to be proven by the plaintiff, in order to entitle him to relief, are not changed by the present rules. In order to make out a *prima facie* case, the plaintiff must introduce the same evidence as before the adoption of the rules, if a defense be interposed raising the issue, under section 4920, R. S. (U. S. Comp. St. 1901, p. 3394). The defendant likewise must respect the same rules of decision and the same requirements of law and evidence in offering testimony. The statement by the Supreme Court rule that the bill shall contain "the ultimate facts" necessary has not done away with the necessity of proof, nor even of an allegation, in some form, that the plaintiff's position embodies the jurisdictional elements and the necessary facts to make out a *prima facie* case. The "ultimate fact" could be strictly but one fact as to each series of allegations, and the phrase is apparently intended to do away with the recital of evidence and preliminaries. The manner of interposing defenses by answer has not been

changed, but the requirements of good pleading have been embodied in the rule. Under section 4920, R. S., a general denial, followed by notice of separate defenses, will allow the issue of the separate defense to be raised, or these defenses may be raised *in the answer*.

The new rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) gives a new definition to the "general denial" and requires it to be specific, but section 4920 is still in force as to the necessity for pleading each defense relied upon. Rule 30 says:

"The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial."

The words "specifically admitting or denying or explaining the facts upon which the plaintiff relies," imply a direct denial of any material element or fact upon which the plaintiff's case depends. The direction to avoid any general denial of the averments of the bill prohibits "negatives pregnant" or denial of the language *in his verbis*, and requires the use of specific defenses rather than a general plea like "not guilty" in a criminal case. But assuming these propositions, with the desirability of which no one can disagree, and assuming that the desire was to shorten the forms of pleading, we find the plaintiff going at once to an extreme and considering that the "ultimate facts" upon which he asks relief are merely the issuance and claim of right to a patent formally and "duly" granted, at a time and under conditions complying with the express requirements of the statutes and the decisions of the courts with respect thereto, and a statement that "infringement" (i. e., wrongful use) is simply "using."

The defendant is called upon to deny specifically the facts of the complaint, and a denial that the plaintiff had complied with any requirement of the statute would not seem to satisfy the rule and would not be sufficient, under section 4920, to put in the defenses desired. The defendant must still plead his defenses as definitely as before, and his "general denial" must now be made "specific" in its contradiction. On the other hand, if the statement of the rule requiring pleading only of the "ultimate facts" be held to require a short statement of each fact which has been held jurisdictional or necessary to make out a *prima facie* case, then the defendant would, in exactly the same way, be required to deny or controvert these specific allegations which he wishes to contest or be deemed to have admitted them as stated. Definiteness of pleading would seem to be produced by either method. Shortness and avoidance of technical difficulties in drawing the complaint, without causing any effect upon the further proceedings and making no difference with respect to the answer or upon the trial, would seem to be the result of the method adopted by the plaintiff herein, except as to the allegation of infringement. That allegation is consistent with a "rightful" use of the patent, and the absence of authority should be alleged.

This court considers that the purpose of the Supreme Court is to

accomplish the results indicated and to have the rules followed according to their plain intent and in a manner not calculated to defeat the real object of the rules. The rules indicate an intention to keep out unnecessary words and to make all of the pleadings simple and definite. To say that a patent was "duly" issued may not cover all defenses as to the alleged inventor's own acts and rights, but the allegation that he has "fulfilled all the requirements" and was "entitled" under the law, are statements of facts (involving conclusions it is true) but still coming within the new rule.

The case of Zenith Carburetor Co. and Société du Carburateur Zenith v. Stromberg Motor Devices Co., 205 Fed. 158, decided February 18, 1913, in the Southern Division of the District of Michigan, approved of a pleading setting forth fewer allegations than those at bar; and, while a copy has been presented upon this motion, we need not consider the differences in detail. The general conclusion as to interpretation of the rule is the same as that reached by this court, to the effect that the verbose and reiterative forms under the old rules have been abolished, and that rule 25 requires no more than the allegations above set forth.

The motion will be granted as to the allegation of fact of alleged infringement, unless that allegation be amended within five days, and as to other matters the motion will be denied.

STEINBERGER v. GENERAL ELECTRIC CO.

(District Court, N. D. New York. August 4, 1913.)

COURTS (§ 525*)—DIFFERENT FEDERAL COURTS—SUIT FOR INFRINGEMENT—STAY.

Where a suit in equity has been brought under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to determine the right to a patent, a subsequent suit for infringement by the successful against the unsuccessful applicant may properly be stayed a reasonable time to await the determination of such issue.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 525.*]

In Equity. Suit by Louis Steinberger against the General Electric Company. On motion by defendant for stay. Granted.

Motion for suspension of further proceedings herein until the hearing and determination of a suit now pending in the Eastern District of New York, brought under the provisions of section 4915 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3392) and the Acts of February 9, 1893, c. 74, § 9, 27 Stat. 436 (U. S. Comp. St. 1901, p. 3391), to have it decreed that one Hewlett was and is the first inventor of the subject-matter of the claims of the patent granted to Steinberger, and that the General Electric Company, as assignee of the invention, is entitled to receive a patent therefor, and directing the Commissioner of Patents to issue a patent to the General Electric Company accordingly.

Charles H. Wilson, of New York City, for plaintiff.

Charles Neave, of New York City, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. After proceedings in the Patent Office and on an appeal therefrom to the Court of Appeals of the District of Columbia, the right of the plaintiff, Steinberger, to a patent for the invention in controversy was upheld and a patent issued accordingly. The General Electric Company and said Edward M. Hewlett, the alleged first inventor, then brought suit in the District Court of the Eastern District of New York, where Steinberger resides, under section 4915 of the Revised Statutes of the United States and the Act of February 9, 1893, in effect to reverse such action and obtain a decree directing that the patent for the invention issue to the General Electric Company. The plaintiff brings suit for infringement of the patent issued to him for this invention against said General Electric Company in the Northern District of New York, where the General Electric Company resides and has its principal manufactory and where the alleged infringements were committed.

Inasmuch as the law is as it is and the suit in the District Court of the Eastern District of New York was first brought and is at issue and speedily may be tried and it does not appear that such suit was instituted for delay, I think it reasonable and just to suspend further action in this infringement suit to give the plaintiffs in that action in the Eastern District an opportunity to have it heard and decided. It can be heard and decided by October 1, 1913, and when that time comes, if the case has not been heard and decided, this case should proceed.

It is true that in this the infringement case the question of who was the first inventor may be presented and passed upon. The decisions rendered and referred to are not conclusive on the General Electric Company, but I think it should have a reasonable time in which to present that single question, as the law has provided for such a course. If it is used to delay and harass the plaintiff, Steinberger, who now has the patent, this court can at any time compel the defendant to proceed in this case.

So ordered.

In re AKHAY KUMAR MOZUMDAR.

(District Court, E. D. Washington, N. D. May 3, 1913.)

No. 992.

1. ALIENS (§ 61*)—NATURALIZATION—PERSONS CAPABLE—"FREE WHITE PERSONS."

Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), extending the privilege of naturalization to "free white persons," confers that privilege only upon members of the Caucasian race.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

2. ALIENS (§ 61*)—NATURALIZATION—PERSONS CAPABLE—HIGH-CASTE HINDU.

An applicant who testifies that he is a high-caste Hindu of pure blood, and that such Hindus have always considered themselves as members of the Aryan race, is entitled to naturalization as a white person.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of the application of Akhay Kumar Mozumdar to become a citizen of the United States. Application granted.

George W. Tyler, U. S. Naturalization Examiner, of Seattle, Wash.

Will G. Graves, of Spokane, Wash., *amicus curiæ*.

RUDKIN, District Judge. On the 11th day of July, 1912, Akhay Kumar Mozumdar filed his petition in this court to be admitted to citizenship in the United States, and the petition came on regularly for hearing on the 28th day of the ensuing December. At that hearing it was made to appear to the satisfaction of the court from the testimony of the applicant and two witnesses that the applicant has resided continuously in the United States and in the state of Washington for the requisite statutory period; that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and that he is in all respects qualified for citizenship, provided he is a white person within the meaning of the Naturalization Acts.

On the latter question the testimony offered was very meager. The applicant was not represented by counsel, and the questions propounded by the Naturalization Examiner, representing the government, simply brought out the fact that the applicant is a native of India, and that his ancestors for generations before him were natives of that country. From this testimony and the appearance of the applicant, the court was not fully satisfied that he was a white person within the meaning of the law, and a formal order was entered denying the petition, with leave to file a petition for a rehearing, if the applicant were so advised. Such a petition has been filed, and at the request of the court Mr. Will G. Graves, of the bar of this city, kindly consented to appear in the matter, and has filed an able and exhaustive brief covering the entire subject under consideration. His intervention has greatly aided the court and lightened its labors in determining the question presented for decision.

On the rehearing the petitioner was further examined, and his testimony has been well summarized by counsel appointed by the court as follows:

"I come from the northern part of India, from the part of India that is customarily spoken of as Upper India, or what is known as Hindustan proper. I am a high-caste Hindu of pure blood, belonging to what is known as the warrior caste, or ruling caste. The pure-blooded Hindus are divided into three castes—the priestly caste, the warrior or ruling caste, and the merchant caste. The blood is kept pure by rigid rules of exclusion. Any one who marries outside of his caste is ostracized, and is disinherited by the native law. None of the high-caste Hindus will have anything to do with him. Marriage outside of the caste is not often known. Very few of the high-caste Hindus come to the United States. The great bulk of the Hindus in this country are not high-caste Hindus, but are what are called *sihks*, and are of mixed blood. The laboring class, those who do the rough manual labor, are not high-caste Hindus at all, but are in an entirely separate class, having quite a different religion and a different ancestry. The high-caste Hindus are of Brahmin faith, and in India are clearly distinguished from all of the other inhabitants, including the aborigines of the country, or the hill tribes, and

also the descendants of the invaders, those of the Mohammedan faith. The high-caste Hindus comprise perhaps one-fourth of the natives of India. The high-caste Hindus always consider themselves to be members of the Aryan race, and their native term for Hindustan is *Arya-vartha*, which means country or land of the Aryans."

[1] Section 2169 of the Revised Statutes (U. S. Comp. St. 1901, p. 1333), relating to naturalization, provides as follows:

"The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

The provision relating to free white persons has found a place in our naturalization laws from the beginning, except for the brief period between 1873 and 1875, and the provision relating to aliens of African nativity and to persons of African descent was first incorporated after the adoption of the thirteenth amendment to the Constitution of the United States, abolishing slavery. In the original naturalization act the expression "free white persons" was doubtless primarily intended to include the white emigrants from Northern Europe, with whom the Congress of that day was familiar, and to exclude Indians and persons of African descent or nativity. Beyond this, perhaps, Congress had no definite object in view. It could not have foreseen the vast immigration problems with which the government is now confronted, or the difficulties which might hamper and embarrass the courts in the administration of the law. But, whatever the original intent may have been, it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only. *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; *In re Saito* (C. C.) 62 Fed. 126; *In re Camille* (C. C.) 6 Fed. 256; *Matter of San C. Po*, 7 Misc. Rep. 471, 28 N. Y. Supp. 383; *In re Buntaro Kumagai* (D. C.) 163 Fed. 922; *In re Knight* (D. C.) 171 Fed. 297; *In re Najour* (C. C.) 174 Fed. 735; *In re Halladjian* (C. C.) 174 Fed. 834; *United States v. Balsara*, 180 Fed. 694, 103 C. C. A. 660.

[2] It is likewise true that certain of the natives of India belong to that race, although the line of demarcation between the different castes and classes may be dim and difficult of ascertainment. The difference between daylight and darkness is apparent to all; but where is the dividing line, and where does daylight end or darkness begin? So it is with the races of mankind, where miscegenation has been in progress for generations. The system of castes has existed in India for upwards of 20 centuries, and religion and law have done much to maintain that system and to prevent corruption of blood; but experience teaches us that religion and law have not always triumphed over nature. After referring to this system, and to the efforts made to maintain it, the historian Le Bon says:

"But in the course of the centuries nature triumphed over these formidable prohibitions. Woman always has her charms, no matter how inferior she may be in caste. In spite of Manu, crossings of caste were numerous, and one need not travel India throughout to perceive that, to-day, the populations of all the races are mixed to a large extent. The number of individuals white enough to prove that their blood is quite pure is very restricted. The word 'caste,' taken in its primitive sense, is no longer a syno-

nym of color, as it used to be in Sanskrit, and, if caste had had only formerly prevailing ethnological reasons to invoke, it would have had no reason for continuing. In fact, the primitive divisions of caste have long since disappeared. They were replaced by new divisions, the origin of which is other than the difference of races, except in the case of the Brahmins who still form the less mixed portion of the population." Great Events by Famous Historians, vol. 1, p. 55.

I fully appreciate the fact that the lineage of the applicant in these matters must rest largely, if not entirely, upon his own testimony, and that the courts may be imposed upon; but they must administer the law as best they can until Congress sees fit to prescribe a more definite rule for their guidance. The testimony in this case satisfies me that the applicant has brought himself within the provisions of the Naturalization Act, and he will be admitted to citizenship accordingly, upon taking the oath prescribed by law.

In re KELLER.

In re RABINOWITZ & KOEN.

(District Court, S. D. New York. June 12, 1913.)

1. BANKRUPTCY (§ 482*)—ALLOWANCE OF ATTORNEY'S FEES.

Where a rule of court fixes the scale of fees allowable to attorneys in bankruptcy proceedings, such allowances should not be increased, except in most unusual cases.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

2. BANKRUPTCY (§ 482*)—ATTORNEY'S FEES—ALLOWANCE TO BANKRUPT.

In voluntary proceedings, the attorney for the bankrupt may properly be allowed a docket fee for filing application for discharge if there is no contest; if there is a contest made by the trustee at the instance of the creditors, which is unsuccessful, he may be given a larger allowance from the estate, but, where an unsuccessful contest is made by one or more creditors, the question of costs should be settled inter partes in that proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

In Bankruptcy. In the matter of Eleanor S. Keller and of Rabinowitz & Koen, bankrupts. Orders as to allowance of attorney's fees.

Winthrop & Stimson, of New York City, for plaintiff.

Gordon Ireland, of New York City, for defendant.

HAND, District Judge. [1] It is very probable that in these cases the allowance under "Instructions to Referees," chapter 8, is not adequate compensation for the work done. However, like every other lawyer's charges, the return must depend very much upon the amount involved. This is especially true of bankruptcy matters where the total expenses are too apt to eat up the estate. I think that the case ought to be very exceptional indeed which justifies an allowance beyond the amount fixed by the rule. The practice has not been consist-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ent as yet, and cannot in the nature of things be definitely fixed, but I shall interpret it in the future as limiting the allowance to that stated except in the most unusual cases.

[2] As for the allowance to the bankrupt's attorneys, it stands on a somewhat different basis. Judge Brown held in *Re Kross* (D. C.) 96 Fed. 816, that in voluntary cases the statute—Act July 1, 1898, c. 541, § 646 (3) 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447)—permitted an allowance to the bankrupts' attorneys for procuring a discharge, though the rule is certainly different in involuntary cases. That allowance where the proceedings were not contested was the docket fee of \$20, and Judge Brown said obiter that in cases of contest the referee may allow further sums. It seems to me clear enough that the bankrupt should be allowed nothing for an unsuccessful application for discharge, but in voluntary cases, if the trustee at the instance of the creditors conducts an unsuccessful contest, I cannot see why the estate should not bear a fair allowance. Where, however, a single creditor or several creditors oppose the discharge, the question should be treated as one arising *inter partes*, and the estate generally ought not to suffer from an ill advised contest. If the creditor loses, the question of the propriety of the contest may be then decided and he may have to bear costs. Usually no costs are given against a creditor; but in any case the question is to be determined in that proceeding. In this case the trustee did not conduct the opposition, and the allowance will be limited to a docket fee of \$20.

The order is therefore modified by allowing in *Re Keller* \$142.92 to the trustee's attorneys and \$20 to the bankrupt's attorneys.

In *Re Rabinowitz & Koen* the allowance of the trustee's attorneys is fixed at \$223.12.

In re I. RHEINSTROM & SONS CO.

(District Court, E. D. Kentucky. June 16, 1913.)

1. BANKRUPTCY (§ 350*)—PRIORITIES—"MANUFACTURER"—CONSTRUCTION OF STATUTES.

Whether or not one is a "manufacturer," within the meaning of statutes exempting manufacturers or manufacturing establishments from taxation, or giving to employes or those furnishing materials priority of payment in case of insolvency, is to be determined by what was his principal business, and not by what are mere incidentals to it; and in making such determination the word should not be limited to its grammatical or etymological meaning, since by usage in course of time, and when used in such statutes, it has taken on a different meaning, which would seem to exclude one who simply makes by hand in a small way, and make it apply only to those who make by machinery on a considerable scale and who sell their product.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 882; Dec. Dig. § 350.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4346-4358.]

2. BANKRUPTCY (§ 350*)—PRIORITIES—"MANUFACTURE"—"MAKING."

Within the meaning of such statutes, a "manufacture" is a "making"; and while a change in the condition of existence of an article is never a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

making, a change in the article itself, as a result of treatment, labor, and manipulation, is always a making.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 882; Dec. Dig. § 350.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4292-4294, 4344-4346; vol. 8, p. 7716.]

3. BANKRUPTCY (§ 348*)—DISTRIBUTION OF ESTATE—DEBTS ENTITLED TO PRIORITY—"MANUFACTURING ESTABLISHMENT."

A bankrupt company purchased cherries grown in Greece and Italy, and imported preserved in brine and sulphuric acid, extracted the preservative, stemmed, pitted, sweetened, colored, flavored, and preserved them, and sold them as cherries; the product being what is commonly known as "Maraschino cherries," used as a garnish in drinks, ice cream, etc. *Held*, that it was the owner and operator of a "manufacturing establishment," within the meaning of Ky. St. § 2487, which gives a lien to employes of such establishments, and to those furnishing materials or supplies in the carrying on of their business, on the distribution of their property to creditors, and that creditors of such classes were entitled to priority of payment from the proceeds of the bankrupt's plant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 870-877½; Dec. Dig. § 348.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4346-4358; vol. 8, p. 7716.]

4. BANKRUPTCY (§ 348*)—PRIORITIES—CONSTRUCTION OF STATUTE—GENERAL AND SPECIFIC WORDS—MANUFACTURING ESTABLISHMENT.

In Ky. St. § 2487, which gives to employes and persons furnishing materials or supplies for the carrying on of the business of "any mine, railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment," a lien on the distribution of the property among creditors, the words "manufacturing establishment" are not limited in meaning to iron manufacturers, but include manufacturing establishments of all kinds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 870-877½; Dec. Dig. § 348.*]

In the matter of I. Rheinstrom & Sons Company, bankrupt. On review of order of referee. Reversed.

De Camp & Sutphin and Burch, Peters & Connolly, all of Cincinnati, Ohio, for petitioners.

Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, for Covington Savings Bank & Trust Co.

Lessing Rosenthal, Chas. Hamill, and Leo F. Wormser, all of Chicago, Ill., for Central Trust Co. of Illinois.

COCHRAN, District Judge. This case is before me on petition of eight creditors of the bankrupt, who claim priority over the other creditors under sections 2487 to 2491, inclusive, of the Kentucky Statutes, by virtue of section 64b (5) of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) for review of an order of the referee denying them such priority. The bankrupt owned and operated an establishment at Ludlow, Ky., in this district, where it produced what are known as "Maraschino cherries," and the debts of the petitioning creditors were for materials and supplies furnished for the purpose of carrying on its business. The provisions of those

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sections of the Kentucky Statutes under which priority is claimed may be found set forth in full in my opinion in the case of *In re Bennett*, 153 Fed. 680, 82 C. C. A. 531.¹

The right thereto depends solely on the question whether or not the bankrupt was the owner or operator of a manufacturing establishment, within the meaning of section 2487. That is the only question which has been presented and argued before me. It is claimed by the trustee and creditors, other than petitioners, that it was not the owner or operator of such an establishment, and the referee so held. Under that section and section 2491, in certain contingencies, the employés of and persons furnishing, for the purpose of carrying on its business, materials and supplies to "any mine, railroad, turnpike, canal or other public improvement company," or "any owner or operator of any rolling mill, foundry or other manufacturing establishment," acquires a lien on its property and effects.

The position of the trustee and objecting creditors is twofold. They contend that the bankrupt was not the owner or operator of a manufacturing establishment at all, and that, if it was, it was not the owner or operator of the kind of a manufacturing establishment covered by the statute. They contend that it does not cover every kind of a manufacturing establishment, but only such manufacturing establishments as are like the two specified, to wit, rolling mill and foundry, and the bankrupt's establishment was not of such character. The referee based his holding on the first branch of the position; i. e. that the bankrupt's establishment was not a manufacturing establishment at all.

The problem in hand, therefore, is one of interpretation—the ascertainment of the thought of the Legislature of Kentucky as to the character of establishment necessary to bring the owner or operator thereof within the statute. What kind of an establishment did it have in mind when it used the words "other manufacturing establishment." Generally such a question is stated to be concerned with the intent of the Legislature or the spirit of the legislation. I prefer to put it as having to do with the thought of the Legislature.

It is urged on behalf of the respondents that this statute should be strictly construed. By this I understand to be meant that it must clearly appear that the bankrupt's establishment was such an establishment as the Legislature had in mind in enacting the statute; otherwise, the claim to priority should be denied. I accede to the sound-

¹ Section 2487 of the Kentucky Statutes (Carroll, 1909) provides:

"When the property or effects of any [mine], railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employés of such company, owner or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business."

ness of this position, particularly as from my experience with it, in the Bennett Case, I have found that it is capable of working a very great hardship. In that case foreign materialmen, who did not know that they were entitled to priority until after bankruptcy, took the entire estate, and local banks, who, in like ignorance, had furnished money, not only to buy material, but to pay the employes, and by so doing had aided materially in keeping the concern on its feet for many months, went without anything. But if the bankrupt's establishment comes clearly within the statute, I have no other recourse than to sustain the claim to priority.

In the argument before me the last branch of respondents' position—i. e., that the Legislature did not have in mind any manufacturing establishment, but only such establishments as were like the two specified, and the bankrupt's establishment, assuming it to have been a manufacturing establishment at all, was not such an one—has been put to the front. It seems to me, however, that it is more logical to deal first with the other branch of respondents' position, assuming for the time being that the Legislature had in mind any such establishment, and I shall pursue that course. In so doing I think best at the outset to come to an understanding as to two matters. One is as to what bankrupt did at its establishment, and what were the so-called "Maraschino cherries" which it produced thereat. The other is as to respondents' argument in favor of the position that the establishment was not a manufacturing establishment.

What the bankrupt did at its establishment had to do with natural cherries in a certain condition. The cherries were large, white-meated, free-stone cherries. They had been grown in the north of Greece or Italy; then picked just before reaching the ripened stage—i. e., as they began to turn—with their stems attached; then treated with sulphuric acid to bleach them, the color produced thereby being white or light brown; and finally immersed in brine and a percentage of sulphuric acid in casks or barrels to preserve them, in which condition they were purchased by the bankrupt. There were ten distinct stages in what it did to them after they had been received at its establishment. It first drained off the brine and sulphuric acid; then washed the cherries in various changes of fresh water, to remove all traces of the brine and acid; then stemmed them by hand; then pitted them by machinery; then washed them again in various changes of fresh water to remove any brine or acid which might have gotten under the skin in stemming and pitting; then colored them by immersing them in a solution of coloring matter and water; then sweetened them, by immersing them in a syrup made of cane sugar and water, contained in a vacuum kettle within an open kettle containing water, and, whilst in this condition, keeping the water in the outer kettle hot for 12 hours, and then converting that kettle into a vacuum kettle, also, and keeping the water therein boiling for 24 to 48 hours, this operation being termed the "cooking" operation; then flavored them, by adding to the syrup such flavoring substance as might be desired; then sorted and graded them; and finally bottled them with the syrup thus flavored. It does not appear what was the original name of the cherries so pur-

chased and treated. It was not Maraschino. There is a cherry of that name grown in the mountains of Dalmatia in Austria, but they were not such cherries. Amongst the substances with which some of them were flavored was what was termed real "Maraschino water," made from the real Maraschino cherries, and with which others were flavored was what is termed "Marasque water," made from cherries grown in southern France, an imitation of the real Maraschino water.

The cherries so treated were given two colors, red and green. The red ones are characterized as luscious, big, red cherries, and up to the year 1911 had been labeled "Maraschino cherries," and that was the name by which they were popularly known. In that year, under the Pure Food and Drug Act, it was forbidden to so label them. Thereafter they were labeled simply as cherries. It was stated that they were artificially colored, and, if flavored with real Maraschino water, that also was stated. It is not likely that this change in the label has to any extent affected the name by which they are popularly known. It is testified that it has not affected their sale. The referee has put the bankrupt's connection with these articles, to which I have given so much detail, in a single sentence. He says:

"In short, the bankrupt bought cherries, preserved in brine and sulphuric acid, extracted the preservative, stemmed, pitted, sweetened, colored, flavored, and preserved them, and sold them as cherries."

The principal, if not only, use to which these cherries are put, is as a garnish in various mixtures of alcoholic liquor, salads, ice cream, and deserts. Their flavor is not that of the original cherry, not even of the real Maraschino cherry.

The argument of respondents' counsel in support of the position that the bankrupt's establishment is not a manufacturing establishment hardly deals with the subject as a matter of principle. They rely on certain decisions, some from noncontrolling jurisdictions, and others from controlling jurisdictions. Those from controlling jurisdictions are by the Court of Appeals of Kentucky, the Sixth Circuit Court of Appeals, and the Supreme Court of the United States. It must be conceded that the decision of any of these three courts, if in point, is binding on me. I have no right to do otherwise than follow it, whether I deem it sound or not. I deem it important to make a rather full presentation of these decisions. Those from noncontrolling jurisdictions will be noted first.

Two decisions from the Supreme Court of Louisiana are much relied on. They arose under the Constitution of that state exempting manufacturers from a certain tax. They were in the cases of *City of New Orleans v. Mannessier*, 32 La. Ann. 1075, and *City of New Orleans v. New Orleans Coffee Co., Ltd.*, 46 La. Ann. 86, 14 South. 502.

In the *Mannessier* Case it was held that one who produced ice cream in an establishment equipped with steam engines and other complicated apparatus, and with the aid of a large force of workmen, was not a manufacturer. In the course of the opinion it was said:

"We are told that any one seeing the steam engine, and complicated apparatus, and large force needed to produce defendant's goods, would at once conclude that he is a manufacturer. With as much force it might be said

that any one visiting the mammoth kitchen of the Grand Union Hotel at Saratoga, together with their myriads of employes, and their colossal apparatus, would at once magnify the cooks and pastry-men into manufacturers."

In the New Orleans Coffee Co., Ltd., Case it was held that a corporation which purchased green coffees, divided them, by a secret process, for the production of different brands, suitable to different tastes and recognizable from each other, roasted them carefully and cleanly, cooled them by another secret process, and in this condition put them on the market, was not a manufacturing corporation. It used no chemicals and did not grind the coffee. Judge Parlange said:

"We are satisfied that the defendant corporation does not claim that it is a manufacturer by reason of grinding coffee and thereby changing its form. * * * Its claim to be a manufacturer * * * is based wholly on the production of brands of unground roasted coffee. * * * We are to decide whether the defendant corporation is a manufacturer, on the tangible results of the manipulation to which they subject green coffees, bearing in mind the assertion of the defendant corporation that it uses no chemicals, and that the coffee after the manipulation is still pure coffee. The defendant corporation virtually admits that a 'coffee roaster' is not a manufacturer, but denies that such a designation can properly be applied to it. A 'coffee roaster' is testified by the witnesses for the defendant corporation to be a person 'who takes a sack of coffee and simply puts it in a roaster and turns that coffee out after it is roasted.'"

Again he said:

"It is not every employment of labor which will make the thing upon which it is employed a manufacture. It has been held that the great and laborious pursuits of mining and shipbuilding are not manufacturing occupations."

In referring to the ice cream case he said:

"In that case this court said that the mammoth kitchen of a hotel is not a manufactory, yet the confectionary and the kitchen yield products in which the identity of the articles from which they are made is almost lost."

In distinguishing the decision of that court in the case of *In re Ernst*, 35 La. Ann. 746, which arose between the case then in hand and the ice cream case, in which it was held that a rice miller was a manufacturer, he said:

"To clean rice, a long and laborious process is required; a large and expensive plant, including powerful and complicated machinery, is necessary; and from the 'paddy' several marketable by-products are obtained, beside the cleaned rice."

The first of the two decisions of the Supreme Court of the United States relied on and hereafter presented was cited in support of the position taken.

Then comes the decision of the Supreme Judicial Court of Massachusetts in the case of *Hittinger v. Westford*, 135 Mass. 258. It was there held that a steam engine, boiler, machinery, and tools used in houses located on the shores of two large ponds to cut and remove from the ponds and store in the houses ice, which formed on the ponds during the winter time, by a person who sold same at wholesale in large quantities for export and use in Massachusetts and other states was not machinery employed in a "branch of manufactures" under a tax statute. Judge Colburn said:

"The cutting of ice produced by the agencies of nature, on the surface of a pond, into pieces convenient for handling, and storing the pieces in a building, cannot in any proper sense be called a manufacture. The material is in no way changed, or adapted to any new or different use; it still remains ice; * * * it is no more a manufacture than the putting of the water from the pond into casks for transportation and use would be a manufacture, or the mining of coal, which has been decided not to be a manufacture. *Byers v. Franklin Coal Co.*, 106 Mass. 131. It is like the harvesting of hay or grain, or other agricultural crops, and the analogy is so strong and obvious that the 'ice crop,' the 'ice harvest,' and 'harvesting ice' are terms in common use."

Then come three decisions of the Court of Appeals of New York in the cases of *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, 1 N. E. 669; *People ex rel. Union Pacific Tea Co. v. Roberts*, 145 N. Y. 375, 40 N. E. 7; *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 155 N. Y. 408, 50 N. E. 53, 41 L. R. A. 228.

The Kickerbocker Ice Co. Case is just like the Massachusetts case first considered. It involved the question whether a corporation engaged in the business of collecting ice from the Hudson river and Richland Lake, storing, preserving, and preparing it for sale, transporting it to the city of New York, and vending it there, was a manufacturing corporation under a statute exempting such corporations from taxation. It was held that it was not. No reference was made to the earlier Massachusetts case. Judge Danforth said:

"Its dealing is with 'ice' as an existing article, not the manufacture or production of ice by combination of materials, or the application of forces, or otherwise. It collects, stores, and preserves that which natural causes created, and which other natural causes would destroy and waste. It seeks only to hold these last in check. Similar operations would equally apply to water, fruit, sand, gravel, coal, and other natural productions. Water might be improved by filtration, fruit by judicious pruning of the tree or vine, or protection by glass, sand and gravel by screening, cobble stones by selection, and coal by breaking, and each by various processes stored until the season of demand, when * * * the natural articles and no other would be put upon the market. No doubt ice may be manufactured and frigorific effects produced by artificial means. Corporations exist for that purpose and come literally within our manufacturing laws. Their methods in no respect resemble those of the defendant. Its tools and implements are for convenience in handling and marketing a product, and not at all for making it."

In referring to certain cases cited in support of the contention that the defendant was a manufacturing corporation, and in distinguishing them from the one in hand, Judge Danforth said:

"They all, so far as they have any application, require the production of some article, thing, or object by skill or labor out of raw material, or from matter which has already been subjected to artificial forces, or to which something has been added to change its natural conditions."

The Union Pacific Tea Company Case is like the Louisiana coffee case, but goes it one better. The question involved was whether a corporation which purchased tea in its original state, mixed various kinds together, and produced a compound which was called a combination tea, and purchased, also, coffee in the raw bean, roasted and ground it, and in some instances mixed different kinds of coffee together, forming, as in the case of tea, a combination article, was a manufacturing corporation, so as to be exempt from taxation. It was

held that it was not. Here the coffee was ground. In the Louisiana case it was not, and point was made of this in that case. Here, too, the first of the two decisions of the Supreme Court of the United States relied on and hereafter considered was cited as authority for the position taken, and the only authority relied on was its earlier decision in the ice case just considered. Judge Bartlett said:

"We think it very clear that the handling of tea and coffee in the manner indicated is not 'manufacture' in any legal sense, and the relator cannot be regarded as a manufacturing corporation. Mr. Webster defines 'manufacture' to be 'anything made from raw materials by the hand, by machinery, or by art, as cloths, iron utensils, shoes, machinery, saddlery, etc.' The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material. It is quite apparent that the processes of relator, when subjected to this test, cannot be deemed 'manufacture,' either in the ordinary or legal definition of that term."

The New England Dressed Meat & Wool Company Case involved the question whether a corporation operating a slaughterhouse was entitled to the exemption as a manufacturing corporation. The nature of the corporation's business was thus set forth by Judge Martin:

"Briefly stated, the principal business carried on by the relator was the purchasing of sheep and lambs, slaughtering them, pulling the wool from the hides or pelts, selling it, selling the hides, taking from the animals the offal, including the blood and legs, converting it into fertilizer, and then reducing the carcasses to a temperature which would retard decomposition, and shipping them to the place of delivery in refrigerator cars."

He stated the conclusion of the court in these words:

"We think this does not constitute 'carrying on manufacture' within the spirit and meaning of the statutes. The business conducted by the relator was obviously that of purchasing, slaughtering, and selling sheep and lambs. While it utilized the hides, the wool, the tallow, and the offal, as well as the carcasses of these animals, yet to say that refrigerated mutton, rendered tallow, pulled wool, or untanned hides were manufactured articles would be quite incorrect. The words of a statute are to be given their natural, plain, obvious, and ordinary signification. To say that the relator was engaged in manufacturing mutton, wool, hides, or tallow would not be giving to the words 'manufacture' or 'manufacturers' their ordinary and plain meaning. It may be that the fertilizer might be regarded as a manufactured article, but that was not the principle business in which the relator was engaged, but was a mere incident to it. Manifestly, none other of these articles was manufactured. At most, they were merely prepared for market and preserved until sold. We are clearly of the opinion that the relator was not a manufacturing corporation, nor engaged in 'carrying on manufacture' in this state, within the spirit and meaning of the statutes."

The only authorities relied on in support of the conclusion reached were the court's previous decisions in the natural ice and coffee cases heretofore considered.

Finally comes a decision of Judge Blatchford, just before his elevation to the Supreme Court Bench, in the case of *Frazee v. Moffitt* (C. C.) 18 Fed. 584. The question there involved was whether hay in bales imported from Canada was an "unmanufactured" article, or a "manufactured" article, within the tariff laws. It was held that it was an "unmanufactured" article. Judge Blatchford stated the contention of the defendant, who was claiming it to be a "manufactured" article, to be:

"That hay is a new article, transformed from grass, as much as sugar is from the cane juice or the maple sap, or as salt is from the saline brine, and that the heat of the sun, and the air, and human skill and labor, manufacture the grass into hay."

In answer to this contention he said:

"Many articles are properly called raw which have undergone some manipulation. Cotton is picked from the bolls, and cleaned by ginning, and baled. Yet it is raw cotton in the bale. Wheat is cut, and the grains are threshed out, and then subjected to a cleaning machine, and then bagged. Yet it is raw wheat in the bag. So with other grains. The cotton and the grains undergo such change and preparation as exposure to light, and natural or artificial heat, and air, and the manipulation they receive, produce or allow, be it more or less. Yet neither the cotton nor the grains would be said to be manufactured. Salt and sugar are new articles. Cotton and grains are the same articles they were when on the plant with its roots in the earth. So hay is the same article it was when it was stalks of grass with roots in the earth. It is dried, to be sure; but the drying and any conversion of starch into sugar are mere incidents of the necessary cutting to enable it to be stored for food in latitudes where grass cannot be found all the year around. Where it can be so found, no hay is stored. Dried apples would not be called a manufactured article, though the apple is peeled and cored and sliced, and dried by exposure to the sun and manipulation. The substance of dried apples is still apples. The substance of dried grass or hay is still grass. Change of name and manipulation do not necessarily constitute manufacture, within the meaning of section 2516. Each case must be decided according to its own circumstances."

These seven decisions are all that are cited and relied on coming from noncontrolling jurisdictions.

I come now to those from controlling jurisdictions. They are two from the Kentucky Court of Appeals, one from the Sixth Circuit Court of Appeals, and two from the Supreme Court of the United States. The Kentucky decisions are those in the cases of *Muir v. Samuels*, 110 Ky. 605, 62 S. W. 481, and *Standard Tailoring Co. v. City of Louisville*, 152 Ky. 504, 153 S. W. 764.

The *Muir Case* involved the question whether a laundry company was the owner or operator of a "manufacturing establishment" under the statute involved here. It was raised by certain laborers claiming a lien on the laundry under that statute. It was held that it was not. Judge Burnam said:

"The only business of a laundry is to transform soiled into clean linen. It is true that this is done largely by means of machinery, and requires the use of an engine and boilers, and other appliances ordinarily used in manufacturing establishments; but, after all, nothing new is produced."

He then cited the *Massachusetts ice case* and the *Louisiana ice cream case*, and concluded as follows:

"We are therefore inclined to the opinion that a laundry cannot be considered a manufacturing establishment in contemplation of the statute."

The *Standard Tailoring Company Case* was decided but recently. It involved the question whether that company operated a manufacturing establishment in the city of Louisville, so as to be entitled to exemption from municipal taxation for five years under an ordinance thereof granting such exemption to such establishments. The business in which the company was engaged was that of making up men's

clothing for the trade, pursuant to sales from samples distributed among local dealers. It was held that it was not a manufacturing establishment. Judge Carroll said:

"The words 'manufacturing establishment' have been given a variety of meanings, depending largely on the circumstances surrounding the case in which they have been used. The result of this is that, although the words have been often defined by the courts, few judicial precedents can be found that may be properly applied to any particular state of facts. Webster defines 'manufacture' to be: 'The process or operation of making wares or any material products by hand, by machinery, or by other agency; often such process or operation carried on systematically, with division of labor and with the use of machinery. Anything made from raw materials by the hand, by machinery, or by art, as clothes, iron utensils, shoes, machinery, saddlery.' And this definition in different forms of expression embodies the general idea that may be found in all the cases where the word has come up for construction; but, in applying it to the facts of particular cases in which the construction of ordinances or statutes was involved, the courts, especially in license and exemption cases, have found it necessary, in carrying out the legislative intent in the use of the word, to materially limit the scope of this general definition, which is broad enough to embrace almost every concern that is engaged in business of changing the nature or quality of articles, so that they may be used for whatever purpose they were intended. Indeed, we might say that the meaning of the words 'manufacture' and 'manufacturing establishment' has been adapted to meet the varying circumstances arising in the case or class of cases in which it was necessary to define them, so that the intent with which they were used might be accomplished. The purpose of the lawmaking body in using the words has always been allowed to have controlling weight in the decision of the meaning that should be attached to them, as may be seen by an examination of the number of cases cited in Words and Phrases, vol. 5, title 'Manufacture.' Keeping in mind, then, the purpose of this ordinance and the thought that the words should be given such meaning as was reasonably intended in their use, it must be at once manifest that, if this broad definition of Webster should be given to the words as used in this ordinance, there are few establishments, whether large or small, that are engaged in the business of converting material from one form into another, to make it more convenient or desirable for use, that would not be entitled to the benefit of the exemption. The baker, the blacksmith, the carpenter, the shoemaker, the confectioner, the merchant tailor, the milliner, the dressmaker, and scores of others, would escape taxation, although it seems quite obvious that it was not intended by the adoption of this ordinance to exempt from taxation the multitude of concerns that in some way or another are engaged in the business of changing the character of material from one form to another. To give the ordinance the construction contended for would defeat, in place of accomplish, the result intended in its adoption, which was to induce the location in the city of new manufacturing establishments, that would bring wealth into the city to increase its revenue when the period of exemption has passed, because the diminution in revenue by the exemption of the large class continually engaged in changing articles or material from one form to another would largely exceed the amount that might be produced as a result of the establishment of new manufacturing enterprises. Aside from this, it would work gross inequality in the system of taxation; for example, the merchant tailor and the shoemaker would be exempt from taxation, while their next-door neighbors, the clothing merchant and the dealer in shoes, would be taxed. So that, while conceding that under a liberal definition of the words the appellant company might be entitled to the exemption, we are sure that, when interpreted to carry out the legislative intent in granting the exemption, it does not bring itself within the fair or reasonable meaning of the ordinance, to the purpose of which reference would be constantly made in determining the class entitled to the favor of exemption. We may also with much propriety observe that it would not be either safe or judicious to attempt any more accurate definition of the words 'manufacturing establishments' than may be necessary to a decision of the

precise question before us. The meaning that should be given to these words may come up in other cases presenting entirely different states of fact, in which the meaning here ascribed to them would be both inappropriate and unjust, and therefore what we say upon the subject must be understood as referring directly to the question submitted in this record from our decision."

And again he said:

"Counsel for appellant undertakes to make a sound distinction between the business of a merchant tailor and the business the appellant company is engaged in. There is a difference in the amount of business they do and a difference in the manner of transacting it, but this is all. When a customer wishes to buy a suit of clothes from a merchant tailor, he goes to his place of business, selects the style of goods he wants, the tailor takes his measure, and manufactures, or makes, as you please, a suit of clothes for him out of the goods selected. When a man wishes to get a suit of clothes from the appellant company, in place of going to its business house, he goes to its agent, the country merchant, selects the kind of goods he wants, has the country merchant take his measure and send it to the appellant company, and it makes the suit of clothes as ordered. The merchant tailor probably has a dozen people employed in cutting and making clothes by hand and machine, while the appellant company claims to have 60 employes and a number of machines operated by electricity. Under this state of facts, if the appellant is entitled to the exemption, it would be clearly an unjustifiable discrimination to deny a like exemption to every merchant tailor in the city of Louisville, and, if the merchant tailor in the city were granted the exemption, no good reason could be assigned for not exempting all the milliners, all the dressmakers, all the bakers, all the confectioners, all the shoemakers, all the carpenters, and all the cabinet makers who have places of business in the city, and all other persons who are engaged in converting articles from one form into another; and yet we think it apparent that the most ardent champion of giving this ordinance a liberal construction would not think of extending it to embrace merchant tailors, dressmakers, milliners, and the like."

He cited the Louisiana ice cream case, and the court's decision in the laundry case, and also the decision of the Supreme Court of Montana in the case of *Montana v. Johnson*, 20 Mont. 367, 51 Pac. 820, involving the question whether a merchant tailor was a manufacturer. He quoted from the opinion in that case these words:

"A 'manufacturer' is one who makes or fabricates anything for use, and within the literal definition of 'manufacturer' would come a tailor who works clothes into suits for wear. So, too, a seamstress would be brought within such a definition, for she makes handkerchiefs from linen; and the carpenter, who takes raw lumber prepares it for building a house; and a milliner, who makes and sells bonnets; and a blacksmith, who makes horseshoes or forges iron; and the cook, who makes bread or other articles to use as food; and many other persons, whose pursuits in life demand the working of some materials into certain forms. * * * We know of no technical meaning to be given to the word 'manufacturer,' used in the statute, and it is our best judgment that it should be understood in its popular sense. We therefore would include among the manufacturers those who produce goods from a raw state by manual skill and labor, and goods which are commonly turned out of factories, and we would exclude a merchant tailor, who merely cuts and fashions a suit of clothes as ordered by a customer, from cloth purchased elsewhere, and kept to be made up as suits are ordered from him."

The decision of the Sixth Circuit Court of Appeals relied on is that of *City of Memphis v. St. Louis & S. F. R. Co.*, 183 Fed. 529, 106 C. C. A. 75. In that case it was held that the compress plant of a cotton company was not a "manufacturing plant" under a statute of Tennessee authorizing a railroad company to build lateral roads not ex-

ceeding 15 miles in length extending from their main stem or any branch "to any mill, quarry, mine, manufacturing plant or to the bank of any navigable stream."

Judge Sanford did not attempt to reason the matter out for himself, but viewed it from the standpoint of the decisions. Amongst the decisions cited and relied on were the two natural ice cases, one from Massachusetts and the other from New York, and the two coffee cases, one from Louisiana and the other from New York, the decision of Judge Blatchford in the hay case heretofore considered, and the first of the decisions of the Supreme Court of the United States to be hereafter considered. He said:

"While various definitions of the terms 'manufacture' and 'manufacturing plant' are given in the adjudged cases, making it difficult to frame an exact definition of the term 'manufacturing plant,' as defined by the unbroken weight of authority, the closest analogy to the precise question now under consideration is to be found in those decisions which hold that the cutting of natural ice on the surface of a pond into pieces of a convenient size for handling, and storing the pieces so cut in a building, is not a 'manufacture' within the meaning of the tax laws, the material being in no way changed, or adapted to any new or different use, but remaining ice, to be used simply as ice (*Hittinger v. Westford*, 135 Mass. 258, 262); that a corporation organized to collect, store, and preserve natural ice, prepare it for market, and transport and vend it, is not a manufacturing corporation within the meaning of the tax laws, its tools and conveniences being 'for convenience in handling and marketing a product, and not at all for making it.' (*People v. Knickerbocker Ice Co.*, 99 N. Y. 181, 183, 1 N. E. 669, 670); that a corporation engaged in roasting, mixing, and grinding coffee is not a manufacturing company within the meaning of the tax laws (*People v. Roberts*, 145 N. Y. 375, 40 N. E. 7; *City of New Orleans v. Coffee Co.*, 46 La. Ann. 86, 14 South. 502); that marble which has been cut into blocks simply for convenience in transportation is not a manufactured article within the meaning of the tariff laws (*United States v. Wilson*, 1 Hunt, Mer. Mag. 167, 28 Fed. Cas. 724); and that hay which has been pressed into bales ready for market is not a manufactured article within the meaning of the tariff laws, although labor has been expended in cutting and drying the grass and baling the hay (*Frazee v. Moffitt* [C. C.] 20 Blatchf. 267, 18 Fed. 584)—these last two cases, it is to be noted, being cited with approval in *Hartranft v. Wiegmann*, 121 U. S. 609, 615, 7 Sup. Ct. 1240, 30 L. Ed. 1012. And so it is held that the mere fact of the application of labor to an article, by hand or machinery, does not make it a manufactured article within the meaning of the tariff laws, unless the application of such labor effects some transformation in the character of the article and converts it into a new and different article, having a distinctive name, character, or use. *Hartranft v. Wiegmann*, 121 U. S. 609, 615, 7 Sup. Ct. 1240, 30 L. Ed. 1012; *Foppes v. Magone* (C. C.) 40 Fed. 570, 572; *United States v. Semmer* (C. C.) 41 Fed. 324, 326; *Baumgarten v. Magone* (C. C.) 50 Fed. 69, 71."

The two decisions of the Supreme Court cited and relied on by the respondents are the case of *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012, cited and relied on by Judge Sanford, and in several of the decisions from noncontrolling jurisdictions heretofore considered, and the recent case of *Anheuser-Busch Brewing Association v. United States*, 207 U. S. 556, 28 Sup. Ct. 204, 52 L. Ed. 336.

In the *Wiegmann Case* the question was whether certain articles were "manufactures of shells," made dutiable by a certain provision of the tariff laws, or "not manufactured" shells, made exempt from duty by another provision thereof. These articles were shells which

had been gathered in London from the seashore in all parts of the world and there subjected to a certain treatment, which altered them to a certain extent. In their natural condition the shells consisted of two or three layers. By the treatment all layers were removed except the inner one, which presented a pearly appearance, and in case of some of them, in addition, the Lord's Prayer or some motto was etched on them. In either condition they were used as ornaments, and in the former condition they were sold for the purpose of making buttons and handles to penknives out of them. It was held that in neither case were the articles "manufactures of shells." They were all "unmanufactured shells" Judge Blatchford, who decided the hay case before his elevation to the Supreme Bench, delivered the opinion of the court. He said:

"We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufactures, but were shells not manufactured, and fell under that designation in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a 'manufactured article,' within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In Schedule M of section 2504 of the Revised Statutes, page 475, 2d edition, a duty of 30 per cent. ad valorem is imposed on 'coral, cut or manufactured'; and in section 2505, page 484, 'coral, marine, unmanufactured,' is made exempt from duty. These provisions clearly imply that, but for the special provision imposing a duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it."

He cited four decisions in support of the conclusion reached. The first of these was his hay case. The third was the decision of the Supreme Court in the early case of *United States v. Potts*, 5 Cranch, 284, 3 L. Ed. 102, in which it was held that round copper plates, turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were not manufactured copper. In the fourth case, to wit, *United States v. Wilson*, 1 Hunt, Mer. Mag. 167, Fed. Cas. No. 16,736, Judge Betts, of the lower federal bench, had held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured.

The second case was the decision of the Supreme Court in the case of *Lawrence v. Allen*, 7 How. 785, 12 L. Ed. 914, which he states was to the effect that india rubber shoes, made in Brazil by simply allowing the sap of the india rubber tree to harden upon a mold, were a manufactured article, and that:

"Because it was capable of use in that shape as a shoe, and had been put into a new form, capable of use, and designed to be used in such form."

The Anheuser-Busch Brewing Association Case was what may be termed a drawback case. It arose under an act of Congress which

provided that, where imported materials on which duties had been paid were used in the manufacture of articles manufactured or produced in the United States, there should be allowed on the exportation of such articles a drawback, equal in amount to the duties paid on the materials used, less 1 per centum of such duties.

The association was engaged in the manufacture of beer at St. Louis and exporting it in large quantities from the United States in bottles duly corked by it with corks so as to preserve the beer. The corks which it so used had been imported by it from Spain, where they had been cut by hand to a size of over three-fourths of an inch in diameter, measured at the larger end. After being received in St. Louis, a careful selection was made from them of those fit for use, and those selected were assorted according to sizes and branded by unskilled labor. They were then put into a machine or air fan, and all dust, meal, bugs, and worms were removed therefrom. They were then thoroughly cleansed by washing and steaming, removing the tannin and germs, and making the cork safe and elastic, and made absolutely dry by exposure to blasts of air in a machine. Following this, they were put for a few seconds into a bath of glycerine and alcohol, which closed up all the seams, holes, and crevices, and gave the corks a coating. The corks were then dried by the absorption of the chemicals that covered them. This whole process took from one to three days; the longest part of it being the drying after the chemical bath. They were then taken to the bottling department, where they were again soaked or wetted by steaming them for a short time, so they would fit snugly and easily in the bottles. All of this was done by skilled labor. The object of the treatment was twofold—to prevent the beer from acquiring the taste of the cork, and to prevent the escape of the gases in the beer, the escape of which would render it flat. Either result happening would injure the market for the beer, and not otherwise could beer with safety be exported from the United States to foreign countries. The Brewing Association claimed that on the exportation of these corks in the bottles of beer it was entitled to the statutory drawback. The Supreme Court denied its right thereto. Mr. Justice McKenna said:

"In opposition to the judgment of the Court of Claims, counsel have submitted many definitions of 'manufacture,' both as a noun and a verb, which, however applicable to the cases in which they were used, would be, we think, extended too far if made to cover the treatment detailed in finding 3 or to the corks after treatment. The words of the statute are indeed so familiar in use and of meaning that they are confused attempts at definition. Their first sense as used is fabrication or composition. A new article is produced, of which the imported material constitutes an ingredient or part. When we go farther than this in explanation, we are involved in refinements and impracticable niceties. Manufacture implies a change, but every change is not manufacture, and yet every change is an article in the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U. S. 609 [7 Sup. Ct. 1240, 30 L. Ed. 1012]. There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.' This cannot be said of the corks in question. A cork put through the claimant's process is still a cork."

This completes the presentation of the decisions relied on by the respondents to support their contention. I have given, not only the point decided in each of them, but the reasoning and authorities upon which each was based. It will be noted that certain of the decisions coming from noncontrolling jurisdictions have been cited and relied on in those coming from controlling jurisdictions. The ice cream and coffee cases from Louisiana were cited by the Kentucky Court of Appeals in the laundry case; the natural ice cases from Massachusetts and New York, the coffee and slaughterhouse cases from New York, and Judge Blatchford's hay case were cited by the Sixth Circuit Court of Appeals in the compress case; and the hay case was cited by the Supreme Court in the shell case. This indorsement of these decisions coming from noncontrolling jurisdictions may be thought to give them more weight than they would otherwise have. It will be noted, further, that in no one of these decisions was it held that an establishment of the character of that involved here was not a manufacturing establishment, or that the owner or the operator thereof was not a manufacturer. The argument is that the cases involved in these decisions are analogous to this, and that it follows, therefore, from the fact that the persons as to whom the question was there whether they were manufacturers were not, that the bankrupt was. The reasoning on behalf of respondents is thus largely analogical. And it will be noted, further, that in each one of these decisions the reasoning by which it is upheld, if not entirely so, is almost entirely of the same character.

Respondents gather from these decisions that the mere application of labor to an article by means of machinery, however complicated, does not constitute the one applying it thereto a manufacturer, and from the coffee cases, one of them, the Louisiana case, approved by the Court of Appeals of Kentucky in the laundry case, and the other, the New York case, approved by the Sixth Circuit Court of Appeals in the compress case, that mere change in the color resulting therefrom does not constitute him such. But what they most emphasize is the epigrammatic formula found in the hay, the shell, and the cork cases, varied in each to suit its particular character. In the hay case Judge Blatchford said, they say, that hay is not a manufactured article because it "is still grass," and in the shell case that the articles there involved were not manufactures of shells because "they were still shells," and in the cork case Judge McKenna said that a cork put through the brewing company's process was not a manufactured article because it "is still a cork." As the cherries here, after being treated by the bankrupt, were still cherries, they maintain that, because of this formula, the bankrupt was not a manufacturer, and its establishment was not a manufacturing establishment. They urge that the bankrupt's business was that of fruit preserving. It characterized itself as a fruit preserver on its letter heads, and in its articles of incorporation it is stated that it was formed for the purpose of "buying, selling, dealing, preserving, and packing fruits, vegetables, fruit products, and similar articles." They cite no case involving the question as to whether a fruit preserver is a manufacturer, but refer to two dicta, which they

claim are to that effect. One is the dried apple illustration of Judge Blatchford in the hay case. He said that:

"Dried apples would not be called manufactured article, though the apple is peeled, and cored, and sliced, and dried by exposure to the sun and manipulation."

The other is a statement of Mr. Justice Brown in the case of Schlitz Brewing Co. v. United States, 181 U. S. 584, 589, 21 Sup. Ct. 740, 45 L. Ed. 1013, to the effect, as they put it, that canning fruits and vegetables by a process that requires them "to be incased" does not constitute manufacture. Such, then, I understand to be the line of respondents' argument. I think I have made a full and fair presentation of it. It must be conceded that it is quite formidable, and that he who undertakes to meet it has somewhat of a task before him. It is in order now to test its soundness.

Before coming to close quarters with it, some preliminary observations and queries are not out of place. The first observation I would make is that the subject now in hand is a large one. That subject may be stated to be: Who is a manufacturer, within the meaning of legislation favoring manufacturers in the way of exempting them from taxation or payment of duties, or providing for facilities to do business, or favoring their employes or persons furnishing materials or supplies, in way of giving them a lien or priority? I take it that, within the meaning of legislation of the latter character, he is a manufacturer who is such within the meaning of legislation of the former. Hence I class the two kinds of legislation together. I take it, also, that the words "manufactured article," when used in such legislation, mean an article manufactured by one who is a manufacturer within the meaning thereof, and that the word "manufactory," or the words "manufacturing establishment" or "manufacturing plant," so used, mean a place where articles are manufactured by one who is a manufacturer within such meaning. Hence I limit the subject to a consideration of who is a manufacturer within the meaning of such legislation. I am not concerned with the meaning, in other connections, of the verb "to manufacture," or the noun "manufacture," or the participial adjective "manufacturing."

There is a note to the case of Williams v. Park, 72 N. H. 305, 56 Atl. 463, as reported in 64 L. R. A. 33, dealing with the question as to what are manufacturing corporations within the meaning of taxation laws, which covers 37 pages, many of them full pages, of small print, in double columns, in which several hundred cases are referred to. The subject is not only a large one, but there is considerable conflict in the decisions having to do with particular phases of it, and there is not a little confusion of thought in regard to it. The author of the note referred to says "the decisions contain many anomalies." He instances some of them by asking these questions:

"Why is cutting up trees into blocks of kindling wood for use in furnaces manufacturing, while cutting up ice into blocks for use in refrigerators is not? Why is making biscuits manufacturing, while making bread or ice cream is not? Why is printing and publishing books and magazines manufacturing, while printing and publishing newspapers is not? Why is putting the parts of a fountain pen together manufacturing, while the putting of the parts of

a cask together is not? Why should the dried sap of the caoutchouc tree, if collected around a shoe last, be a manufactured article, while grass dried into hay is not?"

He adds:

"Many similar questions arise in one's mind, and find no answer when the cases are read together."

In view of this situation, the whole subject calls for fresh treatment from the ground up, so as to bring order out of chaos. Such treatment would call for a consideration of each case where the question had been involved and much reflection. Want of time prevents my giving such a treatment to the subject, and I do not feel that the necessities of this case require that I should do so; but the failure to do so, whilst I do not think it will affect the correctness of the conclusion reached, may be responsible for possible crudities which I may be guilty of in the course of the discussion. The ideas which I have are the result of reflection upon the decisions already considered and a few others.

[1] The next observation which I would make is that whether one is a manufacturer is to be determined by what is his principal business, and not by what are mere incidents to it. In the New York slaughterhouse case Judge Martin noted that the fertilizer which was made at such an establishment might be regarded as a manufactured article, but held that this fact did not affect the character of the operator's occupation, because the making of fertilizer was not the "principal business" in which he was engaged, but was a "mere incident" to it. In the case of *In re Chandler*, Fed. Cas. No. 2,591, Judge Lowell gave two reasons for saying that a farmer, who made cider or cheese, was not a manufacturer. One was that:

"The making is one merely incidental to the cultivation of his land, like curing hay, etc."

No doubt many other cases can be found where a similar position has been taken.

The final observation which I would make is that, in determining who is a manufacturer within such meaning, we should not limit ourselves to the grammatical meaning. This is so because the word, in the course of time, has taken on more than its grammatical, or more specifically its etymological, meaning. Etymologically it means one who makes something by hand. It is now not so limited to one who makes by hand. It at least includes one who makes by machinery. Common usage has given at least this additional significance to it. In the case of *Lawrence v. Allen*, *supra*, Mr. Justice Woodbury said:

"Going to more technical definitions and to first principles, such a process to make the shoe is making an article by the hand, which was once the literal meaning of the word 'manufacture,' or 'manu factum,' and in the more modern idea attached to the word it is making an article, either by hand or machinery, into a new form, capable of being used, and designed to be used, in ordinary life."

And in the case of *Tidewater Oil Co. v. United States*, 171 U. S. 210, 18 Sup. Ct. 837, 43 L. Ed. 139, Mr. Justice Brown said:

"The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but as machinery has largely

supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product."

The queries which I would put are these: In the first place, is one who simply makes by hand ever a "manufacturer" within the meaning of such legislation? Is it not essential that he be a maker by machinery to a more or less extent in order that he come within its meaning? Again, to this end, is it or not essential that he be a maker on a considerable scale? If so, this of itself would seem to exclude a maker by hand, as the one who makes by hand cannot make on a considerable scale. I find an indication that this is essential in two old cases coming from the lower federal bench. In the case of *Schrieffer v. Wood*, Fed. Cas. No. 12,481, Judge Hall, in explaining why it is "that we do not ordinarily call a wood-sawer a manufacturer, and that we do not usually term a miller, who simply grinds corn in his mill, a manufacturer," gives as one reason therefor that "their operations are usually quite limited." He said further:

"We do not ordinarily apply the term 'manufacturer' to one whose operations are as limited as those of a wood-sawer; but, when great quantities of salable articles are produced, even by a single operation of a very simple machine, we frequently, if not ordinarily, speak of the operation as a manufacture. When large quantities of kindling wood are made by splitting blocks of wood by machinery adapted to that special purpose, we do not hesitate to speak of it as a 'manufacture of kindling wood,' and an establishment where very large quantities of bone dust are produced by grinding by machinery would, by many in ordinary conversation, be termed a 'manufactory of bone dust.'"

And in the *Chandler Case*, *supra*, Judge Lowell said:

"One who works up lumber on a considerable scale is popularly called a 'manufacturer' of that article, and such lumber is spoken of as 'manufactured' in our tariff acts and treasury regulations, and in the lately repealed [reciprocity] treaty regulating commerce with Canada."

The lumber in that case came from the land of the operator of the sawmill, and it was in answer to the suggestion in argument that it was like the case of a farmer making cider or cheese that he gave two reasons, one of which has already been quoted. The other is in these words:

"These products, when made by the farmer exclusively from his own farm, are not usually made on so large a scale as to be called a 'manufacture,' as the word is now commonly used."

Still again, is it sufficient for the person in question to be a maker of things with the making of which machinery had a part, more or less, to do, and that on a considerable scale? Is it not essential that he be a seller of the things which he makes? Is not the word used in contrast to the word "merchant," "trader," or "dealer"? The latter sells what he buys. Does not the manufacturer sell what he makes at least from what he buys? Ordinarily, at least, he must be a seller; for in the very nature of things he cannot keep making things. It is essential for him to sell the things which he makes to keep going.

In *Norris v. Com.*, 27 Pa. 495, the word "dealer" was thus defined:

"A dealer, in the popular and therefore in the statutory sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again.

He stands intermediately between the producer and the consumer, and depends for his profits, not upon the labor he bestows on his commodities, but upon the skill and foresight with which he watches the markets."

This definition is quoted in note to 21 Ann. Cas. 78, and it is then said:

"The term 'dealers,' when used in a statute to describe persons who shall pay a tax, does not include manufacturers who sell only their own manufactures. Every manufacturer must sell his wares; but he is not for that reason to be classed as a dealer in such goods."

Reference is then made to the case of *Harms v. Parsons*, 32 Beav. 328, in which Sir John Romilly, Master of the Rolls, held that one engaged in the business of a horsehair manufacturer, who sold his business to another and agreed with him not thereafter to carry on the "business of a horsehair manufacturer," breached his agreement by buying and selling manufactured horsehair. And in the case of *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 166, 38 N. E. 990, Judge Andrews said:

"Without the power of sale, the business of production could not be carried on. The power to sell is an indispensable adjunct to a manufacturing business."

It is in this connection particularly that I would limit the subject in hand to who is a manufacturer within the meaning of such legislation; for the noun "manufacture" may be used in connection where it means no more than making, as, for instance, in the case of *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346, the Iowa statute involved therein provided that "no person shall manufacture or sell," and Mr. Justice Lamar said:

"The conjunction is disjunctive. The sale is forbidden, the manufacture is forbidden, and each is forbidden independently of the other."

And again he said:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The function of commerce is different. The buying and selling and the transportation incidental thereto constitute commerce."

And in the case of *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, Mr. Chief Justice Fuller said:

"Commerce succeeds to manufacture, and is not a part of it."

Here undoubtedly the word "manufacture" is confined solely to making. It is in view of these expressions that I have expressly limited the subject under consideration as above. And the query that I am now putting is whether, invariably, in such connection, a manufacturer is one who is a seller of what he makes?

This suggests the additional query whether he is not also a buyer of that out of which he makes what he sells. Here one runs counter to decisions where this is not recognized as an element of the term. As for instance, in the *Chandler Case*, already twice referred to, a lawyer, who had quit the practice of the law and gone to operating a steam

sawmill, soon thereafter landed in bankruptcy. The lumber from which he made boards and shingles came from his own land. The question was whether he was a manufacturer. It was held he was. Judge Lowell began his opinion with this question:

"I am disposed to agree with the argument of the defendant's counsel that one cannot be a trader unless he buys, as well as sells; but is not Mr. Chandler a manufacturer?"

The presupposition of the question seems to be that, for one to be a manufacturer, he must sell, and the answer was that he need not buy as well as sell. He said:

"The fact that the manufacturer uses only lumber which he grows himself does not appear to be material."

In my investigation I have run across other cases where this same position is taken, but I cannot lay my hand on them.

This leads up to two other queries. Though it is not necessary, in order for one to be a manufacturer, that he should buy that out of which he makes, is it or not essential that what he makes be made out of what Mr. Justice Lamar, in the quotation made above from his opinion in the case of *Kidd v. Pearson*, calls "raw materials," which pass into what is made? In the quotation from the opinion of Judge Bartlett in the New York coffee case, made above, occurs this reference to Webster's definition of the word "manufacture":

"Mr. Webster defines 'manufacture' to be anything made from raw materials by the hand, by machinery, or by art, as clothes, iron utensils, shoes, machinery, saddlery, etc."

And in the case of *Schriefer v. Wood*, *supra*, Judge Hall makes this reference to the definitions of the word "manufacture" as given in the dictionaries:

"Among the definitions given by Webster, are: (1) 'The operation of reducing raw materials of any kind into a form suitable for use, by hand, by art, or by machinery;' (2) 'anything made from raw materials by the hand, by art, or by machinery;' (3) 'to make or fabricate from raw materials by the hand, by art, or by machinery, and work into forms convenient for use;' (4) 'to work raw materials into suitable forms for use.' Worcester has the same definitions, in substance; and similar definitions are found in other dictionaries."

In each of these definitions the words "raw materials" figure. It is this question which is involved in the conflict of the courts as to whether an electric plant is a manufacturing establishment or not. The Court of Appeals of New York holds that it is; but the Supreme Courts of Maryland and New Hampshire hold that it is not. In the case of *Williams v. Park*, *supra*, Judge Chase said:

"'Manufacturing,' then, in the present statute, is used in the sense of working materials into a fabric or structure for use, as, for example, cotton into cloth, iron into tools, wood into carriages, etc. This is the ordinary meaning of the word, and, independently of the light thrown upon it by the history of the statute, would be regarded as the meaning which the Legislature attached to it. The question then resolves itself into this: Whether the collection and distribution of electricity, for purposes of power and light, are manufacturing within the sense of the word? Machinery and manual labor are required in the process, but this fact alone does not bring it within the meaning of the word. The product of the machinery and labor must be a fabric or structure made from materials of some kind."

The final query is, if it is essential that what is made be made out of materials or raw materials, must such materials or raw materials be dead? This question is involved in the question as to whether the operator of a slaughterhouse is a manufacturer.

The necessities of this case do not require that I make answer to either of these queries. The bankrupt used machinery in its establishment to produce the articles produced; it produced on a considerable scale; it was a seller of what it produced from dead materials bought by it. It follows from this that neither one of these queries is directly involved herein, and it is for this reason that the necessities of the case do not require that I take position as to either. The only question involved herein, therefore, is whether the bankrupt was a maker. In order for it to have been a manufacturer, it is essential that it was a maker. Whatever meaning, in addition to its etymological meaning, common usage has given to the word "manufacturer," or is attached to it when used in legislation of the kind heretofore referred to, the idea of being a maker has not been eliminated therefrom. The discussion, then, has brought us up to and centered in this question, whether the bankrupt was a maker. If it was, it was a manufacturer. If it was not, it was not a manufacturer. And the question whether it was is a philosophical or logical one.

In disposing of it, the bearing thereon of the decisions relied on by respondents should first be determined, and then the matter should be treated independently of them. By the bearing of those decisions on this question I mean the bearing of the point decided in each one of them; i. e., that the person there in question was not a manufacturer. The bearing thereon of those decisions depends on whether the cases in which they were rendered are truly analogous to that in hand. In so far as they had features not found here, which called for the decision rendered, they are not analogous.

Such of those cases as involved directly any of the queries which I have put are not true analogies, if the query there involved should be answered in the affirmative; for none of those queries are involved here. Such an answer of itself necessitated the decision that the person in question was not a manufacturer. Hence there was no call to pass on the question whether he was a maker, the only question involved here. The New York slaughterhouse case, for instance, involved the query whether, for one to be a manufacturer, he must make from dead materials. If he does, then on this ground alone the New England Dressed Meat & Wool Company was not a manufacturing corporation, and it was properly so held. In this contingency the case did not necessarily involve the question whether that company was a maker.

Again, the Kentucky laundry and the Sixth Circuit Court of Appeals compress cases each involved the query whether, for one to be a manufacturer, he must be a seller of what he makes. In neither case was the person in question a seller. In each he performed a service for another; in one he laundered clothes; in the other he compressed cotton. If, then, for one to be a manufacturer, he must be a seller of what he makes, in neither case was the person in ques-

tion a manufacturer, and it was properly so held. In this contingency neither case necessarily involved the question whether the person in question was a maker. With these cases must be classed certain of the analogies relied on in certain of the other cases. The ginning cotton and threshing wheat analogies mentioned by Judge Blatchford in the hay case, and the scouring wool analogy, mentioned by him in the shell case, are similar in this particular to the laundry and compress cases. In each of these analogies a service is performed by one for another. There is no selling. To the same class may be said to belong analogies where, in connection with the performance of service, title to property passes from the one to the other. Such is the case of a contractor, who undertakes to erect a building for another, furnishing all the materials. No doubt the shipbuilding analogy, referred to in the Louisiana coffee case, belongs here. Such a contractor is not regarded as a seller. If, then, that he be a seller is an essential characteristic of a manufacturer, not one of these instances is a true analogy to the case in hand, where the bankrupt was a seller. Those three cases, to wit, the slaughterhouse, the laundry, and the compress cases, therefore, conditionally, at least, do not have any bearing here; the condition being that the queries which they involved call for an affirmative answer.

The Louisiana ice cream case also has no bearing conditionally; the condition here being that the person there in question was a confectioner, and his production of ice cream was a mere incident to his business of a confectioner, as no one is a manufacturer unless that as to which alone he can be said to be a manufacturer is his principal business, and not an incident thereto, and such was not the case here. I am not in position to say as to what is the truth as to this, as I do not have the full case before me. All I know of it is what I gather from counsel's briefs. But the analogy relied on in the quotation given from the opinion therein, which seems to have influenced the decision, to wit, that of the mammoth kitchen of the Grand Union Hotel at Saratoga, indicates that such was the fact. However, the same illustration was used by the same court in the later coffee case, and the production of coffee there seems to have been, not only the principal, but the only, business of the producer. It is to be noted in connection with this analogy that in the ice cream case its application was made to hang on the circumstance that no one visiting the kitchen would "magnify the cooks and pastrymen into manufacturers"; but the court in the coffee case, in referring to the use which it had made of the analogy in the earlier case, remarked that it had there said "that the mammoth kitchen of a hotel is not a manufactory." That resort should have been made to such an analogy, and such use made of it, indicates the confusion of thought under which the court was laboring. Of course, the mammoth kitchen of the Grand Union Hotel at Saratoga, or of any other great hotel, is not a manufactory, but not because they do not make things in it, but because the kitchen is a mere incident to the business of running a hotel, and the word "manufactory" is never applied to what is a mere incident. For this reason, and the additional one that the term is never applied to the employés in what is properly called a manufactory, the cooks and pastrymen in

such kitchen are never termed manufacturers. This consideration is sufficient to render Judge Blatchford's hay case without bearing absolutely. A sufficient reason for holding that hay is not a manufactured article is that it is produced by a farmer, and the production of hay is simply an incident to the business of farming. It was on this ground that Judge Lowell, in the Chandler Case, put it that a farmer was not a manufacturer from the fact that he cured hay.

The decisions in certain of the other cases are without bearing absolutely, but for a different reason. This is so of the decisions in the two natural ice cases. The ground of their being without bearing is that in connection with the handling of natural ice there is no making, and, of course, where there is no making, there is no maker. The existence of natural ice is due to nature, over whose forces in producing it the handler thereof exercises no control. All that he does is to change the place and manner of its existence after it is produced. He removes it from the pond, river, or lake to the icehouse, and thence to the consumer, and in so doing he divides it up into separate parcels. Altering the conditions of existence of a substance does not constitute making. As well put by Judge Colburn in the Massachusetts case, such treatment of natural ice is no more a making than the putting of water from a pond into casks for transportation, and he properly classed it with mining coal; the only difference being that coal is a permanent formation until dug, and ice is a temporary one.

It has always been held that mining in all its forms is not manufacturing, and no doubt for this reason Judge Betts' decision in the marble case cited by Mr. Justice Blatchford in the shell case belongs here, for quarrying stone is a species of mining. On this ground the compress case and the ginning cotton, threshing wheat, and scouring wool analogies referred to by Judge Blatchford in the hay and shell cases, which, for another reason, I have said are without bearing conditionally, are so absolutely. In such cases there is no making save in what nature has done before the doing of that which alone can constitute the person in question a manufacturer. In what he does he does not make. He simply changes the conditions of existence. The compressor presses the cotton together, the ginner separates the hulls and seeds from the cotton, the thresher separates the wheat from the straw, and the wool scourer cleanses the wool. And on this ground the laundry case, which, for another reason, I have said is without bearing conditionally, is so absolutely. In laundering there is no making in what the launderer does, and hence he is not a maker. The handler of natural ice, the miner, the compressor, the ginner, the thresher, the wool scourer, and the launderer, therefore, are essentially alike in this: That in what each does there is no change in the thing with which he has to do, such change as there is being limited to its condition of existence, and hence no making, and neither is a maker. Neither, therefore, is a true analogy to the bankrupt, because in the matter of coloring, sweetening, cooking, and flavoring a change was made in the thing with which it had to do.

I am not now considering whether such change is sufficient to constitute the bankrupt a maker. That will be considered later. I am merely noting that this difference between those instances and this

renders them without bearing on the question whether the bankrupt was a maker, and that absolutely. I have already noted that the decision in the hay case is without such bearing, because curing hay is a mere incident to the farmer's business. There is an additional reason for this position in the fact that in what the farmer does in curing hay is no making. Judge Blatchford seems to have been of the view that in the change from grass to hay there was no making at all. I will deal with this later. But assuming that he is wrong in this view, and that there is a making in such change, it is nature and not the farmer that makes the change, and hence the farmer cannot be said to be a maker, notwithstanding the adage of making hay while the sun shines. He simply manipulates the grass, so that nature can do her work better. He does not manipulate the forces which are the efficient cause of grass becoming hay. Judge Colburn, in the Massachusetts natural ice case, had the true idea of the matter when he classed hay harvesting and ice harvesting together. There is, however, a difference between the two. In each case, so far as there is a making, it is nature which does the making. The farmer in the one case and the ice man in the other do not make; but the former takes a hand during the process of making, whereas the latter does not do so until that process is completed. In this case the changes in the matter of coloring, sweetening, cooking, and flavoring, as to which it remains to be determined whether it was a making, and constituted the bankrupt a maker, was due to its agency alone.

So far, then, I have reached the conclusion that the natural ice, hay, compress, and laundry decisions are without hearing absolutely, and the slaughterhouse and ice cream decisions are so conditionally. There are reasons for thinking the decisions of the United States Supreme Court in the shell and cork cases are without bearing absolutely; but, as I desire to dispose of all the other decisions relied on before taking them up, I pass them by for the present. As to the slaughterhouse and ice cream decisions, I will assume that they have bearing, because I am not prepared to answer the query involved in the one case in the affirmative, and I am not sure that in the other the production of ice cream was not the principal business of the person as to whom the question was there whether he was a manufacturer. Apart from the decisions in the shell and cork cases, the following will be accepted as having bearing, to wit: The ice cream, the two coffee, the slaughterhouse, and the tailoring decisions. The last one, to wit, the tailoring decision, is the only one coming from a controlling jurisdiction, to wit, the Kentucky Court of Appeals.

Now, a word or two as to the standing of these decisions, in view of the reasoning on which they are severally based. That of the Louisiana ice cream decision is seriously affected by the consideration that it was distinctly based on the mammoth kitchen analogy, which was without bearing absolutely, except on the ground that the making of ice cream was an incident, which does not clearly appear, and that no point was made of this feature. The Louisiana coffee decision was based, not only on this same analogy, but the analogies of mining and shipbuilding, between none of which and the case in hand was there

the slightest resemblance. Its standing is further affected by the attempt to distinguish the case from the rice miller case, between which cases I find it very difficult to see any distinction. It is in this jurisdiction that one of the anomalies referred to by the author of the note to *Williams v. Park*, supra, is to be found.

In the case of *State v. Eckendorf*, 46 La. Ann. 131, 14 South. 518, that court held that a baker of bread was not a manufacturer; and in the case of *State v. Am. Biscuit Mfg. Co.*, 47 La. Ann. 160, 16 South. 750, it held that a corporation making biscuits, crackers, and Italian, fancy, and soup pastes out of flour was a manufacturer. I do not have the cases before me. Possibly the baker of bread did not do so on a sufficiently large scale to be called a manufacturer. The decisions in the ice cream and coffee cases can hardly stand against the later decision of that court in the case of *State v. Am. Sugar Refining Co.*, 108 La. 603, 32 South. 965, where it held that refining raw sugar and crude molasses was manufacturing, overruling an earlier decision that it was not in the case of *State v. American Sugar Refining Company*, 51 La. Ann. 562, 25 South. 447. The decisions of that court show that it has been much befuddled as to what is necessary to make one a manufacturer.

The New York coffee case differed from the Louisiana coffee case, in that in the latter all that was done was to roast green coffees, the effect of which was not to change the form, but the color and internal structure, whereas in the latter, in addition to this, the coffee so roasted was ground and different kinds of coffee were mixed together, forming a combination article. There is little or no reasoning in Judge Bartlett's opinion. It may be said to be wholly magisterial. The only thing in it which can be called reasoning is the statement that for one to be a manufacturer he must produce a new article, which is undoubtedly sound. But it is difficult to make out that the result of the process involved therein was not a new article. Certainly the ground coffee was not the same article as the green coffee bean that was subjected to the process. If it was not the same article, it must have been a new one. Other than this he contented himself with saying, in one place, "We think it very clear," and in another, "It is quite apparent," that the defendant was not a manufacturing corporation, and citing the decision in the shell case from the Supreme Court of the United States, and its previous decision in the natural ice case, heretofore considered, in support of the conclusion reached. When we come to consider the former decision, it will appear how pertinent it was to the case then in hand; and from what we have said as to the latter, it is certain that it was not "in a mile thereof," to use the language of a learned judge.

As to the New York slaughterhouse decision, these things are to be noted. The Appellate Division, from which the case was taken to the Court of Appeals of New York, held that the operator of the slaughterhouse was a manufacturing corporation. As in the coffee decision, the conclusion of the court was not the result of any substantial reasoning. It was nearly a mere fiat. The court began by saying that it thought, and ended by saying that it was clearly of the

opinion, that the operator thereof was not a manufacturing corporation. Confusion of thought is shown in this sentence:

"The business conducted by the relator was obviously that of purchasing, slaughtering, and selling sheep and lambs."

It would have been more correct to say that its business was that of purchasing and slaughtering sheep and lambs, and selling mutton and lamb. The Supreme Court of Ohio, in the case of *Engle v. Sohn*, 41 Ohio St. 691, 52 Am. Rep. 103, reversing its earlier decision in the case of *Jackson v. State*, 15 Ohio, 652, held that the business of purchasing and slaughtering hogs, and packing pork, producing lard, and curing hams and bacon, was manufacturing. I see no room on principle for holding that such business is not manufacturing, save the one I have suggested that the word "manufacturer" relates only to one who makes from dead material.

This brings me to the very recent decision of the Kentucky Court of Appeals in the tailoring case. It is somewhat difficult to determine the exact basis of the decision. There are some things about it which are reasonably certain. Judge Carroll was of the opinion that, in determining who is a manufacturer or what is a manufacturing establishment, within the meaning of favoring legislation of the character heretofore described, the dictionary meaning is not controlling—that they have a more limited signification in such legislation. It was such a thought as this which led me to put the several queries hereinbefore set forth. In no dictionary definitions is the idea of making on a considerable scale, or selling what he makes, embraced. The fact that it is favoring legislation tends to the position that it was not intended to embrace every maker. Again, it is certain that the ground of the decision was not that the tailoring company was not a maker; the only possible ground upon which it can have bearing here. It was admitted that what it did came within the dictionary meaning, the fundamental idea in which is that of a maker.

The real basis of the decision seems to have been a fear of the consequence of holding that the tailoring company was a manufacturer and its establishment a manufacturing establishment. It was thought that, if its claim to exemption were sustained, it would be "an unjustifiable discrimination to deny a like exemption to every merchant tailor in the city of Louisville," and that, "if the merchant tailors in the city were granted the exemption, no good reason could be assigned for not exempting all the milliners, all the dressmakers, all the bakers, all the confectioners, all the shoemakers, all the carpenters, and all the cabinet makers who have places of business in the city, and all other persons who are engaged in converting articles from one form to another." It is not unlikely that, if there had been "scorn of consequence," the decision would have been different.

But this consequence would not necessarily follow from a holding that the tailoring company came within the ordinance. There was a difference between it and all these others, which was not noticed. That difference was that it may be said that it made on a considerable scale, and they did not. It is stated that the company had 60 employes and a number of machines operated by electricity, whereas a

merchant tailor would have no more than 12 making by hand and machine. And possibly another difference between it and some of the cases referred to was that the makers were not sellers also.

The final remark which I would make on the case is that Judge Carroll cautioned against the use of the decision as an authority in other cases not exactly like it. He said:

"The meaning that should be given to these words may come up in other cases presenting entirely different states of fact, in which the meaning here ascribed to them would be both inappropriate and unjust, and therefore what we say upon the subject must be understood as referring directly to the question submitted in this record for our decision."

So much, then, as to the standing or weight of these decisions. I frankly concede that if the producer of ice cream, or of unground roasted coffee, or of ground roasted coffee, or of mutton and lamb, or of clothes, is not a maker, then the bankrupt was not, and it was not a manufacturer, or its establishment a manufacturing establishment. But the reasoning on which they are severally based is faulty.

This brings me to a consideration of the two decisions of the Supreme Court of the United States, which, of all of the decisions relied on by the respondents, are probably most in the way of holding against their contention.

The opinion in the shell case was delivered by Mr. Justice Blatchford, who, just before his elevation to the Supreme Bench, had decided the hay case. The epigrammatic formula made use of by him in the shell case, and repeated by Mr. Justice McKenna in the cork case, had its origin in the hay case. In view of this, before taking up the shell and cork cases, the feature of that case, which was passed in our former consideration thereof, should be dealt with. As heretofore noted, it was held therein that baled hay is not a manufactured article. Undoubtedly this decision was sound. Apart from the fact of baling, it was not such on the two grounds heretofore set forth; one being that the curing of hay is a mere incident to a farmer's business, and the other that, though the change from grass to hay is a making, it is nature, and not the farmer, which brings this about. He merely disposes the grass so that nature may do her work better. Its baling does not constitute it a manufactured article, because in baling there is no making; the change which is thereby brought about being simply a change in the condition of the hay's existence, just like, in the compress case, we found that pressing cotton into bales is not making. But Mr. Justice Blatchford did not place the decision on either ground. He placed it on the ground that at no stage in the production of baled hay is there a making. He said:

"Cotton and grains are the same articles they were when on the plant with its roots in the ground. So hay is the same article as it was when it was stalks of grass with roots in the earth. It is dried, to be sure; but the drying, and any conversion of starch into sugar, are mere incidents of the cutting, to enable it to be stored for food in latitudes where grass cannot be found the year round."

What is here said as to hay, I submit, is not sound. Hay is not still grass. Hay is hay, and grass is grass. Hay is different from grass in color, structure, and name. That Judge Blatchford realized

that he was perhaps putting the matter too strongly appears from his putting it less strongly when, after referring to the dried apple analogy, he said:

"The substance of dried grass or hay is still grass."

What, then, is the bearing of the decisions in the shell and cork cases on the question whether the bankrupt was a maker? And what is to be said as to the validity of the reasoning on which they are severally based, in so far as they have bearing? To determine these matters as to the shell case, it is important to note what was the exact point decided therein. It was that the "Lord's prayers" "Turk's caps," "magpies," and other articles therein involved, were not "manufactures of shells," but were "not manufactured shells." It was not decided therein that they were not manufactured articles, unless the question whether they were was involved in determining whether they were "manufactures of shells," or "not manufactured shells." If I knew just what a "manufacture of shells," within the meaning of the tariff act there involved, was, I would be in a better position to determine whether the decision involved this subordinate question; but I do not know. The opinion contains not the slightest hint of what it is. It simply holds that the articles there involved were not "manufactures of shells," but were "not manufactured shells." If the preposition "of" in the first phrase was used in its privative sense—i. e., in the sense of away from, or as denoting absence or nonexistence, in which case the meaning of the phrase would be manufactures from shells, and would cover articles in which the shells have lost their identity—then the decision that those articles were not manufactured shells did not involve the question whether they were manufactured articles—i. e., articles which had been made, which owed their existence to a maker. Or, if that preposition was used in its causal sense, according to which the meaning of the phrase was artificial shells—i. e., shells that had been made by the act of man, and not by nature—then also the decision that those articles were not manufactures of shells did not involve the question whether they were manufactured articles.

And it is only in the event that the decision did involve this subordinate question that it can have any bearing on the question whether the bankrupt was a maker. But in view of Judøe Blatchford's statement, in the course of his argument, that the application of labor to an article "does not necessarily make the article a manufactured article, within the meaning of that term as used in the tariff laws," and his further statement that the provisions thereof as to coral, imposing a duty on "cut or manufactured" coral, implied that, in the absence of a duty on "cut" coral expressly, such coral "would not be regarded as a manufactured article, although labor was employed in cutting it," it may be thought that he regarded the question before him to be whether those articles were manufactured articles. I will assume that he so regarded it, and that such was the question therein. Of course, if that is so, the case does have a direct bearing on the question as to whether the bankrupt was a maker. But, on this assumption, what is to be said as to its correctness and that of the reasoning on which it is based? I am not now concerned with the question as to whether I am

bound to follow it. That will come later. It was not an aid to coming to the conclusion thus assumed to have emphasized, as Judge Blatchford did, the thought that the mere application of labor to an article does not cause it to be a manufactured article. That is a truism, mention of which was more likely to confuse than to enlighten. It did not follow therefrom that the article in question was not a manufactured article. The question in such cases always is whether the result of application of labor to the article in question therein is manufactured articles; i. e., articles of which it can be truly said that they have been made. Such may or may not be the result thereof. And it is upon that question that attention should be concentrated. The substance, if not the whole, of Judge Blatchford's argument, apart from the analogies relied on, is to be found in two sentences, the first of which I have characterized as an epigrammatic formula. They are:

"They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell."

The statement that the articles there involved were still shells should be pressed hard to see just what it can be made to mean. It may mean that they were still parts of the original shells; i. e., that the labor which had been applied to them had not changed them from so being. In this sense the statement may be taken as true. But it may mean that those articles were the same things which they had been before labor was applied to them; i. e., in Judge Blatchford's language, they were not new and different articles. In this sense I respectfully submit that the statement was not true. Those articles were not the same thing which they had been before labor was applied to them. Not being the same, it necessarily followed that they were new and different articles. And they were new and different, in that they had a distinctive name, character, and use from that of shells. They were called "Lord's prayers," "Turk's caps," "magpies," etc., whereas before they were simply called "shells." They were only parts of shells, beautified and ornamented; whereas before they were as nature had made them. They were used as ornaments, and to make pen knives and buttons; whereas before they were put to no use. If, then, the decision is to be taken as holding that those articles were not manufactured articles, so much of the reasoning on which it was based is faulty. So much of it as relied on certain analogies is equally so. Scouring wool and ginning cotton does not result in manufactured articles, because, as we have shown, in the application of such labor to wool and cotton there is no change in them, and hence no making. Wool and cotton thereafter are the same articles which they were before. The sole effect of the application of such labor thereto is to change the conditions of their existence. They are merely separated from the substance in connection with which they have previously existed. I am not sufficiently posted as to what cut coral is to attempt a criticism of this analogy. The baled hay analogy, from what I have already said, was not pertinent, nor was the marble blocks analogy. In the latter there is no change in the marble, and hence no making, in connection with cutting the marble into blocks. That is a species of

mining. In the former, though there is a change from grass to hay, and hence a making in connection with curing the hay, the farmer is not the efficient cause of the change or making, and, in so far he renders aid, that is an incident to his business as a farmer. I am not quite sure that I understand the copper plate analogy. It was held in the case involving it that round copper plates, turned up and raised at the edges, were not manufactured copper. If by manufactured copper was meant articles manufactured out of copper, I cannot see its pertinency. The only other analogy, to wit, that of the india rubber shoes, favored the holding that the articles in question therein were manufactured articles. By the efficient activity of the person, as to whom the question was whether he was a manufacturer, the sap of the india rubber tree had been changed into india rubber shoes. So, in the shell case, by the efficient activity of that person the natural shells had been changed into those articles. The change was not so great, yet it was a distinct change. For these reasons, therefore, I am driven to the conclusion that, on the assumption that what was decided therein was that the articles in question were not manufactured articles, the decision cannot stand criticism. The case has been pretty frequently interpreted as so deciding; i. e., that in the production of those articles there was no making, and the producer thereof was not a maker, and it has been much cited. It was cited in the two coffee cases herein criticised, where it was evidently so interpreted; and I am much persuaded that it is responsible for much confusion of thought in the field now under consideration.

This leaves the cork decision. In connection with this case it will be noted that the question for decision therein was, not whether a person whose sole business was to produce by the process therein described corks which would prevent the escape of gas from the beer inclosed by them in bottles, and would not impart their taste to it, from corks imported by him from Spain, or not so imported, and then place them on the market, would be a manufacturer, within the meaning of legislation of the character hereinbefore referred to. No such question was presented. To understand this decision, clearly, note should first be taken of the earlier decision of that court in the case of *Joseph Schlitz Co. v. United States*, 181 U. S. 584, 21 Sup. Ct. 740, 45 L. Ed. 1013. There the Brewing Company had imported hops, barley, bottles, and corks. It had been allowed the drawback on the hops and barley as coming within the statute. They were imported materials which had been used in the manufacture of beer manufactured by the company and subsequently exported. They, therefore, clearly came within the terms of the statute. They were ingredients of the exported beer. Its right to a drawback on the bottles and corks alone was involved in the case, and it was denied, because the bottles and corks were not ingredients of the exported beer, but only its incasement. The statute was construed to cover only imported materials which were ingredients of the manufactured article subsequently exported. Mr. Justice Brown said:

"To speak of the bottles and corks as ingredients of the beer is simply an abuse of language."

In this case it did not appear that the corks had been given any special treatment to fit them for duty. The later case came about by another Brewing Company thinking that because of such treatment it could get within the drawback statute as to its corks. Its position was that the imported corks were an ingredient of the exported corks, and on the exportation of the bottled beer it would be entitled to the drawback. Mr. Justice McKenna was of the opinion that there was force in the position that within the meaning of the statute the corks and bottles were not exported; an exportation of the article of which the imported materials were an ingredient being essential to entitle one to the drawback. Within that meaning the beer alone was exported; the exportation of the corks and bottles being a mere incident to its exportation. But he did not place the decision on that ground. In the earlier case Mr. Justice Brown, as we have seen, construed the words "imported materials * * * used in the manufacture of articles manufactured or produced in the United States," in the statute, as covering only such materials as became ingredients of another article manufactured or produced in this country. It was far-fetched to say that the imported cork was an ingredient of the finished cork. And the denial of the right to the drawback might well have been placed on this ground. I will not say that it was not so placed. But the matter was put in such a way as to lend color to the view that, if the question in the case had been that which I have stated it was not, it would have been decided that such person was not a maker, and hence not a manufacturer, within the meaning of such legislation. What Mr. Justice McKenna says that lends color to this view is open to some criticism. He says, for instance:

"Manufacture implies a change; but every change is not a manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary."

Now, I take it that "manufacture" here means the same as making. And it will clear the situation somewhat to substitute the one word for the other. So doing we have:

"Making implies a change; but every change is not a making, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary."

[2] This statement is ambiguous, and in one view of it is, as I submit, erroneous. What sort of a change is had in view? Is it a change in the article itself, which is the subject of treatment, labor, and manipulation, or in the conditions of its existence? The first clause of the first sentence does not say which. It takes in either change. The last clause seems to have in view a change in such article itself. A change in the condition of existence of an article is never a making, but a change in the article itself is always a making. There is no reason why one change in an article itself rather than another shall constitute a making.

He bases this statement on the shell case, which undoubtedly was the source of all that he had to say in this connection. I have already indicated what seems to me the faulty reasoning in that case. He then says:

"There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.' This cannot be said of the corks in question. A cork put through the claimant's process is still a cork."

Undoubtedly there must be transformation, and a new and different article must emerge. But what is essential in order that there may be a transformation, and that a new and different article may emerge? Is it not sufficient that what emerges is not the same article which was in existence before the treatment, labor, and manipulation? If it is not the same, is it not a new and different article, and has not a transformation taken place? And is it material in what the lack of sameness, or the newness or difference consists? Is not one particular of such lack, or of newness, or of difference, just as effective as any other? Is there any logical ground for making a difference between such particulars? If not, why then add that the new or different article shall have a distinctive name, character, or use? If the article which emerges is not the same, but a new and different one, what boots it whether it is given a distinctive name or not, or whether it is put to a distinctive use or not? Though it retains its old name, and is put to the same use, has there not been a making? It is essential, however, that it have a distinctive character; but is not saying so tautological? If in fact a new and different article has emerged, is it not necessarily distinctive in character? It seems to me that to constitute a making it is essential that the article which emerges should not be the same, but a new and different article. If it is not the same, it is new and different, and it has a distinctive character, and in that contingency it is entirely immaterial whether it is given a distinctive name or put to a distinctive use.

Coming to the statement that a cork put through the claimant's process is still a cork, we must do as we did with Mr. Justice Blatchford's statement in the shell case that the articles there involved were still shells; i. e., press it hard, and see what possible meanings it is capable of, and which, if any, of them were true. It may mean that the article is still called a cork, or is still used as a cork. This no doubt was the case. But does the fact that it was given the same name and put to the same use as before indicate that there had been no making? The preceding statement in the alternative, that the new and different article which emerges must have a distinctive name, character, or use, conceded that it was not essential that it have a new name or that it be put to a new use. It was sufficient that it had a distinctive character. In the case of *Tidewater Oil Co. v. United States*, 171 U. S. 216, 18 Sup. Ct. 839, 43 L. Ed. 139, Mr. Justice Brown said that "ordinarily" a manufactured article—

"takes a different form, or at least subserves a different purpose, from the original materials, and usually it is given a different name."

This implies that it need not be given a different name, or subserve a different purpose, and not only this, but that it need not take a different form. Or the statement may mean that the material of the two articles is substantially the same. This, too, was true. But, notwithstanding this, the article produced by claimant's process may not have been the same article which existed before. It may have been a new

and different article. It may have had a distinctive character from the original. And, according to Mr. Justice Blatchford's alternative statement, if such was the case, there had been a transformation and a making or manufacture. Or it may mean that, after the original cork had been put through the process, what resulted was the same thing that existed before, that it was not new or different from what it was before, and that it had no distinctive character. If that was the meaning intended to be conveyed by the statement, I submit that it was not true. What resulted was a clean, tasteless, air-tight, and usable cork. The original cork had neither of these characteristics. That the statement is not true follows necessarily from the consideration that the original cork would not serve the purpose for which the resultant cork was used, and the resultant cork did.

According, then, to all possible meanings, except the last one, the epigram, though true, was of no significance; and according to the last one it was not true.

This is all I have to say as to the bearing of the decisions relied on by respondents on the question whether the bankrupt was a maker, and as to their soundness and that of the reasoning on which they are based.

[3] Was, then, the bankrupt a maker? The answer to this question depends on what is essential to constitute one a maker. My idea as to this is, perhaps, apparent from what has already been said. In order that one may be a maker, it is essential that he be the efficient cause of the coming into existence of something that did not before exist. Making involves causality—the production of an effect by a cause; the effect being the existence of a concrete thing. And the causing a concrete thing to exist involves the idea that it is without previous existence. But it does not involve the idea that no part of such concrete thing existed before. This is so because, so far, at least, as man is concerned, there is no such thing as a making out of nothing. The finite mind can hardly, if at all, conceive of the making of something of which no part existed before. It can only involve the idea that some part thereof was without previous existence. And it would seem to be immaterial as to what part thereof this is true. If some part thereof was without previous existence, it is not the same thing as that which previously existed. It is a new and different thing. It is distinctive in character from that which so existed. If this be thought to be too rigid and thorough-going, it is true, at least, that, if the part thereof which was without previous existence is such as to enable such thing to meet a demand which that which previously existed did not, it is not the same thing, but is a new and different thing, is distinctive therefrom in character, and he who is the efficient cause of its existence is the maker thereof. Ordinarily such thing may have a distinctive use from that which previously existed, but not essentially so. That which previously existed may not serve the use so effectually, or for some other reason may not meet the demand that there is for that particular thing. Ordinarily it may also have a distinctive name from that which previously existed, but not essentially so. By treatment the cucumber becomes a pickle. Though the

pickle has the same outward form as the cucumber, it is distinctive in character from the former in internal structure, color, and taste. It has a different name. By treatment, also, the seed of the mustard plant becomes a condiment. Here the change is more radical. It is in matter of outward form, as well as internally and in color and taste; but the old name is preserved. The condiment is still called mustard. Is it to be said that there is no making in this instance, because the new is still called mustard, but there is a making in the other, because the new is not still called a cucumber, but a pickle? The fact is that in each instance there is a making. The new has parts which were without previous existence, and because it has them it meets a demand which the old does not; and it is immaterial that in the one instance the old name is preserved and in the other a new one is given.

How, then, is it in the case in hand? I will not compare the article purchased by the bankrupt with the article produced by it. Probably it cannot be said that there was any making in the restoration of the cherries which it purchased to their original condition before immersion in brine and sulphuric acid to preserve them. I will compare the cherries in their natural condition with the articles produced by the bankrupt. Is it the same thing as the natural cherry? Or is it a new and different thing, a thing distinctive in character therefrom? There can be no question that the first of these two questions must be answered in the negative, and the other in the affirmative. The coloring, sweetening, cooking, and flavoring—leaving out of consideration the stemming and pitting—to which the natural cherries were subjected by the bankrupt rendered the article produced by it a new and different thing, a thing distinct in character therefrom. It had parts which the natural cherry did not have. It served a purpose which the natural cherries did not serve. In their natural condition the only purpose which they could serve was as an eatable either from the hand or in that best of pies, the ability to make which “in the twinkle of an eye” was the chief accomplishment of Charming Billie’s wife. In their artificial condition, as they left the bankrupt’s establishment, their chief function was as a garnish, being mainly used, according to counsel for the petitioning creditors, to render the American cocktail “pleasant,” or better, “a delight to the eyes,” though not “to be desired to make one wise.” The article produced by the bankrupt by reason of the existence of such parts met a demand which the natural cherries did not and could not meet. And as the bankrupt was the efficient cause of the existence of such parts, it was the maker thereof.

On principle I do not see how it is possible to reach any other conclusion. But am I free to dispose of this question in accordance with my view of the matter? Am I not more or less hampered by the decisions relied on by respondents, which I have conceded have a bearing on it, absolutely or conditionally? They are the decisions in the ice cream, the two coffee, the slaughterhouse, the tailoring, the shell, and the cork cases. The last three come from the courts whose decisions are controlling on me, to wit, the Kentucky Court of Appeals and the Supreme Court of the United States, and the ice cream and

the two coffee cases have been given standing by citation by such courts, to wit, by the Kentucky Court of Appeals and by the Sixth Circuit Court of Appeals of the United States. It is possible that the decisions in the two coffee cases and the tailoring case are the only decisions which have bearing absolutely on the question whether the bankrupt was a maker, as in all the other cases it is possible that the decision therein can be placed on another ground than that the producers of the articles there involved were not makers. I will assume, however, that one and all have bearing absolutely, still I do not think that I am affected by them. If they go to the extent of requiring that the bankrupt be held not to be a maker, then they go to the extent of requiring that it be held that there is no such thing as a maker in any case. In so far as they hold that the producers there involved were not makers, they are not sound. They cannot stand the test of just criticism, and, as Judge Carroll said expressly in the tailoring case, they should not be accepted as authorities in any other case.

To a degree, at least, this case involves a larger question than whether the bankrupt was a maker, and hence a manufacturer, and its establishment a manufacturing establishment. That question is whether preservers and canners, who prepare fruits and vegetables for future use, are makers, and hence manufacturers, within the meaning of legislation of the character hereinbefore described, if they have such other characteristics in addition to being makers as may be deemed essential in order that they be such. Indeed, I am not disposed to antagonize the position, which has been assumed in argument, that the question whether the bankrupt was such hangs on the question whether they are such. For I am clear that preservers and canners are makers. By their treatment of the natural fruits and vegetables they give them qualities or parts which enable them to meet a demand which the natural fruits and vegetables do not and cannot meet. They are the efficient cause of the coming about of the existence of articles which would otherwise not exist. The industry of preserving and canning has come to be one of the great industries of modern times. As I write, the day's newspaper contains the following article about it, to wit:

"AN AMAZING INDUSTRY.

"(Leslies' Weekly)

"An idea of the amazing growth of this vital and all-important industry may be had when it is told that there are now nearly 4,000 concerns in the country engaged in canning and preserving, with an invested capital of \$119,207,000. During the last year they paid over \$100,000,000 for raw material, and their finished product was \$157,101,000. A case of canned vegetables was turned out for every three men, women, and children in that time. Not to mention the fruit and fish, four pounds of condensed milk were put up in 1912 for each inhabitant of the United States. One packing house in Chicago daily cooked canned food sufficient to feed a city of 100,000 population. Think of it.

"We now consume 3,000,000,000 cans of food each year, the surplus crop of the country, which, before the art of preserving was perfected, went to waste. It is so stupendous a quantity that, if the canning industry were suddenly destroyed, a famine might be created. Certainly it would have an effect on

the cost of living, for while that has gone up the price on staple articles in canned food has remained stationary."

If this industry is not to be classed as manufacturing, and those who carry it on as manufacturers, how are it and they to be classed? An indication of how common usage classes them is to be found in the following article taken from the same issue of the same newspaper, to wit:

"NEW CATSUP FACTORY.

"Special Dispatch to the Enquirer.

"Petersburg, Ind., April 19.—Yesterday evening the Snyder Preserve Company, of Cincinnati, closed the contract with the Business Men's Association at Mt. Carmel for the erection of a factory there. The company agrees to manufacture catsup, employ 200 men and women for 10 months a year, and expend \$40,000 on the site before any payment be made to them, and to expend \$35,000 to \$40,000 for tomatoes and labor each year."

The question as to how they are to be classed seems never to have been involved in any reported case. At any rate the research of counsel has not been able to find a case involving it. As heretofore stated, respondents rely on two dictums in support of their position that such persons are not manufacturers. One is the dried apple analogy referred to by Judge Blatchford in the hay case. It is questionable whether the person who peels, cores, slices, and exposes to the sun the apples can be said to be the maker of the resulting dried apples. Is not nature the real maker, and is not all that he does simply an aid to nature, just as in the case of haymaking, though he renders more assistance than the farmer does in making hay? In the production of india rubber shoes, held to be manufacturing in the case of *Lawrence v. Allen*, supra, the producer thereof dips the mold in the juice or sap of the caoutchouc tree, resembling milk, and then holds it in the heat and smoke of a fire made by him. This process he repeats several times to produce the shoe. Here the maker makes and manipulates the fire and causes it to dry the juice or sap. In drying apples and making hay there is no manipulation of the sun or of its heat by any one. But, however this may be, the production of dried apples is no one's principal business, so far as I am advised. It is generally a mere incident to housekeeping. It is only as to one whose principal business is that of producing dried apples that the question whether he is a manufacturer can arise.

The other dictum relied on is that of Mr. Justice Brown in the *Joseph Schlitz Brewing Company Case*. But counsel misinterpret Judge Brown's statement on which they rely. He does not say that canning fruits and vegetables is not manufacturing. He is combating the idea that a beer bottle is an ingredient of the beer which it incases, which, as we have seen, was essential in order to entitle the company to a drawback on account of the bottles. He says that the fact that the beer is steamed after being bottled "certainly does not convert a bottle from an incasement into an ingredient." He then likens it to the cases of bottling champagne and other sparkling wines and Apollinaris and other effervescing waters and of canning fruits and vegetables. The bottling and canning is in all such cases essential to the

preservation of the article bottled or canned. And his argument is that, as the incasement in all such cases is not an ingredient of that which is incased, so the bottles which incase beer are not ingredients of the beer which they incase. He was not thinking of the question whether the one who produces canned fruits and vegetables is a manufacturer, and hence said nothing on the subject. The inference from what he says in this connection is rather that he regarded that he was a manufacturer. His full statement is in these words:

"Thus, champagne and other sparkling wines must be bottled while yet effervescing, or they will lose the 'tang' which gives them their principal value. The same remark may be made of Apollinaris and other effervescing waters, though not manufactured, and of certain canned fruits and vegetables, which are required to be incased while hot and still in the process of preservation."

In distinguishing Apollinaris and other effervescing waters from champagne and other sparkling wines, and possibly beer, also, he uses the qualifying clause "though not manufactured," thus implying that they are not manufactured. But he does not so distinguish canned fruits and vegetables.

There is, therefore, no dictum against the position that preservers and canners are makers, and hence, all other essential characteristics existing, manufacturers. On the other hand, there are two dicta in favor of it. In the case of *Engle v. Sohn & Co.*, 41 Ohio St. 694, 52 Am. Rep. 103, the Ohio slaughterhouse case, Judge Dickman said:

"The occupation of the defendants in error was, we think, essentially that of manufacturers. By the use of tools, implements, and mechanical devices, by subjecting the slaughtered animals to divers processes, running, some of them, through several mouths, by combination with various materials and ingredients requiring skill, care, and attention, products were obtained in the form of pork, lard, and cured meats, to which may appropriately be applied the term 'manufactured articles.' The original substance, though not destroyed, was so transformed through art and labor that, without previous knowledge, it could not have been recognized in the new shape it assumed, or in the new uses to which it was applied. One who produces such results may as correctly be designated a manufacturer as he who buys lumber, and planes, tongues, grooves, or otherwise dresses the same, or as he who by a simple process makes sheets of batting from cotton, or as he who buys fruit and preserves the same by canning, all of whom have been held to be manufacturers, and taxed as such, under the internal revenue laws of the United States. 9 Int. Rev. Rec. 193; 5 Int. Rev. Rec. 180; Internal Revenue Decisions, 117, No. 171. And as to the article of ice, to which reference has been made in argument, he is not inappropriately termed a manufacturer who produces artificial ice by the method of vaporization and expansion. The dressed lumber, cotton batting, canned fruits, and artificial ice, though but slightly changed from the original material, could not, we think, be properly classified as unmanufactured goods. Indeed, the term 'manufacturer' has been extended to include every object upon which art or skill can be exercised, so as to afford products fabricated by the hand of man, or by the labor which he directs. *Curtis on Pat.* § 74."

And in the case of *State v. American Sugar Refining Company*, 108 La. 603, 32 South. 965, the Louisiana sugar refining case, Judge Provosty said:

"Canning factories, which prepare fruits and vegetables for future use without changing the identity of the raw material, are manufacturers, by the very term used to designate them."

Besides these two dicta, which are precisely in point, the decision in the case of *In re Alaska American Fish Company* (D. C.) 162 Fed. 498, is not without decided bearing on the matter. There involuntary bankruptcy proceedings had been brought against a Washington corporation. An objection to its adjudication was made on the ground that it was not principally engaged in manufacturing, within the meaning of the Bankruptcy Act of 1898.¹ The business of the corporation consisted of catching and preserving by salt and marketing salt water fish. Judge Hanford overruled the objection and said:

"Fish, as a commodity of merchandise, requires the application of a process for its preservation, as well as labor in packing the same in suitable receptacles for handling and transportation. Therefore I hold that the business of said corporation was a manufacturing business, within the meaning of the bankruptcy law, and that it is subject to be adjudicated a bankrupt."

The case is criticised because only half a dozen lines are devoted to the question, no authorities are cited, and no reasoning advanced for the conclusion, and because the right to adjudicate the corporation a bankrupt might have been based on the ground that it was engaged in a trading and mercantile pursuit. It is urged, also, that inquiry has elicited that the industry involved is a vast and extensive one, and the fish are caught, skinned, boned, and cut into pieces, so that, when ready for market, the canned salmon is as different from the fish in its natural state as sliced bacon or other forms of dressed meat are from the animals from which they are taken. This all may be true; but, as I have already indicated, there is nothing in this difference from what is done in preserving and canning fruits and vegetables, or was done by the bankrupt at its establishment, to bring about a difference in decision. And the support of the case is not needed to sustain the conclusion here reached.

I cannot leave this branch of the case without indicating how it seems to me that a case involving the question whether the producer of a given article is a manufacturer, within the meaning of favoring legislation of the character heretofore indicated, should be dealt with. It should be accepted at the outset that in order for him to be such it is absolutely essential that he be a maker, or, in other words, that, whatever other ideas the word "manufacturer" may, in such legislation embody, it at least embodies this idea. This idea should be disentangled from any other possible ideas which the word may embody, and the mind concentrated on whether the producer of the article there involved is a maker. This is readily done by treating the question as being, not whether he is a manufacturer, but whether he is a maker. If it be determined that he is not a maker, that is an end of the case. Not being a maker, he cannot be a manufacturer. If it be determined that he is a maker, then it should be considered what other ideas are embodied in the word—i. e., have, as it were, been imposed on it; and, if it be determined that other ideas are embodied in it, the conformity of the producer in question to each should be considered separately. Though the necessities of this case do not require that I determine whether other ideas than that he is a maker by hand or by machinery are embodied in the word, I feel quite sure that it is not so limited. By this method things are looked at singly, and this is a

¹ Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418).

great aid to seeing them as they are. I always had a more vivid conception of what I had seen at the old one-ring circus than what it is possible for one to have of what he sees at the modern two-ring circus with a platform performance between. Indeed, single-mindedness is essential to seeing things as they are. But to avoid misconception I would note that single-mindedness is not the same as a "single-track mind." Matthew Arnold, who represented truth as a "mysterious goddess," wrapped in a black robe, and said that we shall never see her, except in outline, seems to have had such a mind in view when he said, further, that the only way to gain a vision of truth "thus even in outline" is "to try and approach" her "on one side after another, not to strive or cry, nor persist in pressing on any one side with violence and self-will," and that "he who will do nothing but fight impetuously towards her on his own one, favorite, particular line is inevitably destined to run his head into the folds of her robe." This suggestion which I have made as to dealing with such a case may be an Ariadne's thread or a mare's nest. As to which it may be is for others to judge.

I must also add that one, in dealing with such a case, should be sure of his analogies and his epigrams. If he does not look out, they will lead him astray.

[4] This brings me to the other position taken on behalf of respondents, and which seems to be mainly relied on. It is that the statute in question has to do, not with all manufacturing establishments, but only with such as are like the two specified, to wit, rolling mill and foundry, and the bankrupt's establishment, assuming it to have been a manufacturing establishment at all, was not such a one. They would apply here what is called the rule of *ejusdem generis*, or, in recognition of its origin, Lord Tenterden's rule. It is sometimes termed a doctrine. It is thus stated by Lord Tenterden himself in the case of *Sandiman v. Breach*, 7 B. & C. 96:

"Where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*."

Mr. Justice Brewer, in the case of *United States v. Mescall*, 215 U. S. 31, 30 Sup. Ct. 20, 54 L. Ed. 77, puts it thus

"Where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described—*ejusdem generis*."

Here the particular words "any rolling mill, foundry," are followed by the general term, "or other manufacturing establishment." The case, therefore, respondents contend, is one calling for the application of this rule or doctrine. The general term should be construed as if it were "or other such like manufacturing establishment," in which case there could be no question that it did not include all manufacturing establishments, but only such as are like a rolling mill and foundry.

One called on to apply this rule or doctrine should, before attempting to do so, understand exactly the reasoning on which it is based and the essentials to its application. The case of *Newport News, etc., Co. v. United States*, 61 Fed. 488, 9 C. C. A. 579, where the rule or doc-

trine was undoubtedly correctly applied, affords a good illustration to bring out these matters. It involved the federal statute forbidding carriers of animals to confine them more than the 28 consecutive hours without unloading for rest, water, and feeding, unless prevented by "storm or other accidental causes." It was held that failure to unload is excused only by accidental causes, which, like storms, are unavoidable, and not by an accident to a train. Judge Lurton said:

"The meaning of the general words, 'other accidental causes,' must be ascertained by referring to the preceding special words. * * * A storm is unavoidable, in the sense that it cannot be prevented. 'Other accidental causes' must be taken to mean 'other unavoidable accidental causes.'"

Literally, the words "by storm or other accidental causes" mean exactly the same thing as if the words used had been "by accidental causes." In other words, each clause literally includes all accidental causes, one no more than the other. The only difference is that the latter expression is the simpler one of the two. To hold that the former includes only a storm or other unavoidable accidental cause is to give it a meaning other than its literal meaning. To give it such meaning literally, and to express it more accurately, it should be made to read "by storm or other unavoidable accidental cause," or more simply "by unavoidable accidental causes." The requirement of the rule or doctrine, therefore, is that the words used should be given a meaning other than their literal meaning, a meaning which they do not express as accurately as they could have been made to express. The idea behind the rule or doctrine, and which brought about its formulation, is that, if the Legislature had intended to include all accidental causes, it would have used the general words, and made no specification at all. In the case of *Rex v. Inhabitants of Whitmarsh*, 7 B. & C. 596, decided in the same year (1827), when Lord Tenterden stated his rule, where it was held that a statute providing that "no tradesman, artificer, workman or other person whatsoever shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's day or any part thereof (work of necessity and charity only excepted)," did not apply to a contract of hiring made with a farm hand upon Sunday, Bayley, J., said:

"If the Legislature had intended to embrace every description of persons and every species of business, it would not have been necessary to make an enumeration of several classes of persons exercising particular descriptions of labor or business. It would have been sufficient to say that no person whatever should do any work or business on the Lord's day. If the enactment had been intended to be general, the Legislature would have used general words."

Littledale said:

"If it [Parliament] had intended that no person should do any work on a Sunday, it would have used different language."

In applying the rule, therefore, the interpreter, in his critical mood, judges the Legislature by himself. He says to himself that if he had been writing the statute in question—e. g., the statute involved in the case taken as an illustration—and had intended to include all accidental causes, he would have said "by accidental causes," and would not have

said "by storm and other accidental causes." That was the simplest, and therefore the logical, way to express the thought, and it should be assumed that the Legislature would in that contingency have acted logically.

We have here an instance of what has been characterized, in connection with the subject of historical criticism, as a "methodological assumption." And it has been questioned whether historical critics are not "too prone to rest content with the assumption that the logical thing is right." It is thus a weakness of the rule or doctrine in question that it overlooks the fact that a Legislature may not always express its meaning as it should logically do. And it has this still further weakness that though, if it had been the intention to include all accidental causes, the logical thing would have been to use the words "by accidental causes" as the simpler expression, and that, therefore, it was illogical not to use them, on the basis that the intention was to include only unavoidable accidental causes, the more accurate, and therefore the more logical, thing to do was to use the words "by unavoidable accidental causes," or "by storm and other unavoidable accidental causes," and not to use the words "by storm and other accidental causes." Wherever, then, the rule or doctrine is applied, a meaning is given to the words used by the Legislature which they do not logically express, and that, because had it intended to express the other meaning, it would have expressed itself logically.

So much, then, as to the reasoning on which the rule or doctrine is based and in criticism of it. As to what is essential to its application, apparently all that is required is that "general words follow particular ones," or that "particular words are followed by general terms." But something more is essential than this. The persons or objects covered by the particular words must belong to a subordinate class of persons or objects within the class covered by the general words, and they must not exhaust all the persons or objects belonging to such subordinate class. Two things, then, are essential: There must be a class within a class, and the former must not be full. That which the rule or doctrine does is, not to eliminate the general words from the statute, but to restrict their meaning. And this it cannot do unless there is both a subordinate class within the class covered by them and such class is not full. A case where this position is enforced is that of *United States v. Mescall*, supra. The statute there involved provided that:

"If any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise" by certain means specified "such merchandise shall be forfeited, * * * and such person upon conviction fined," etc.

The question was whether an employé in the customs service, who had made an entry of imported merchandise in the manner prohibited, could be fined under the statute. It was held that he could, even though he had no goods that could be forfeited. Mr. Justice Brewer stated the position taken against the right to punish him in these words:

"The particular words of description, it is urged, are 'owner, importer, consignee, agent.' The general term is 'other person,' and should be read as re-

ferring to some one similar to those named, whereas the defendant was not owner, importer, consignee, or agent, or of like class with either."

And the basis of the decision was that there was no one of like class with either to whom the general term could apply, and unless it was given its literal meaning it would be meaningless. He quoted with approval this language from a certain Missouri decision:

"Where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the generis, there is nothing ejusdem generis left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose."

The case of *United States v. Celluloid*, 82 Fed. 627, 27 C. C. A. 231, relied on by respondents, can hardly stand against this decision.

It seems to me that it is essential, also, that it should be obvious that there is a subordinate class to which the persons or objects covered by the particular words belong, and which is not exhausted thereby, and, at least, that it should not have been unreasonable for the Legislature to restrict the legislation to such subordinate class. I do not know what the cases yield on the subject, but I have an idea that the rule should never be applied unless the restriction is one which it appears it is reasonable to make.

The respondents contend that this case meets all requirements. The subordinate class which it is claimed the Legislature had in mind were iron manufactories, to which rolling mills and foundries belong, and which is not exhausted thereby. I have not been advised on the subject of the various iron manufactories, and have no special knowledge thereon myself. I have an idea that rolling mills and foundries have to do with a manufactured product, to wit, pig iron, which is manufactured from the ore in furnaces or smelters, and that there are other iron manufactories having also to do with this manufactured product, or with the manufactured product of the rolling mills and foundries. But is it reasonable to hold that the Legislature could have intended to limit the statute to iron manufactories? What possible reason was there for making such limitation? It must, however, be accepted as rather singular that the Legislature, if it had in mind all manufactories, singled out only two kinds of iron manufactories for specification. The statute was originally enacted March 20, 1876. As originally enacted it covered only "any railroad company, or an owner or operator of any rolling mill, foundry or other manufacturing establishment." In 1893 it was made to cover also any turnpike, canal, or other public improvement company, and in 1894 any mine company. On the same date of its original enactment the Legislature provided for the compilation and publication of "a general account of the agricultural, commercial and mineral resources of the commonwealth of Kentucky" by the Kentucky State Bureau of Agriculture for distribution to emigrants and emigrant societies.

Counsel for respondents make certain quotations from this document. I do not have it before me, nor does the date of its publication appear. Probably it was published in 1876, before or at the time

of the Centennial Exposition at Philadelphia. It appears from those quotations that it was then thought that there were "inexhaustible beds of iron ores in various parts of the state," and that amongst other things desired to be accomplished by the publication of this account was the mining of those ores and the establishment of iron manufactories in the state. It is the contention that the legislation in question, in so far as it related to manufacturing establishments, had in view this same end. But the legislation is not legislation favoring any manufacturing establishment, as legislation exempting from taxation does. It is legislation favoring the employes of the manufacturing establishments to whom it relates and persons who furnish them materials and supplies. In the former particular it is in line with legislation everywhere. It is rather unique in favoring persons who furnish materials and supplies. Why, then, should the Legislature single out the employes of and persons furnishing materials and supplies to iron manufacturers for so favoring, and omit to favor the employes of and persons furnishing material and supplies to other manufacturers? No conceivable reason occurs to me for making such a distinction. Such a limitation is so unreasonable as to be of itself a consideration against the application of the rule in this instance. Besides, though at the time of the original enactment of the statute it seems to have been thought that there were such beds of iron ores in various parts of the state which it was desirable to have mined, it has long since been ascertained that such beds as there are are not capable of being profitably mined. If there is now, or for many years has been, any iron ore mining in the state, I am not informed as to it. And since this condition of things has been definitely ascertained, the original statute has been twice re-enacted. It was re-enacted in 1893, at the long session of the Legislature after the adoption of the present Constitution of the state, and again, on February 29, 1904, by the adoption of Carroll's 1903 Edition of the Kentucky Statutes.

But there is a conclusive consideration against limiting the statute as is claimed on behalf of the respondents it should be. The decisions so cited which apply the rule of *ejusdem generis* recognize that it should not be applied where there is something in the context against its application. There is something in the context of this statute which shows beyond question that it was the thought of the Legislature to include all manufacturing establishments. The article containing the statute and other relevant provisions is entitled as follows:

"Railroads, Other Improvements and Manufacturers—Liens of Employes and Others on."

This title is not simply the work of the compiler of the Kentucky Statutes. It is the work of the Legislature also. It became so by the adoption in 1904 of Carroll's 1903 Edition of Kentucky Statutes as above stated. In this title occurs the general word "Manufacturers," without any limitation whatever. It clearly indicates that it was the thought of the Legislature to include in the following statutory provisions all manufacturers whatever.

I have thus far considered the question as one of principle, without reference to the effect thereon of any relevant decisions. I have so done, because it is the contention of respondents that the question has not been foreclosed by any such decision, but is still an open one. The relevant decisions are not few in number. They are as follows: *Winter v. Howell*, 109 Ky. 163, 58 S. W. 591; *Bogard v. Tyler*, 119 Ky. 637, 55 S. W. 709; *Muir v. Samuels*, 110 Ky. 605, 62 S. W. 481; *Graham v. Magann Lumber Co.*, 118 Ky. 192, 80 S. W. 799, 4 Ann. Cas. 1026; *Hall & Son v. Guthrie's Sons' Assignees (Ky.)* 103 S. W. 721; *In re Falls City Shirt Manufacturing Company (D. C.)* 98 Fed. 592; *In re Bennett*, 153 Fed. 673, 82 C. C. A. 531; *In re Starks-Ullman Saddlery Co.*, 171 Fed. 834, 96 C. C. A. 506. In no one of these cases was the manufacturing establishment in question an iron manufactory. In *Winter v. Howell* it was an establishment where mixed paints and cut-offs for cisterns were made; in *Bogard v. Taylor and Graham v. Magann Lumber Company*, a sawmill; in *Muir v. Samuels*, a laundry; in *Hall & Son v. Guthrie's Sons' Assignees*, a flour mill; in *Re Falls City Shirt Manufacturing Company*, a shirt manufactory; in *Re Bennett*, a barrel factory; and in *Re Starks-Ullman Saddlery Company*, a horse leather factory. In the cases of *Winter v. Howell*, *Bogard v. Tyler*, *Muir v. Samuels*, and *Re Starks-Ullman Saddlery Company* the lien claimed under the statute was denied. But it was not denied on the ground that the establishment in question was not a manufacturing establishment within the meaning of the statute, except in *Muir v. Samuels*, and it was so denied there, not on the ground that it was not an iron manufactory, but on the ground, as we have seen, that a laundry is not a manufacturing establishment. It was assumed that the statute covered all manufacturing establishments. In the other four cases there was no question that the establishment was a manufacturing establishment. In each of them, except *Bogard v. Tyler*, it was assumed that the statute covered all manufacturing establishments, and hence the particular establishment involved therein. In *Bogard v. Tyler* the question was expressly raised and determined that the statute covered a sawmill. Judge Du Relle said:

"Numerous questions are made as to the proper construction of the act of February 25, 1893, relied on as giving a lien in favor of the employes and materialmen. These questions, however, in our view, need not be considered, except the question whether the statute applies in this case. The lien being statutory, all the conditions upon which it is predicated must exist. There must be a manufacturing establishment; and, under the evidence in this case, as the sawmill was engaged in manufacturing lumber for the market, we think there was."

He then stated the several contingencies on which the lien under the statute was to attach, and held that none of them had happened. It was on this ground alone that the lien was denied. In *Winter v. Howell* the lien was enforced in the lower court to a certain extent. All the Court of Appeals did was deny its enforcement to any greater extent. In the cases of *Graham v. Magann Lumber Co.*, *Hall & Son v. Guthrie's Sons' Assignees*, *In re Falls City Shirt Manufacturing Company*, and *In re Bennett* the lien was enforced. In none of them,

except in that of Hall & Son v. Guthrie's Sons' Assignees, was the question raised as to whether the statute covered the particular manufacturing establishment therein involved. In the other three cases it was simply assumed that it did. In the case of Hall & Son v. Guthrie's Sons' Assignees, the question was raised as to whether the statute covered a flour mill and it was decided in the affirmative. Judge Nunn said:

"The mill of Guthrie's Sons was a manufacturing establishment in the meaning of this section. In the case of Muir v. Samuels * * * this court determined that a laundry was not a manufacturing establishment in the meaning of that section, for the reason that it only changed dirty linen into a clean linen. The article was a complete one before and after it was laundered. In the case of Bogard v. Tyler * * * it was held that a sawmill was a manufacturing establishment, because it manufactured lumber from logs. The mill in this case changes wheat into flour."

The ground upon which it is claimed that the decisions in these four cases do not foreclose the question is that it was not claimed in any one of them that the rule of ejusdem generis applied, and, applying it, the statute should be limited to iron manufactories, and hence this precise question was not decided. In order for a prior decision to be a precedent as to any question, it is argued that it must be raised and decided. It is not sufficient that it was directly involved. In the case of Celluloid Manufacturing Company v. Tower (C. C.) 26 Fed. 451, Judge Carpenter said:

"No decision, as it seems to us, can amount to a precedent unless made after full argument."

In the case of Carroll v. Lessee of Carroll, 16 How. 275, 14 L. Ed. 936, it was said:

"There must have been an application of the judicial mind to the precise question necessary to be determined."

And in the case of Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302, it was held that a court was not precluded, by having enforced a statute, from thereafter considering its constitutionality.

But I think that the fact that in Bogard v. Tyler the question as to whether a sawmill, and in Hall & Son v. Guthrie's Sons' Assignees the question as to whether a flour mill, was a manufacturing establishment within the statute was expressly raised, and so determined, though the bearing thereon of the rule of ejusdem generis was not suggested or considered, makes them binding precedents in support of the position that the statute covers all manufacturing establishments. I do not think that Judge Lurton, in the case of In re Starks-Ullman Saddlery Company, recognized the question as open and undetermined. Priority was there denied, because the indebtedness was not incurred on the manufacturing side of the bankrupt's business. On the contrary, it does not seem to have occurred to Judge Lurton that there was any question as to the statute not covering all manufacturing establishments. He said:

"The statute is plain enough. The purpose is to give a lien under certain circumstances to persons furnishing materials and supplies for the carrying on of the manufacturing business in which the debtor was engaged. * * *

The statute was before us in the case styled *In re Bennett*, 153 Fed. 673 [82 C. C. A. 531]; but the claims then involved were undisputably for materials and supplies, furnished for the carrying on of an undisputable manufacturing business."

But how does it happen in all these cases it never occurred to the lawyers or the court that the statute could have a limited meaning in this particular? It can be accounted for on two grounds: One is the use of the unlimited word "manufactures" in the title, and the other is the total absence of any reason for limiting a statute favoring employes and materialmen to iron manufactories. The latter consideration was sufficient of itself to prevent its occurring to them that the statute could have such a limited meaning. It would have been unreasonable to so limit it.

I am therefore clear, both on principle and authority, that the statute is not limited to iron manufactories. The order of the referee is therefore reversed, and the cause remanded, with directions to give priority to the petitioning creditors.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO. OF IDAHO.

(District Court, D. Idaho, N. D. April 1, 1913.)

1. WOODS AND FORESTS (§ 8*)—NATIONAL FOREST RESERVATIONS—ACQUISITION OF RIGHT OF WAY BY RAILROAD—"LANDS SPECIALLY RESERVED FROM SALE."

Lands within a national forest reserve are not subject to appropriation by a railroad company for right of way and other railroad purposes, under Right of Way Acts March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), which by section 5 expressly excepts from its operation lands "especially reserved from sale."

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

2. WOODS AND FORESTS (§ 8*)—NATIONAL FOREST RESERVATIONS—RAILROAD RIGHT OF WAY.

Acts March 3, 1899, c. 427, § 1, 30 Stat. 1233 (U. S. Comp. St. 1901, p. 1584), providing that "in the form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad or other highway over and across any forest reservation or reservoir site when in his judgment the public interest will not be injuriously affected thereby," whatever may be the extent or nature of the rights which it confers, unmistakably conditions the acquisition of any right upon the consent of the Secretary of the Interior.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

3. WOODS AND FORESTS (§ 8*)—NATIONAL FOREST RESERVATIONS—TEMPORARY WITHDRAWALS OF LAND FROM SALE.

Acts March 3, 1891, c. 561, § 24, 26 Stat. 1103 (U. S. Comp. St. 1901, p. 1537), authorizing the President to set apart and reserve public lands as forest reservations, necessarily implies the authority, as a preliminary to such reservation, to make temporary withdrawals from sale of lands the reservation of which is in contemplation during the time of their examination and survey, and such withdrawals may legally be made through the appropriate departmental officers.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. PUBLIC LANDS (§ 92*)—RIGHT OF WAY ACT—CONSTRUCTION.

Under Right of Way Act of March 3, 1875, c. 152, § 5, 18 Stat. 483 (U. S. Comp. St. 1901, p. 1569), which excepts from the operation of the act lands especially reserved, etc., the date upon which the status of the land is fixed is the time when the railroad company first seeks to give practical effect to the grant by the definite location of its line by the filing of its map of final location or actual construction, and not the time when it qualified itself as a grantee by filing its articles of incorporation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

5. SPECIFIC PERFORMANCE (§ 49*) — CONTRACTS ENFORCEABLE — AGREEMENTS WITH UNITED STATES.

Defendant railroad company surveyed its line over a national forest reservation, and filed its map of definite location with the Secretary of the Interior. Pending its consideration, in order to obtain permission to proceed with the construction of its road, its duly authorized attorney filed with the Department of Agriculture a paper by which it promised to enter into a stipulation, as nearly as practicable like one relating to another reservation, to take certain measures, etc., for the protection of the forests. After it had constructed its road it refused to sign the stipulation presented, and the Secretary of the Interior did not approve its map. *Held*, that the agreement was not without consideration, and that the United States, having acted on it, could maintain a suit in equity for its specific enforcement against defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.*]

In Equity. Suit by the United States against the Chicago, Milwaukee & St. Paul Railway Company of Idaho. Decree for complainant.

C. H. Lingenfelter, U. S. Atty., of Boise, Idaho, and W. C. Henderson and H. H. Clarke, both of Missoula, Mont., for the United States.

F. M. Dudley, of Seattle, Wash., and H. H. Field, of Chicago, Ill., for defendant.

DIETRICH, District Judge. This is a suit in equity exhibiting a controversy between the United States and the Chicago, Milwaukee & St. Paul Railway Company of Idaho, primarily involving the question of the conditions under which a railroad company may acquire a right of way through lands embraced in a national forest. The right of way here in controversy is that claimed by the defendant through the Cœur d'Alene reserve, in the northern part of Idaho. In chronological order, the salient facts may be stated about as follows:

On March 21, 1905, the Commissioner of the General Land Office, by direction of the Secretary of the Interior, acting upon the request of the Secretary of Agriculture, temporarily withdrew from all disposal, except under the mineral laws, all of the lands which at a later date became the Cœur d'Alene National Forest. In January, 1906, the defendant company was organized for the purpose of constructing a railway, which, in part, was to extend across the lands so withdrawn. On February 17, 1906, the articles of incorporation and proofs of organization of the defendant company were accepted for filing,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and were filed by the Secretary of the Interior, and later in the same year, on November 16th, amendments thereto were accepted and filed. During the period from June 3, to October 13, 1906, the defendant's line of road was surveyed and staked upon the ground. On October 20, 1906, the route as thus selected was adopted by resolution of the defendant's board of directors. On October 23, 1906, maps of the defendant's road were filed in the local land office at Cœur d'Alene, Idaho, as required by the act of March 3, 1875, and the departmental rules, and upon the same day these maps were transmitted by the register to the General Land Office. On November 6, 1906, the Cœur d'Alene National Forest was created by proclamation of the President. On January 2, 1907, in response to an inquiry, the chief law officer of the Forest Service wrote a letter to counsel for the defendant, advising him of the practice in cases where applications were made for railroad rights of way in the national forests, from which it appears that it was customary for the Secretary of the Interior to call upon the Secretary of Agriculture to consider right of way applications over lands embraced within temporary withdrawals, and it was the view of the department that, if the reserve was actually created before the approval of the maps, the Secretary of Agriculture would have the right to demand from the railroad company, as a condition precedent to approval, a stipulation containing certain provisions for the protection of the forests. It was further explained in the letter that the applications of the defendant had not been approved, and that therefore the Forestry Service would be obliged to require such a stipulation. On March 18, 1907, the defendant, after making certain additional surveys, by resolution adopted a route different in some particulars from that shown upon its original maps. On March 20, 1907, maps exhibiting the newly adopted route were filed with the register of the land office at Cœur d'Alene, and forwarded to the General Land Office. On May 6, 1907, still another resolution was adopted making further changes in the route. On May 20, 1907, maps exhibiting this new route were filed with the register of the local land office, and transmitted to the General Land Office. In this connection it may be added that none of these maps has ever been approved by the Secretary of Agriculture or the Secretary of the Interior. On June 25, 1907, the register of the local land office at Cœur d'Alene, acting under instructions from the Commissioner of the General Land Office, returned to the railway company its maps filed on October 23, 1906, and on March 20, 1907, with the explanation that it was understood by the department that the maps of May 10, 1907, were intended to supersede the two earlier filings.

On May 10, 1907, one George R. Peck signed and filed with the United States Department of Agriculture, Forest Service, a writing which, in a measure, is the foundation of this suit, the same being as follows:

"Chicago, Milwaukee & St. Paul Railway Company of Idaho—Railroad (Interior). Cœur d'Alene National Forest, Idaho. United States Department of Agriculture. Forest Service.

"Whereas the Chicago, Milwaukee & St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of

the company's railroad in the Cœur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the company that it will execute and abide by stipulations and conditions to be prescribed by the forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana.

"Date May 10, 1907.

[Signed]

George R. Peck,

"General Counsel for the Chicago, Milwaukee & St. Paul Railway Company of Idaho."

On the same day—that is, on May 10, 1907—the following notation was indorsed upon this writing by the acting forester:

"Approved and advance permission given to construct, subject to ratification hereof by the company. Date May 10, 1907."

And it is to be added that thereafter, until October, 1907, at least, the government officers in good faith acted upon the assumption that the conditions of the writing were satisfactory to the defendant company.

On or about July 10, 1907, the defendant commenced the construction of that part of its road extending through the Cœur d'Alene National Forest, and completed the same on or about July 31, 1909. On or about October 24, 1907, a form of stipulation or contract, represented to be in accordance with the terms of the Peck agreement, was by the Forestry Service presented to the defendant for execution. On or about November 15, 1907, the defendant informed the forest supervisor that it would not sign such stipulation, but would await the outcome of certain negotiations which were pending at Washington with the officers of the Interior Department and the Department of Agriculture; the record does not disclose what reasons were assigned by the defendant for its declination to sign the proffered stipulation, but on or about December 2, 1907, Peck, acting for the defendant, personally advised the forester at Washington that he, Peck, was not authorized to make any different agreement in the case of the Cœur d'Alene National Forest than that which had been made for a right of way through the Yakima National Forest, and requested that the work of construction which was then being prosecuted should not be interrupted until the matter could be finally adjusted. Complying with this request, proper instructions were given to the subordinate officers of the Forestry Service to let the work proceed, and generally it may be said that while the officers of the government and its employes from time to time manifested their dissatisfaction with the attitude and conduct of the defendant, it was permitted to prosecute the work of construction to completion without molestation. On October 29, 1908, the Secretary of the Interior, after having given the defendant a specified time in which to execute the required stipulation, upon its default rejected its maps of definite location filed May 10, 1907, and struck the same from the files, for the reason, as stated, that the defendant refused to execute the required agreement for the protection of the forests. In the meantime, no settlement of the controversy having been reached, the plaintiff commenced this suit, on June 25, 1909, while construction work was still in progress.

The bill exhibits many of the facts hereinbefore set forth, and in

addition thereto it is averred that the defendant, in violation of law, and without right, cut the timber growing upon the strip of land claimed as a right of way, and in some instances upon land adjacent thereto, aggregating approximately 9,000,000 feet board measure. And it is further averred that at the time the bill was filed the defendant had cleared portions, and was clearing other portions, of the alleged right of way, for the purpose of constructing its railroad, and in the process of such clearing and construction it was destroying large amounts of small timber and young growth, and had thrown, and was throwing, and rolling, great quantities of rock, earth, gravel and débris in the St. Joseph river, a stream running through the National Forest, and by such obstructions the defendant was rendering the stream wholly unfit and useless for the purposes of navigation and logging. It is further alleged that, through lack of care and proper precaution, the defendant was causing fires to be started along the right of way, and large quantities of timber and young growth and seedlings were being burned. It is still further represented that, notwithstanding the warnings of representatives of the Forest Service, the defendant was continuing to engage in such unlawful acts, and was threatening to continue therein, and to commit waste and trespass upon such forest land, and that it was the intention and purpose of the defendant wholly to disregard the requirements of the Secretary of the Interior and the Secretary of Agriculture, and to decline to execute any agreement or stipulation, or to await the approval of its maps of definite location by the Secretary of the Interior.

The prayer is that the defendant be required to execute and file with the Secretary of the Interior the form of stipulation prescribed, a copy of which is set forth in the bill, and to refrain from obstructing the navigability of the St. Joseph river, and to refrain from cutting timber and constructing or operating its railroad until it shall have executed such agreement or stipulation, and until its maps shall be approved. Or, in the alternative, that the defendant be absolutely enjoined from constructing or operating its railroad upon any part of the Cœur d'Alene National Forest. There is the further prayer that damages be awarded.

[1] While they have been considered, it would be wholly impracticable to review in detail the multitude of questions embraced in the voluminous and able briefs which have been furnished by counsel, and in the main therefore I shall content myself with a discussion of those which are thought to be controlling. The fundamental question is the construction or interpretation to be given to the general right of way act of March 3, 1875 (18 Stat. 482, c. 152 [U. S. Comp. St. 1901, p. 1568]). The plaintiff contends that by its terms it has no application to lands reserved as a national forest, and the defendant, maintaining the contrary view, takes the position that at the date of the Peck agreement it had acquired, or was entitled to acquire, the right of way in dispute without let or hindrance on the part of the Secretary of the Interior or the forestry officials, and that therefore, even if it be conceded that the agreement was properly and authoritatively executed, it was wholly without consideration, a mere nudum pactum,

and for that reason void and unenforceable. It is thought that the government's contention must be sustained. Section 1 of the act purports to grant to qualified corporations a "right of way through the *public lands* of the United States," and by section 5 it is provided that it shall not apply "to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale." The phrase "public lands" is without precise technical signification (*United States v. Blendaur*, 128 Fed. 910, 63 C. C. A. 636; *United States v. Minidoka & S. W. R. Co.*, 190 Fed. 491, 111 C. C. A. 323), and section 5 was doubtless added for the purpose of excluding the possibility that the act would be so construed as to affect publicly owned lands embraced in the classes of reservations specifically named, or otherwise "specially reserved from sale." Clearly, if the language is to be given its ordinary import, lands withdrawn from entry by executive proclamation, and set apart as a forest reserve, are "lands specially reserved from sale," and no valid reason is apparent why its meaning should be limited, or, by resort to a strained construction, we should exclude this class of reservations from its operation. In some of its features the "right of way act" is out of harmony, and is incompatible with the general object and purpose of the forestry laws. It is true that the public interests may, and generally will, be subserved by the construction and operation of railways through national forests; they make more available for use the products of the forest, and in case of emergency, where fires have been started, they may be of the greatest service in facilitating communication and transportation. But upon the other hand, unless the representatives of the public interest are authorized to exercise some control over the location of the lines of such roads and the manner in which they shall be constructed, and shall have the power to require precautions to be taken against loss by fire, always a peril incident to the use of coal-burning locomotive engines, the railroad may become more of a menace than a benefit. Moreover, if the act is applicable at all, it must be held to be applicable in its entirety, and therefore if a railway company is entitled to appropriate as its right of way a strip of land 200 feet wide, upon such line as it may see fit, through a forest reserve, it may also take to the amount of 20 acres for station purposes, to the extent of one station for each 10 miles of road, and it may likewise cut from the lands adjacent to the right of way such timber as may be required for the construction of its road—all of which rights are expressly conferred by the act. It is not impossible to conceive conditions where, if such be the absolute and unrestricted rights of the railway company, the usefulness of a small forest reserve for the purpose for which it was intended may be greatly impaired, if not wholly destroyed.

It may be added that apparently the view that forest reserves are not subject to the operation of the act of 1875 was entertained by Congress, for we find that during the period following the passage of the original forest reserve act (March 3, 1891, 26 Stat. 1103, c. 561, § 24 [U. S. Comp. St. 1901, p. 1537]), and prior to the right of way legislation of March 3, 1899, next to be considered, several special acts

were passed for the purpose of granting railroads a right of way across forest reserve lands. See, for example, Act of May 28, 1896, 29 Stat. 190, c. 257; Act of June 6, 1896, 29 Stat. 253, c. 336; Act of May 18, 1898, 30 Stat. 418, c. 343; Act of February 28, 1899, 30 Stat. 910, c. 223.

[2] In the general deficiency act of March 3, 1899, 30 Stat. 1219, 1233, c. 427, § 1 (U. S. Comp. St. 1901, p. 1584), is found the following isolated paragraph:

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

The language of this remarkable provision is truly cryptic in its obscurity, and is perhaps susceptible to any one of three or more different constructions. In the view put forward by the government, the reference to "existing law" operates only to adopt the forms and procedure prescribed by, and carries forward nothing of the vitality of, such laws. But apparently under such a literal reading the measure becomes meaningless, for the mere approval of maps and surveys is in itself an idle and useless thing to do. The paramount and only important consideration is the force or effect of such approval, and upon that question not only is the provision entirely silent, but light can be drawn neither from the title of the act in which it is found nor from its context. Let us suppose that the "existing law" simply prescribed forms of procedure, and conferred no right; the provision in itself contains no words of grant, and upon what theory then could it be contended that the Secretary's approval would operate to effect a grant or confer any right whatsoever? It would therefore seem that, to render the enactment effective for any real purpose, it becomes necessary, not only to import the forms and procedure, but also a measure at least of the potency and effect signified thereby in the system from which they are borrowed.

In another view the provision operates to carry forward and make applicable to forest reserves the whole of the act of 1875. It is not impossible that Congress, taking cognizance of existing doubts touching both the application of and the discretionary power of the Secretary of the Interior under the general act, intended thus to clear up both doubts, by declaring it to be applicable to forest reserve lands, with the added restriction that in no case could a grant be effected without the consent of the Secretary of the Interior. The objection to this construction is that under it there are carried forward certain provisions of the general act which, as we have already stated, are thought to be out of harmony with the spirit, and incompatible with the purpose, of the forestry laws, a view which apparently Congress entertained, for in each of the special right of way acts above referred to, passed shortly before the enactment of this provision, while the general act of 1875 is adopted and made applicable as a whole, there is expressly excepted from the privileges conferred thereby the right to take timber from adjacent lands.

Still another view, and I am inclined to think a better one, is that the provision extends only to what may be strictly called the right of way features of the act of 1875, to the exclusion of other rights and privileges thereby conferred, and that in the express adoption of the forms and procedure in that act prescribed, and the authorization of the Secretary of the Interior at his discretion to file and approve maps and surveys tendered in conformity therewith, there is necessarily implied the intent that such approval shall operate to consummate a right of way grant, such as would be effected by a like approval of similar plats and surveys upon public unreserved lands under the act of 1875. There is no substantial difficulty in limiting its operation to the right of way feature, for in terms it purports to relate to no other subject or privilege.

However at this juncture an extended discussion of these several theories is unnecessary, for the reason that in no view of its doubtful features can the act of 1899 be made to avail the defendant. Whether it be construed as being substantively independent of the act of 1875, or as adopting it in part, or as making it in all respects applicable to forest reserves, and whatever may be the nature or extent of the rights which it confers, it unmistakably conditions the acquisition of any right upon the consent of the Secretary of the Interior, and, such consent having here been withheld, it is without efficacy as a defense.

[3] We now come to the consideration of the important question, what, if any, rights the defendant acquired in these lands prior to their reservation, and while they remained subject to the operation of the act of 1875. The order of the Commissioner of the General Land Office, temporarily withdrawing the lands from entry and sale, antedated the defendant's organization, and it follows that if the order was valid, there is no possible ground upon which it can be held that by the subsequent filing of the articles of incorporation and proofs of organization, and, later, maps of definite location, any right whatsoever was perfected or even initiated; and I am inclined to the view that the validity of the order must be sustained. In the present inquiry it is all the time to be borne in mind that the issue here arises, not between the defendant and a third person, each claiming priority of right to land which the government is willing to convey to the one showing the better right, but between the defendant and the government itself, and the question therefore is whether and when the defendant became vested with any interest which the government is bound to respect. *Royal Packing Co. v. United States*, 199 U. S. 579, 26 Sup. Ct. 159, 50 L. Ed. 316; *Stalker v. Oregon S. L. R. R. Co.*, 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027.

These were public lands wholly free from private claims, and subject to the control and disposition of the plaintiff, both as proprietor and sovereign. By general law it had established the policy of reserving from entry and sale portions of its forest-bearing lands, and had invested the President with the authority from time to time to establish reservations, and to fix and declare the boundaries thereof. Intelligently to exercise this authority and to give effect to the ex-

pressed will of Congress, it became necessary to make preliminary investigations, including surveys, for 'the purpose of determining whether or not the lands in any given locality were of such character that they fell within the terms of the act, and of preparing a proper description for their identification. Now it cannot be doubted that while this preliminary work is going on the lands under investigation must be held exempt from private entry, for otherwise, upon its becoming known that the creation of a forest reserve is in contemplation, the project may be greatly hampered, if not wholly frustrated, by the initiation, through private entry, of claims to valuable and salient portions thereof. Hence the temporary withdrawal here was in aid of and incidental to the permanent reservation which the President was empowered to make, and it should therefore be held that the power to proclaim the reservation necessarily implied the authority to declare the withdrawal. It thus appears, and the consideration is emphasized, that here the withdrawal was not made merely or primarily to prevent private entry, but for the ultimate purpose of enabling the President fully to accomplish the object of a statute to which it was his duty to give practical effect; the action was taken, not capriciously or arbitrarily, but "in furtherance of a public purpose committed by Congress to the Executive to effectuate." The following authorities, while not involving the precise question, upon principle lend support to this view: *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Wolsey v. Chapman*, 101 U. S. 755, 25 L. Ed. 915; *Grisar v. McDowell*, 6 Wall. 363, 18 L. Ed. 863; *Wolcott v. Des Moines Co.*, 5 Wall. 681, 18 L. Ed. 689; *Hamblin v. Western Land Co.*, 147 U. S. 531, 13 Sup. Ct. 353, 37 L. Ed. 267; *Northern Pacific Ry. Co. v. Musser-Sauntry L. & Mfg. Co.*, 168 U. S. 604, 18 Sup. Ct. 205, 42 L. Ed. 596; *Spencer v. McDougal*, 159 U. S. 62, 15 Sup. Ct. 1026, 40 L. Ed. 76; *Bullard v. Des Moines*, 122 U. S. 167, 7 Sup. Ct. 1149, 30 L. Ed. 1123; *United States v. Payne (D. C.)* 8 Fed. 883; *John M. Kane*, 37 Land Dec. Dept. Int. 277; *George Herriott*, 10 Land Dec. Dept. Int. 513; *John Campbell*, 6 Land Dec. Dept. Int. 317; 17 Op. Attys. Gen. 258. The fact that the withdrawal was provisional and temporary in its character does not materially alter the case. *United States v. Grand Rapids, etc., R. R. Co. (C. C.)* 154 Fed. 131. It ripened into a permanent reservation which should be held to relate back to the initiatory act.

The further point is urged that only the President has the authority to establish forest reserves, whereas here the withdrawal appears to rest solely upon an order of the Commissioner of the General Land Office; but the order was in accordance with the express direction of the Secretary of the Interior, whose acts are in the premises to be deemed those of the President. *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Wolsey v. Chapman*, 101 U. S. 755, 769 (25 L. Ed. 915). In the former case it was said:

"Now, although the immediate agent, in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which

appertain to their respective duties. * * * Hence, we consider the act of the War Department, in requiring this reservation to be made, as being in legal contemplation the act of the President."

In the latter case, in response to the objection that a *proclamation* by the President is a prerequisite, and that a mere *order* of a departmental officer is not the equivalent thereof, the court said:

"A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in *Wilcox v. Jackson* that such an order sent out from the appropriate executive department in the regular course of business, is the legal equivalent of the President's own order to the same effect. It was therefore, as we think, such a proclamation by the President, reserving the lands from sale, as was contemplated by the act."

But if we assume that the preliminary withdrawal was unauthorized by law, and therefore ineffectual for any purpose, what, if any, rights did the defendant have at the time of the execution of the Peck agreement? In that view the lands remained public and unreserved until November 6, 1906, the date of the President's proclamation. Prior to this time, namely, upon February 17, 1906, the defendant's articles of incorporation and proofs of organization were accepted and filed by the Secretary of the Interior; it is thought to be unimportant that amendments thereto were made subsequent to the proclamation. Defendant's first map was filed before, and the other two after, the date of the proclamation. I am inclined to the view that the first and second filings must be disregarded, and that May 22, 1907, the date of the last one, is to be taken as the date of the filing of defendant's map of definite location, under the act of 1875. Both the second and third maps purport to be, not amendments to the first map, but amended maps, and the routes exhibited are far from being substantially identical. Indeed the lines shown upon the first and last are distinct for the larger part of the distance across the reservation, and for long stretches the two routes are separated by many miles of intervening territory. Upon receipt of the last map the other two were returned to the defendant, with the explanation that it was understood that they were superseded by the last one, and, so far as the record shows, no objection was at the time raised, and apparently the defendant acquiesced in this view of the case. But for practical purposes it is quite immaterial whether we consider only one or all three of the maps. Surely, in view of the wide divergence of the several routes, it cannot be held that the last filing relates back to the first. And hence, if the question of whether the filing was before or after the reservation was established by proclamation is of controlling importance in determining the rights of the defendant, so much of the route finally adopted and actually used in the construction of the road is covered only by the later filings, that if, as to this portion, it is without legal right, and if therefore, as to such portion, it may be required either to remove its track or submit to conditions and terms to be im-

posed by the Secretary of the Interior, it would be without effective defense to the relief prayed for, even were it to be held that its right to the other portion—that covered by the earliest filing—is well founded in law. Upon that assumption, the Peck agreement could not be held to have been without consideration; or, if such agreement may be wholly disregarded, the Secretary of the Interior could impose, as a condition to the approval of the defendant's last filing, terms substantially as now demanded.

[4] Assuming then that defendant's articles of incorporation and proofs of organization are to be deemed to have been accepted and filed before, and its map of definite location after, the creation of the reserve, did it acquire a right of way under the act of 1875? Relying upon a rule of law enunciated notably in the case of *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578, the defendant argues that the act is a grant in *præsenti*, although upon its face uncertain both as to the grantee and as to the lands affected by the grant; that upon the filing by the defendant, and the acceptance thereof by the Secretary of the Interior, of its articles of incorporation and proofs of organization, the grantee became identified, and thereafter the defendant was to be regarded as having the same status under the act that it would have had if it had been specifically named as a grantee therein, and therefore it at once became vested with a right of way across the public lands in Idaho within the general boundaries designated in its articles of incorporation; and that while at that date the grant was a floating one, and had still to be defined either by the filing of a map of definite location or by the actual construction of the road, it constituted a vested right of which the defendant could not be divested by any subsequent change in the status of lands which were at that date public and unreserved. In other words, the contention is that the defendant's rights are precisely the same as they would have been if, upon February 17, 1906, while the lands in question were public and unreserved, Congress had passed an act naming it as grantee, and presently granting to it a right of way 200 feet wide through such lands, and that therefore any subsequent disposition of the lands was necessarily subject to such right of way—as was held in the *Baldwin Case*. If section 1 were the whole of the act, the correctness of this position could not well be controverted, but by other provisions the grant is brought into closer analogy to the "land-grant" feature than the "right of way" feature of the act considered in the *Baldwin Case*, and while, therefore, as was there said concerning the land grant, the words used in the first section import an immediate transfer of interest, so that when the route is definitely fixed the title attaches as of the date the railroad corporation becomes a qualified grantee, the grant does not operate to affect lands which in the meantime have, by change of status, ceased to be public, or have fallen into one of the excepted classes enumerated in section 5. The language of this section is:

"That this act shall not apply to * * * any land specially reserved from sale."

And it is thought that the date as of which the status or character of the land is in all cases to control is the time when the railroad company first seeks to give practical effect to the grant by the definite location of its line of road, whether that be by the filing of the statutory map or by actual construction upon the ground. The view finds support in the following cases: *Spokane, etc., R. R. Co. v. Ziegler*, 61 Fed. 392, 9 C. C. A. 548, affirmed 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79; *United States v. Minidoka, etc., R. R. Co.*, 190 Fed. 491, 111 C. C. A. 323; *Minneapolis, etc., R. Co. v. Doughty*, 208 U. S. 251, 28 Sup. Ct. 291, 52 L. Ed. 474; *Stalker v. Oregon Short Line R. R. Co.*, 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027—and it is not in conflict with *Jamestown, etc., R. R. Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698, considered in the light of these more recent decisions. It must be borne in mind that the act is without limit as to either time or place, and in our effort to discover the legislative intent some regard must be had for the possible results in practice of the adoption of any given theory. For instance, it is provided that any section of a railroad must be completed within five years after the location of the route thereof, and forfeiture of rights is imposed as a penalty for default; but there is no limit of time for either commencing or completing construction, from the date of the filing of the articles of incorporation and due proofs of organization, and therefore, if the theory for which the defendant contends is to prevail, it will follow as of course that any “promoting” company may, at a nominal expense, be organized, and, by filing with the Secretary of the Interior the requisite papers, it can pre-empt a “floating” right of way, or, for that matter, any number of them, and hold them an indefinite length of time for speculative purposes. Not for light reasons should it be held that Congress intended that private persons who desire to purchase and improve portions of the public lands, and the government itself in the execution of its plans for the conservation of its natural resources, should be compelled to proceed with the consciousness that at any moment they may be dispossessed of the most cherished part of their belongings by the definite location of one or more of such “floating” grants.

The following often-quoted passage from the opinion in *Noble v. Union River L. R. Co.*, 147 U. S. 165, 176, 13 Sup. Ct. 271, 274 (37 L. Ed. 123), is set forth in defendant’s brief, and relied upon as establishing a rule in support of its view:

“The language of that section (section 1) is ‘that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,’ etc. The uniform rule of this court has been that such an act was a grant in presenti of lands to be thereafter identified. *Railway v. Alling*, 99 U. S. 463 [25 L. Ed. 438]. The railroad company became at once vested with the right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose.”

But the only question which the court was there considering was whether or not the Secretary of the Interior could vacate the approval by his predecessor of the railroad company’s map of definite

location, and thus nullify the grant. Moreover, the immediate context of the passage quoted is as follows:

"The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, *and when decided, and his approval was noted upon the plats, the first section of the act vested the right of way in the railroad company.*"

It thus appears that the phrase "became at once vested" was used by the court in relation to the time, not when the railroad company filed its articles of incorporation and due proofs of organization, but when the Secretary of the Interior approved the maps of definite location and such approval was noted upon the plats.

If the foregoing views are correct, the defendant acquired no rights under the act of 1875; and it being plain that under the act of March 3, 1899, a grant is conditioned upon the precedent approval of the Secretary of the Interior, which the defendant has failed to obtain, the conclusion follows that it is without any right other than such as it may have obtained by reason of its execution, and the government's approval and acceptance, of the Peck agreement.

[5] And this brings us to a consideration of the question whether, under the circumstances, the plaintiff may be granted any relief in a suit in equity. Primarily the prayer is for the specific performance of the Peck agreement, to which relief the defendant interposes several objections. It is first said that equity will not enforce an agreement to make an agreement; but this rule is not without important exceptions, notably in cases where the agreement is for the execution of formal contracts of security, or contracts of insurance and indemnity, or contracts affecting the title to, or possession of, lands. 36 Cyc. 567.

It is next contended that when he signed the agreement Peck was laboring under a mistake as to the relative dates of the order of withdrawal and the President's proclamation upon the one hand, and the defendant's filings upon the other. Assuming, without deciding, that such an extraordinary mistake was made, it should not be held to defeat the plaintiff's prayer. In the first place, it related to a condition upon which, as we have already seen, the legal rights of the parties in no wise depended, and the defendant's claim to a right of way was quite as much without legal validity in one view of the facts as in the other. But aside from that consideration, the dates should have been known by the defendant, if not as a matter of law, then by reasonable diligence as a matter of fact. They were of public record at the very place where the agreement was executed, and could have been ascertained upon the most casual examination. If the defendant through its own neglect failed to inform itself, it cannot now successfully interpose its ignorance as a reason why it should not discharge the obligations of an agreement the benefit of which it has taken, and surely not without returning the consideration which it has received. The obligations of the agreement are not harsh or unconscionable, but are only such as the Secretary had the legal right to impose, and such as the defendant was bound to assume as a condition of its securing a right of way, and which, with a knowledge of all the facts, it doubt-

less would have assumed in order to avoid delay in the prosecution of the construction of its road.

Uncertainty of the agreement is also urged as a ground for denying specific performance, but it is not thought that any serious difficulty is encountered under this head.

The defense that equity will decline to decree the specific performance of a continuous duty is without merit, for the decree here may, with propriety, go only to the extent of compelling the defendant to execute the required stipulation; relief for any subsequent violations or threatened violations of such stipulation is a matter for future consideration.

Finally, it is contended that the agreement is lacking in mutuality. In so far as there is any substance to the point, it is based upon the limited capacity of the government officers to enter into binding contracts, and upon the exemption of the sovereign from the compulsion of judicial process. It cannot be successfully urged that the agreement was not fully executed by the defendant. Peck was delegated to represent it in the negotiations for the desired right of way, and he acted within the scope of his authority. The notation made by the acting forester, to the effect that acceptance was "subject to ratification" by the company, was for the benefit of the plaintiff, and could be waived by it. But ratification is to be presumed from the subsequent conduct of the defendant, in that it failed to repudiate the known act of its agent within a reasonable length of time, and it accepted, during a period of many months at least, the benefit and protection of the agreement.

It is true that a claim is made that the company was not advised of the Peck agreement until some time in October, 1907, but while certain officers of the company may have remained in ignorance, under the circumstances of the case as shown by the record it is wholly incredible that Peck failed to report the results of his mission to any one, and that no curiosity was aroused as to how it came about that the known opposition of the forestry officials to the occupation by the defendant of a right of way suddenly ceased. Moreover, there never was any express or clear repudiation of the Peck agreement, and we find that as late as December, 1907, while declining at that time to sign a form of stipulation tendered by the government officers, the defendant, instead of electing to stand solely upon its alleged legal rights, requested as a favor that the matter be left open for further negotiations, and that in the meantime it be permitted without interruption to prosecute its construction work, with the implied understanding, as must be inferred, that it would make proper adjustment. If Peck was without authority, or if the defendant was unwilling to be bound by the agreement, why did it not promptly and openly repudiate it, instead of thus temporizing until it had in its possession every advantage which the agreement was intended to secure? Can it for a moment be supposed that the government would have stayed its hand, if the defendant's representatives had at that time intimated that, even though it should ultimately be concluded that under the law it had no right upon the reservation without the consent of the

Secretary of the Interior, it would refuse to abide by the Peck agreement, and that, as it is now doing, it would put forward, as a defense to any relief which might be sought, the very possession which it was asking as a favor to be permitted to take and hold without molestation? The only proper construction that can be put upon what then occurred is that both parties understood that the agreement would control, unless they should be able to reach some other arrangement mutually satisfactory.

It is undoubtedly a general rule that the specific performance of a contract will not be decreed against one party unless it is capable of being enforced against the other (*Marble Co. v. Ripley*, 10 Wall. 339, 359, 19 L. Ed. 955; *Pantages v. Grauman*, 191 Fed. 318, 323, 112 C. C. A. 61), but the rule is subject to numerous exceptions. Indeed, in the last edition of *Pomeroy on Equity Jurisprudence* (*Equitable Remedies*), vol. vi, § 769, the learned author says:

"The frequent statement of the rule of mutuality—that the contract, to be specifically enforced, must as a general rule be mutual, that is to say, such, that it might, at the time it was entered into, have been enforced by either of the parties against the other—is open to so many exceptions that it is of little value as a rule."

Thereupon the author states what he conceives to be the extent of the modern rule, as follows:

"If at the time of the filing of the bill in equity, the contract being yet executory on both sides, the defendant, himself free from fraud or other personal bar, could not have the remedy of specific performance against the plaintiff," then the contract is lacking in mutuality.

But here it appears that the government has substantially performed its part of the agreement, and, having voluntarily submitted itself to the jurisdiction of the court, it or its authorized officers can be required to file and formally approve the defendant's maps as a condition to the delivery of the executed stipulation, for which it pays.

"The rule (of mutuality) governs only such contracts as are executory; for when the party who is not bound has performed his part under the contract, even though not legally bound to such performance, the plea of want of mutuality cannot be made." 22 Am. & Eng. Enc. of Law, 1020.

"If plaintiff has performed his unenforceable promise, the fact that before such promise there was a lack of mutuality in the remedy is no defense." 36 Cyc. 631.

In *Mississippi Glass Co. v. Franzen* (C. C. A. 9th Cir.) 143 Fed. 501, 74 C. C. A. 135, 6 Ann. Cas. 707, it was said:

"The doctrine of nonenforceability in equity of a contract for lack of mutuality has no application to an executed contract. *Green v. Richards*, 23 N. J. Eq. 32, 35; *Hulse v. Bonsack Machine Co.*, supra (65 Fed. 864, 13 C. C. A. 180); *Grove v. Hodge*, 55 Pa. 504, 516. In the last-cited case the court, speaking by Judge Strong, said: 'Want of mutuality is no defense to either party, except in cases of executory contracts. It has no applicability to an executed bargain. There are many where the obligation is all upon one party. As to one the obligation was fulfilled, the contract was executed, when it was made. As to the other party, it remained executory. A consideration may be either something done, or something to be done, or a promise itself. When it is something already done, it is idle to talk of want of mutuality. That is to be considered only when the obligations of both parties are future.'"

See, also, *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674.

In conclusion, upon this branch of the case, it should be added that in the absence of insurmountable obstacles this form of relief should be adopted, for in the alternative the defendant must submit either to process of ejectment or an injunctive order restraining it from maintaining or operating its railway within the boundaries of the forest reserve. Putting aside all consideration of the consequences to the defendant itself, only for the most cogent reasons should the court resort to either of these courses, fraught, as of necessity it would be, not only with great inconvenience to the public, but with irreparable loss to private persons who have valuable property rights, growing out of the construction, and dependent upon the maintenance and operation, of the road. No such imperative reasons appear, and the defendant will therefore be required specifically to perform its agreement. *Price v. Mayor, etc., of Penzance*, 4 Hare, 506; *Fry on Specific Performance*, § 83; *Lane v. Pac., etc., R. R. Co.*, 8 Idaho, 230, 67 Pac. 656.

Two other branches of the case remain for disposition, but they are incidental, and I have decided to postpone their consideration to a later date. The one is the precise form of the stipulation which the defendant shall be required to sign, and the other is the amount of damages, if any, which shall be awarded. There is in the record a form of stipulation which the plaintiff desires to have signed, but apparently in material respects it differs from the Helena stipulation, to which reference is made in the Peck agreement, and which it is thought must control the stipulation here. In the briefs little attention is given to this feature of the case, and it has occurred to me that in view of the conclusion here that the defendant will be required to execute a stipulation, counsel can agree upon the form thereof. On the part of the plaintiff it must be borne in mind that it has come into court seeking the enforcement of a specific agreement, and it follows that it must submit to being bound thereby. As a suitor its status is substantially that of a private litigant. *United States v. Detroit Lumber Co.*, 200 U. S. 321, 339, 26 Sup. Ct. 282, 50 L. Ed. 499; *Mountain Copper Co. v. United States*, 142 Fed. 625, 73 C. C. A. 621; *United States v. Grand Rapids, etc., R. R. Co. (C. C.)* 154 Fed. 131, 136. It may be that the Secretary of the Interior would have had the right to impose upon the defendant all of the conditions specified in the form which has been furnished, but the question here is not what might have been required, but what was required, and the only obligation imposed upon the defendant was that it should execute a stipulation "as nearly as practicable" like the one of January 18, 1907, relating to the Helena national forest; and hence that stipulation must here be the guide. At least in so far as the record informs us, there is no question of the "practicability" of charging the defendant at the same rate for timber used by it upon this forest, as was charged in the case of the Helena forest, but in the form here furnished a higher rate is specified. I also note a difference in the width of the space to be cleared outside of the right of way. It is possible, however, that this

provision is not onerous to the defendant, and it makes no objection thereto. The form also contains some entirely new provisions. If counsel cannot agree, each side is invited to furnish a draft as nearly like the Helena stipulation as is deemed to be "practicable," with a brief summary of the reasons why in any particular respect there should be any deviation.

Inasmuch as the question of damages may, under some contingencies, be dependent upon the contents of the stipulation which shall finally be required, and upon the attitude of the parties relative thereto, it will be passed for the present.

The parties may have 20 days in which either to agree upon the form of stipulation or to furnish drafts embodying their respective views, as above suggested.

In re WAKEFIELD.

(District Court, N. D. New York. August 13, 1913.)

1. BANKRUPTCY (§ 408*)—DISCHARGE—GROUNDS FOR REFUSAL—CONCEALMENT OF PROPERTY.

Under Bankr. Act July 1, 1898, c. 541, § 14b (4) added by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496), providing that if, subsequent to the first day of the four months immediately preceding the filing of a petition, the bankrupt has transferred, removed, destroyed, or concealed any of his property with intent to defraud creditors, the judge shall deny discharge, if deeds executed by the bankrupt more than four months prior to the filing of the petition were not absolute, but a secret trust existed, or they were mortgages, then the bankrupt, by failing to disclose the facts in his schedules or examination, would be guilty of a fraudulent concealment under the act; but the burden is on the objecting creditor to establish this fact by clear proof, not suspicion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

2. BANKRUPTCY (§ 407*)—DISCHARGE—GROUNDS FOR REFUSAL—FRAUDULENT CONVEYANCE.

Under Bankr. Act July 1, 1898, c. 541, § 14b (1), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), and section 14b (4), as added by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496), providing that if, subsequent to the first day of the four months immediately preceding the filing of a petition, the bankrupt has transferred, removed, destroyed, or concealed any of his property with intent to defraud creditors, the discharge shall be denied, though conveyances of property by the bankrupt were made with intent to defraud creditors, even in the hope or expectation of some time getting it back, but with no agreement to this effect, if they were made four months prior to the filing of a petition, it is no ground for refusing the discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

3. BANKRUPTCY (§ 414*)—DISCHARGE—SPECIFICATIONS OF OBJECTION—FRAUDULENT CONVEYANCE—SUFFICIENCY OF EVIDENCE.

Evidence on a hearing of objections to a discharge of a bankrupt, because of a fraudulent concealment of property, *held* to show that conveyances made by the bankrupt more than four months prior to the filing of the petition in bankruptcy were believed by him to have conveyed his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whole title and interest in the property, and therefore insufficient to show that he knowingly concealed the property in his schedule.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.*]

4. BANKRUPTCY (§ 413*)—DISCHARGE—OBJECTIONS TO SPECIFICATION OF OBJECTION—TIME FOR FILING.

Under the court rule that, when no demurrer or motion attacking their sufficiency is interposed to specifications of objection to a discharge until the hearing, or reference to the master, they will be deemed sufficient to present every question fairly suggested, where the specifications alleged that a conveyance by the bankrupt was fraudulent, that he retained possession of the property after the conveyance, and received the rents, and that he had not reported the property in his schedules, fairly raised the question of a fraudulent concealment, in the absence of any demurrer or motion as to their sufficiency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712-718, 725, 727; Dec. Dig. § 413.*]

5. BANKRUPTCY (§ 421*)—CLAIMS PROVABLE—JUDGMENT OF NEGLIGENCE.

A judgment for damages for negligence, but not for willful and malicious injuries to person, is dischargeable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 772-774, 776, 777, 779-781, 783-786, 788-790; Dec. Dig. § 421.*]

In Bankruptcy. In the matter of Ernest D. Wakefield. On application for discharge; objections having been filed by Lewis H. Bramer, a creditor. Discharge allowed.

Hancock & Hogan, of Syracuse, N. Y., for bankrupt.

William Kennedy, of Syracuse, N. Y., for objecting creditor.

RAY, District Judge. The only objection to a discharge requiring attention is that subsequent to the first day of the four months immediately preceding the filing of his petition in bankruptcy the said Ernest D. Wakefield transferred, or concealed, or permitted to be concealed, certain of his property, real estate, with intent to hinder, delay, or defraud his creditors, or that while a bankrupt he concealed from his trustee such real property, which, it is alleged, belonged to his estate in bankruptcy. See sections 14 and 29 of the act entitled "An act to create a uniform system of bankruptcy in the United States and territories," approved July 1, 1898, as amended.

Ernest D. Wakefield, the bankrupt, filed his voluntary petition on the 13th day of July, 1907, and on the 16th day of July, 1907, he was adjudicated a bankrupt accordingly. On the 17th day of August, 1907, he filed his petition for a discharge, and the order to show cause was returnable September 17, 1907. Objections were filed by Lewis H. Bramer, a judgment creditor, and the evidence has been taken and the case submitted.

April 15, 1905, Bramer obtained a judgment against Wakefield and others for the sum of \$20,146 damages and costs, no part of which has been paid. This action was commenced September 24, 1903, but was not tried until April, 1905. It is a debt or claim released by a discharge in bankruptcy.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

November 21, 1901, Herriet V. Noble deeded to Ernest D. Wakefield and May F. Wakefield, his wife, their heirs and assigns, the premises at 512 Geddes street, Syracuse, N. Y., and the deed was duly recorded November 22, 1901. The consideration was \$1,800, consisting of the assumption of a mortgage thereon of \$1,300 and \$500 paid, by cash \$100 and two notes of \$200 each, payable one and two years from date, respectively. Thereafter Mrs. Wakefield, the wife, was ill and taken to the home of her father, James A. Bell, where she remained for some 16 weeks. Mr. Bell testified that he charged Wakefield for board, care, etc., of himself and wife, and rendered a claim of \$250 therefor, which was not paid at that time. When the first note became due, Wakefield was unable to pay same, and Mr. Bell paid same, with interest on both notes—in all, \$224. The total indebtedness, if it existed at all, was \$492, including interest. By warranty deed, dated January 1, 1903, but acknowledged September 4, 1903, Ernest D. Wakefield conveyed to said James A. Bell by warranty deed as follows:

"One-half ($\frac{1}{2}$) that tract and parcel of land," etc., being the premises at 512 Geddes street and described in such deed "with the appurtenances, and my one-half ($\frac{1}{2}$) the estate, title, and interest therein of the said property of the first part."

Then follow the usual covenants of warranty, etc. This deed was recorded September 4, 1903, having been held by Bell in the meantime. April 14, 1905, and some two years and three months prior to July 13, 1907, when the petition in bankruptcy was filed, Wakefield executed, acknowledged, and delivered to said James A. Bell a quitclaim deed of all his title and interest in said lands and premises, on the theory the premises were held by Wakefield and wife as tenants by the entirety; and it is also claimed that this was done to insure the passing of the title absolute to Bell on the consideration referred to. This deed was recorded on the 15th day of April, 1905. December 4, 1908, said James A. Bell and wife deeded the said premises to May F. Wakefield, and this deed was recorded February 27, 1909.

[1] If these deeds to Bell were mortgages merely, and so intended and understood, or if there was any secret agreement and understanding by which Ernest D. Wakefield retained or was to have the real ownership and title and eventually a deed, and he retained any possession and control of the premises, then he had an interest as owner in the said premises, and his interest therein was property belonging to him and to his estate in bankruptcy, the title of which passed to his trustee in bankruptcy; and if this was true, and Wakefield knew it, then he intentionally concealed while a bankrupt some of his property belonging to his estate in bankruptcy from his trustee, as he did not disclose the facts known to him on his examination or in his schedules. In *re Dauchy* (D. C.) 10 Am. Bankr. Rep. 527, 122 Fed. 688, and cases there cited, affirmed by C. C. A., Second Circuit, 130 Fed. 532, 65 C. C. A. 78; *Hudson v. Mercantile Nat. Bank*, 119 Fed. 346, 56 C. C. A. 250, 9 Am. Bankr. Rep. 432; *Matter of Borg* (D. C.) 184 Fed. 640, 25 Am. Bankr. Rep. 189; In *re Breiner* (D. C.) 129 Fed. 155, 11 Am. Bankr. Rep. 684; In *re Bemis* (D. C.) 104 Fed. 672, 5 Am.

Bankr. Rep. 36; In re Welch (D. C.) 100 Fed. 65, 3 Am. Bankr. Rep. 93; Collier on Bankruptcy (9th Ed.) 338. But the proof must be clear and convincing. In the Circuit Court of Appeals, Second Circuit, In re Dauchy, 130 Fed., supra, the court said:

"In order to establish a fraudulent concealment, it must appear that the property concealed belongs to the bankrupt's estate. It must be shown that the transfer was merely a temporary expedient to place the property beyond the reach of the trustee, the title to be resumed by the bankrupt as soon as prudence will permit. In other words, it must be proved that a secret trust exists in her favor, and that her son is under agreement, expressed or implied, to reconvey the property to her when the danger of attack by the creditors has passed. Were we permitted to indulge in speculation and guesswork, and to substitute suspicion for proof, it would not be difficult to sustain the creditors' contention; but the burden is upon them to establish by clear and convincing evidence that the bankrupt has been guilty of the offenses alleged."

In Collier on Bankruptcy (9th Ed.) 331, 332, it is said:

"The ordinary rules of evidence control. Proof must be strict and convincing, but not necessarily to the limit required in proving a crime. Evidence will be confined to the specifications. The burden of proof is upon the opposing creditor, unless the question presented is the construction of the statute. It is not necessary that the alleged ground for refusing a discharge be proved beyond a reasonable doubt, as in the case of the trial of a criminal offense, although the conscience of the court should be satisfied by clear and convincing testimony that the bankrupt is not entitled to his discharge. If the ground depended upon is an offense for which the bankrupt may be punished, it is probable that a greater degree of proof should be required."

[2] It may be true, and quite likely is true, that Wakefield transferred all his property, on the eve of the judgment referred to, to hinder, delay, and defraud his creditors; but, as the transfers were more than four months prior to filing his petition in bankruptcy, this fact is not ground for refusing a discharge. The language of section 14b (4), the only clause applicable here, is:

"At any time *subsequent* to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors," the judge shall deny a discharge.

Personally I would remove the limitation to the four months preceding the filing of the petition; but courts do not legislate, and here there is no opening for a construction of the language.

[3] We return, then, to the proposition whether the proof establishes that Wakefield retained any ownership in this property and knowingly or fraudulently concealed the fact from his trustee in bankruptcy. Clearly there was no transfer within four months of his filing his petition in bankruptcy; but if he had an interest in this property, and concealed the facts when he filed his petition and schedules, he concealed this property, and if it was done to hinder, delay, or defraud his creditors—that is, enable him to secure a discharge in bankruptcy and at the same time retain this property or his interest therein—he is not entitled to a discharge under section 14b (4); and under section 14b (1), by referring to the provisions of section 29, "Offenses," we find that if he "knowingly and willfully concealed while a bankrupt * * * from his trustee any of the property be-

longing to his estate in bankruptcy"—that is, his interest in this property in question—by knowingly and willfully omitting it from his schedules, and not disclosing the facts to his trustee thereafter, he is not entitled to a discharge.

That the first deed of this property from Ernest D. Wakefield to James A. Bell, the one dated January 1, 1903, acknowledged September 4, 1903, and recorded the same day, was a mortgage merely, and so given, received, and held, is plainly shown by the evidence of Ernest D. Wakefield in his testimony before Brainerd, Referee, when he said that he and his wife took title, and that it stayed in him until January 1, 1903, when he deeded it to James A. Bell, and then, after stating the consideration for conveyance, his indebtedness to Bell on account of Bell having furnished board, etc., and paid the two notes of \$200 each, he said:

"Q. How did you come to convey to him (Bell)? A. At the time I deeded the property to him, I was not able to pay the notes, and he took the deed as security, and I owed him money besides that. Q. How much did you owe him besides that? A. Pretty close to \$250. Q. So you owed him altogether, as you stated, about \$650? A. Yes, sir. Q. And to secure that indebtedness you turned over your half interest in the block to him; is that right? A. That's right. Q. And he now holds that block under that arrangement? A. Yes, sir."

Bell testified two or three times that he took that deed as security, and that he treated both deeds in the same light is demonstrated by his evidence to the effect that when he was paid he expected to give a deed back, and that when Mrs. Wakefield paid him some \$800 he did deed to her. The evidence before Brainerd was given in July, 1908, and at that time the objecting creditor was fully informed of the situation. The title, whatever it was, under that and the subsequent deed of April 14, 1905, was then in Bell, and suit could have been and should have been instituted to reclaim the property, if there was any equity in it. At that same time, however, Wakefield testified that he had deeded absolute at a date later than January 1, 1903, to Bell, and that he so deeded under advice of counsel. Bell ought to have been examined at that time, and some effort made to reclaim the property for the benefit of the estate, if there was any equity in the property. In December, 1908, Bell and wife deeded to their daughter, May F. Wakefield, the wife of Ernest D. Wakefield, and who owned an undivided one-half interest in the property. Here we have Wakefield, during the pendency of the bankruptcy proceedings, disclosing the situation under oath, just as he now claims it to be and to have been. His claim was and is that the second deed transferred title absolute, and was so intended by him, and so understood. There is no evidence of any secret understanding or agreement between Wakefield and Bell, by which Wakefield reserved any secret interest, or by which at a subsequent period he was to have a deed, or that Bell did not pay the notes and have a just claim for the \$250 board, etc.

It is, of course, repugnant to our fine sense of generous action to find a well-to-do father making such charges for such a purpose against his son-in-law of no pecuniary ability, at that time, in his affliction; but we cannot doubt the legal right to make the charge and

insist on payment. Coming at the time it did, and in view of the suit on the claim resulting in the large judgment, we naturally suspect the charge would not have been made, or security taken for its payment, or payment exacted, but for the claim of this objecting creditor, resulting in the judgment mentioned. However, this is suspicion; and, while it may carry moral conviction, it is not legal proof. If Wakefield, at the time he filed his petition and made his schedules and gave his testimony referred to, believed that the second deed transferred the title absolute to Bell, we are not justified in finding that he "knowingly and fraudulently concealed while a bankrupt * * * from his trustee any of the property belonging to his estate in bankruptcy," or that Wakefield "at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed or *concealed*, or permitted to be removed, destroyed or *concealed*, any of his property with intent to hinder, delay or defraud his creditors." If he honestly believed that more than four months prior to filing his petition he had actually transferred the whole title to another, he was not guilty of a concealment with fraudulent intent or purpose, even if he so transferred outside the four-months period to hinder, delay, and defraud his creditors, as it seems probable he did here. I think the evidence fails to establish that after the last deed Wakefield thought the title to this property, or any part of it, was in himself prior to, at, or at any time during his bankruptcy. Before the referee, Wakefield, after having given the testimony quoted, was further examined by the attorney for the objecting creditor as follows:

"Q. Now, does that transaction remain as it did, as security for the repayment of \$650? A. Yes, sir. Q. And is that property in the hands of a trustee? A. No; he has possession. I do not understand what you mean. Q. Well, according to your statement, he has security for the repayment of that \$650, and that he still holds the property in that way? A. I deeded it to him absolute. Q. Did you sell an account for the repayment of the \$650? A. I did, of the first deed. Q. Oh; you made another deed; when was that? A. I cannot say the date."

Then the time of giving the second deed was fixed as the day of the trial of the action referred to, and then this:

"Q. Did your father-in-law ask you for a deed of the property? A. No. Q. Then you voluntarily gave him a deed of the property, without his asking for it? A. I gave it to him on the advice of my counsel. Q. Mr. Emerson advised you to give him a deed? A. Yes, sir. Q. Why? A. He claimed that the deed I gave him, the deed of the property, was a joint deed, and the deed that I gave to my father-in-law was my individual one-half interest, and Mr. Emerson said I should give him a deed of my whole interest in the property. Q. Why was it done at all? A. On the advice of my counsel. * * * Q. And from that time you never have had anything to do with the property? A. No, sir. Q. Have you received the rents? A. No, sir. Q. Have you rented the stores? A. I have practically had the management of the property since that time."

The receipt of rents by the wife and her father, and their division of them, is testified to, and it does not appear that Wakefield had any part thereof. I think and hold that the deed of January 1, 1903, was a mortgage merely, and intended as such, but that the attorney,

discovering the situation on the evening of the trial of the action referred to, advised an absolute deed, and secured one from Wakefield, and that Wakefield understood at the time, and from then on, that the last deed was a deed absolute, and conveyed the absolute title. That it was given in fraud of creditors, and to defeat the collection of the judgment, no intelligent person can doubt. But, as I have stated, a conveyance of real property in fraud of creditors, even in the hope or expectation of some day getting it back, but in the absence of some agreement or understanding to that effect, will not defeat a bankrupt's discharge, unless made within the four months immediately preceding the filing of the petition. However much the court would like to change the law, and apply it to this case, it is powerless to do so. In *Re Downing* (D. C.) 199 Fed. 329, 28 Am. Bankr. Rep. 778, this same question (see proposed grounds of opposition to discharge, 28 Am. Bankr. Rep. pages 781, 782), was before this court, and it was held that the facts would not justify the refusal of a discharge, even should the discharge before granted be set aside, and the specifications of objection proposed filed, and the facts alleged therein proved. In *Re Dauchey*, *supra*, the same question was presented before this court, and urged in the Circuit Court of Appeals on appeal; but that court, in affirming the order, in substance said that as the law stands fraudulent conveyances made more than four months prior to the petition in bankruptcy, in the absence of convincing proof of a secret trust, are not ground for refusing a discharge.

[4] Reference has been made to the specifications of objection as insufficient to raise the question of a secret trust or ownership in Wakefield. I do not think this objection well taken, as a rule of this court provides that when specifications of objection are filed, and no demurrer or motion as to their sufficiency is interposed to their sufficiency prior to the hearing thereon, or reference thereof to the master, they shall be deemed sufficient to present every question fairly suggested thereby. Here the objecting creditor set out the fraudulent transfer, and then alleges that Wakefield—

“retained possession of said real property and received the rents, issues, and profits thereof; that said Ernest D. Wakefield has made no reference to the said real property in the schedules filed in this court *showing the property owned and possessed by him*, and the same does not appear as an asset to his estate herein.”

Evidently it was the purpose of the objector to assert that the alleged transfer was fraudulent, merely colorable, and not intended to pass title, and that Wakefield, remaining in possession, had in fact, by some agreement or understanding, retained the ownership and was then the owner of such real property. This is plainly suggested by the specifications of objection, and, under the rule referred to, the question is fairly raised and presented, and has been carefully considered.

[5] This judgment against Wakefield and others was for damages for negligence, but not for “willful and malicious injuries to the person,” and is dischargeable in bankruptcy. The schedules show that this judgment in favor of Bramer of \$20,146, and one of only

\$4.50 in favor of one John H. Beaumont, were the only liabilities of the bankrupt. This court has also considered the fact that the other defendants in that suit and judgment also disposed of all their property by devious methods; but no real connection or concert of action with Ernest D. Wakefield is shown. Even if it were, such fact does not establish that Ernest D. Wakefield retained any ownership in this property.

The trustee in bankruptcy was vested with the right to set aside this transfer, made more than four months prior to the filing of the petition, as made in fraud of creditors. Section 70a and section 70e, where it is provided that a trustee in bankruptcy upon his appointment and qualification shall be vested by operation of law with the title of the bankrupt "(4) property transferred by him in fraud of his creditors," and (sec. 70e)—

"the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication," etc.

But this has nothing to do with the question this court is called upon to decide, which is: Did Wakefield retain any title in this property knowingly and conceal the facts? If the last deed was in fact in equity but a mortgage, and Wakefield knew it, or there was any secret trust, which, of course, he knew, if there was one, he is not entitled to his discharge; otherwise, under the law as it stands, he is. As already stated, the burden of proof was on the objecting creditor, and there must be convincing and satisfactory proof, not suspicious circumstances only. The equities are all with the objecting creditor; but he is not able to make proof, and the law is with the bankrupt.

There will be an order granting the discharge prayed for.

O'HALLORAN et al. v. AMERICAN SEA GREEN SLATE CO. et al.

(District Court, N. D. New York. August 22, 1913.)

MONOPOLIES (§ 12*) — COMBINATION OF PRODUCERS — RESTRAINT OF TRADE — "MONOPOLY."

Within Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), declaring illegal every combination in restraint of trade or commerce among the several states, is a combination by most of the previously independent producers of "Sea Green" slate, having a quality and demand peculiar to itself, whereby the power to determine the amount of its production by each, its prices, and the persons to and by whom sales shall be made, is placed in a central body, though it is more or less in competition with black slate, and though such power may not have been unduly exercised to raise prices.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by James O'Halloran and another, partners as O'Halloran & Jacobs, against the American Sea Green Slate Company and others, to recover damages, to be trebled under the provisions of the statute, for an alleged violation of the provisions of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Decision for plaintiffs.

Randall J. Le Bœuf, of Albany, N. Y., and James G. Marks, of Pittsburgh, Pa., for plaintiffs.

Lewis E. Carr, of Albany, N. Y., S. E. Everts and J. B. McCormick, both of Granville, N. Y., and F. L. Taft, of Cleveland, Ohio, for defendants.

RAY, District Judge. Having in view the salient and controlling facts in this case, nearly all of which are undisputed, and the more recent decisions of the Supreme Court of the United States, I am forced to the conclusion that the defendants, except as mentioned in the findings, have violated the statute above referred to, the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to the damage of the plaintiffs, and that the plaintiffs have shown that they have sustained some damage, and that under the stipulation the court should proceed to take proof of such damages.

The defendants have filed many requests to find, which I do not pass upon, except as the findings made determine them, but reserve the right to pass on them before final judgment, and when the defendants shall have determined what additional facts they regard essential to have determined or passed upon specifically. The findings made and filed herewith, and made a part hereof, show, I think, that prior to August, 1904, the producing defendants were engaged in business in the production and sale of "sea green" slate in competition with each other and all other producers of "sea green" slate in the United States; the producing area of such slate being confined to a narrow strip of territory along the western boundary of the state of Vermont and near the eastern boundary of the state of New York. Slate of other colors and qualities were and are produced in Maine, Pennsylvania, and elsewhere, and, of course, there was more or less competition between these other slates and "sea green" slate; but the sea green had a limited area of production of its own, a limited number of actual producers, and a market and demand of its own. It was not difficult to form a combination by and through which, not only the production and output of "sea green slate" should be limited or enlarged or controlled at will, but by and through which the dealers therein could or should be limited in number, and the price of sea green slate fixed and determined by the combination. This was done by and through the formation of the American Sea Green Slate Company, a New York corporation, and the agreements and combination made between it and nearly all the producing companies, corporations, and individuals.

As these companies, corporations, and individuals had been doing an interstate business, the result was an interference with, a restraint upon, and a limitation of interstate commerce in sea green slate. Free competition between the producer and sellers in the production and sale of sea green slate as it had theretofore existed was destroyed, or substantially so, as nearly all producers came into the combination. As matter of fact production was controlled, as well as sales and prices were fixed, not entirely and completely, but substantially so, and interstate trade in sea green slate was in fact restricted and interfered with. It seems to me that when the producing defendants, theretofore engaged in producing and selling sea green slate and controlling substantially the entire production, agreed to form and did form this so-called selling corporation, the American Sea Green Slate Company, and placed in its hands the powers mentioned, and which were exercised, making themselves subject to its will and control in producing and selling, they "combined"; and when we find that the object of the combination was to control and at will restrict trade and commerce in sea green slate among the several states and control the price at which it should be sold, and the persons to whom sold, and the persons by whom it should be sold, it must be held that the combination was illegal, under the provisions of section 1 of the act referred to, which says:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

I acquit the defendants of any willful purpose or conscious design to violate this act; but this is no defense, if the agreements made and their execution necessarily operate to unduly and unreasonably restrain trade or commerce among the several states. See *Addyston Pipe Case*, 175 U. S. 211, 214, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. So far as the intent of the defendants is involved, they are presumed to have intended the necessary, natural, and known effects or consequences of their agreements and acts, and if these effects or consequences be to unduly restrain interstate trade and commerce, then the combination is illegal, and the participants are chargeable with the consequences, and are liable for the damages resulting. See also *Continental Wall Paper Co. v. Voight*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, and *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815.

In *United States v. Union Pacific R. R. Co. et al.*, 226 U. S. 61, 85, 33 Sup. Ct. 53, 57 (57 L. Ed. 124) the court said:

"We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable."

See *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

In the case at bar we find a combination which places several producing and selling persons, corporations, and companies engaged in interstate commerce in such a relation to each other as to create a single dominating control in one corporation, the American Sea Green Slate Company, whereby the natural and theretofore existing competition in producing and selling Sea Green slate in interstate commerce is unduly restricted. The contention for a long time made, and still continued by many, that any agreement which to any extent and in any degree whatever affects or restricts and limits interstate commerce is illegal, is not supported by the recent decisions of the Supreme Court, and it seems to be settled that there must be an undue restriction or restraint, the question of fact to be settled by the court applying the rule of reason. But the legality or illegality of a combination is not to be determined by weighing or balancing the benefits to the combining parties as against the injury to the public or public interests, or by weighing and balancing the possible benefits to the public interests as against the injury to such interests. So an honest intention on the part of the combining parties to benefit the general public, by cheapening the cost to the consumer of the article produced and sold, and giving him a better article, will not save from the condemnation of this statute a combination which restrains and restricts interstate trade and commerce in that article to any considerable degree, and places the power to control production and fix prices in the hands of a dominating corporation or of the combination itself. To so construe this act would make injurious effects on the general public, and not interference with and restrictions or restraints upon interstate commerce, the essence of the offending.

And it is equally true that an intent and purpose to aid the financially weak producer as against the strong, to some extent, as here, will not save the combination from the condemnation of the statute, if that be not the main and controlling purpose and result, but interference with and control of production and prices in interstate commerce be such purpose or the result. While those engaged in the production of an article and interstate commerce therein have the right in all lawful ways to protect and foster their industry, they are not permitted to go to the extent of combining to unreasonably fetter or restrict interstate commerce. It has been declared that agreements or combinations between dealers having for their *sole* purpose the destruction of competition and the fixing of prices are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. This is but a polite way of declaring that combinations by dealers to loot the public for their own gain and benefit are illegal. Each and every individual or corporation engaged in the production or sale of an article may, of course, fix the terms on which he will sell, provided he violates no law in so doing, for here the door to honest competition is left wide open, so that the public may protect itself; but when all, or substantially all, producers and dealers com-

bine to fix prices and control sales, as well as production, the interests of the public are at once threatened, and necessarily injured.

Men may combine their money, their intelligence, and their industry or effort for their common good, and so corporations are permitted and copartnerships are lawful; but when those theretofore engaged independently in producing and selling an article combine their money, intelligence, and effort for the purpose of limiting the supply and controlling the price of such article, and destroying competition, and they interfere with interstate commerce, or their combination is such as in its operation and execution will bring about these results, they have become violators of the statute referred to, regardless of intent. The Supreme Court has declared that the act referred to—

"prohibits any combination whatever to secure action which necessarily obstructs the free flow of commerce between the states, or restricts in that regard the liberty of any individual to engage in business." *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815.

The power under and pursuant to the combination to do the prohibited things is what brands it (the combination) as illegal, not the actual exercise of that power, although when a plaintiff sues for damages he must, of course, show the combination, its operation, and that it has resulted in damages to him. And of course, to bring a combination of this character within the condemnation of the statute, it is not necessary to show that a complete and United States wide monopoly has been actually created, or that the entire trade or business and production of an article has been brought within the control of the combination, or ever will be. It is no defense for such a combination to show that there is still some competition and some competitors, and that the acts of the combination do not wholly and entirely control interstate commerce in the article, or absolutely fetter it. If the combination be one in restraint of trade or commerce among the several states to any substantial degree, it is within the condemnation of the statute.

The defendants, except Sheldon Slate Company, which came in later, and one other, had negotiations which led up to the organization of the American Sea Green Slate Company, the purpose of which is stated in the findings, where the articles of incorporation are also set out. The defendants contend in effect that the competition between them was very injurious and well-nigh ruinous. It was understood and agreed that each of the producing companies, corporations, and individuals should sell the whole of his or its production of sea green slate to this selling corporation, when formed. And it was the purpose that this selling corporation should fix the price of all the slate produced by those who went into the arrangement, whether actually turned over to it or not. It is not a case where the producers in the combination independently fixed their own prices for the same quality of slate at their own free will, or retained the power to fix and control the price to purchasers and consumers, and they were not even left free to fix and determine their own productions. If they did exercise these powers, it was at their peril. In the selling corporation formed, each producer had a representative, and contracts were

executed and renewed by which they transferred to such corporation, not only their stock on hand, but all to be produced by them, and that in any manner thereafter acquired. It was also a part of the combination agreement that the stock of the corporation could only be sold to others after it had been offered to and refused by this corporation itself. All their slate from 1904 down to the trial was transferred to this selling corporation. There was a contract made and signed by the president of the corporation, and this resulted in the Cayahoga Roofing Company, an exclusive selling agency for certain territory, and representatives of all the producing companies signed the contract. A resolution was passed by this corporation forbidding the producers to move slate except on its written order, and the destination of the slate and the consignee must be given also.

Here are some of the things which this joint action of the defendants accomplished: By the exclusive ownership of their product the American Sea Green Slate Company had power, which it exercised, aside from price making, to restrain or destroy at will the competition in interstate commerce which had theretofore existed between them. It determined the persons to whom the slate produced by them should be sold, the classification of such persons, and authorized the entire exclusion of any of such persons. It also determined the quarries from which the producers' slate should be sold, and whether any should be sold, or whether it should be stored to serve the purposes of those in the combination; the terms and conditions of sale; and the piling and loading, etc., as directed by certain inspectors. There are many others which I will not recite. This combination centered its powers in this selling corporation, transferred to it all its slate, that of each producer, gave it control of prices, sale, shipment, and actually forbade the producers to move slate on their own account, except on conditions fixed by it. It is true that on certain conditions producers were permitted to repurchase and sell; but they were not free to sell or ship in interstate commerce the slate so repurchased, as the terms and conditions were prescribed by this selling corporation.

The learned attorney for the American Sea Green Slate Company ably contends that:

"There is a distinction between combination and agreements that were entered into with the legitimate purpose of reasonably forwarding personal interest and developing trade, and those that give rise to the inference or presumption they had been entered into with intent to do wrong to the general public."

There should be added to this quotation:

"And to limit the right of individuals, thus restraining the free flow of commerce, and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

The learned counsel says the first class mentioned are legal, the latter class illegal, and—

"what was done was to better producing conditions, to so aid producers they could successfully continue and increase their operations, without unduly or unreasonably increasing the cost to the consumer. What was so intended has been accomplished, the producers have been benefited, but that expense has not been at the expense of the consuming public."

He also argues that in point of fact, since the organization of this selling corporation, the output and sale of sea green slate has increased, and that the case is devoid of evidence tending to show that the free flow of interstate commerce has been at all interfered with.

I think a combination or an agreement is within the condemnation of the act which places the power in the hands of a controlling or selling company to fix the prices to consumers and dealers of the commodity produced by those in the combination, and who had theretofore been competitors, and to sell or not to sell at all such production, and also fix or determine the class or classes of persons who shall be permitted to purchase and sell or deal in such commodity. The exercise of such a power would clearly interfere with and restrict the "free flow of interstate commerce." The article, as here, sea green slate, over 60 per cent. being in the hands of this selling corporation, could be for an indefinite period entirely, to that extent, withdrawn from the channels of trade. The supply to dealers and consumers in one or more sections of the country may be cut off or greatly limited. Is it a defense to those in such a combination to say that, true, we restrict and interfere with interstate commerce between New York and Boston and Providence and Portland; but we have largely increased such commerce in this article between New York and Cleveland and Chicago and Omaha and San Francisco, and, altogether, we have increased the interstate shipments of this article fourfold; true, we cut off South Carolina, Georgia, and Florida, and the South altogether, but we sell the entire product, which we have largely increased, in Ohio, Michigan, and the great West, and have thereby increased interstate trade and commerce in this article fourfold? I do not so understand the law.

It is also contended that no harm has been done by way of increasing the price of sea green slate to the consumer, inasmuch as the evidence discloses that such increases of price as have been made do not meet or more than meet the increased cost of production. Also:

"Sea green slate is in competition in the markets with black slate, the production of the Pennsylvania region. The production there largely exceeds that of sea green. The prices of the sea green to the producers are limited to the prices of the black slate in the contracts previously referred to. The prices of the sea green to consumers are necessarily limited to and regulated by those of the black slate, which so largely predominates in the markets. So it is not in the power of the Sea Green Slate Company to impose upon consumers any unreasonable burden in the way of price."

But, aside from the question of damages, if any, suffered by the plaintiffs, is it of consequence, in determining the illegality of this combination, whether or not the increase in price actually made was to meet the increased cost of production or to satisfy the alleged greed of those in the combination? Is a combination of this class any the less illegal for the reason it has not put in actual practice or operation the powers it has conferred upon itself by the joint action of its members? It is unquestionably true that sea green slate has met and meets and will meet in competition black slate from Pennsylvania and Maine and other places, and also a variety of other roofing materials, and that such competition will more or less affect and have to do with determining the price at which the sea green slate must be

sold. This may have to do with the question of damages; but as it appears that sea green slate has a quality and a demand peculiar to itself, I am unable to see that the supply of black slate has much, if anything, to do with determining the legality or illegality of this combination. Is trade or commerce in *this* article among the several states restrained unreasonably, or may or will it be so restrained, by the operations of this combination is the crucial inquiry.

Section 7 of the act provides:

"Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

It is quite true that before these plaintiffs can recover it must appear that:

"The acts of the defendant complained of must be forbidden by or be unlawful under the act, and (2) the plaintiffs must have been injured in their business by such forbidden or unlawful act."

I am now, under the stipulation, to pass on the illegality of the combination only, and whether or not the plaintiffs sustain such a relation to its acts as make a *prima facie* case of injury to some extent, even though it be nominal merely. The plaintiffs were and are large dealers in slate of various kinds, and in sea green slate, with others. Since the formation of this combination they have been compelled to pay more for this slate, they claim, and have been placed under restrictions not before in existence, and denied slate, they claim, because of this combination and its illegal character. The question of damages was not gone into, and I express no opinion, as I have none, whether or not the plaintiffs in fact have been substantially injured in their business or property by the acts of the defendants or either of them. The evidence is sufficient to show a *prima facie* case for some damage.

As I cannot hold this combination to be one not in violation of section 1 of the act, and feel compelled to hold it is one condemned by the act, the parties will proceed to present their proofs on the question of damages. As before stated, inasmuch as no judgment can be entered until this question of damages is settled, I reserve the right to pass on defendants' requests, as well as additional requests of the plaintiffs, if any, at the time of final decision. It is useless to lumber a case with a mass of unnecessary and immaterial findings; but defendants should have the privilege of presenting requests in view of the findings already made.

So ordered.

In re SAMUELS & LESSER.

Ex parte QUINN.

(District Court, S. D. New York. July 12, 1913.)

1. BANKRUPTCY (§ 69*)—PARTNERSHIP—UNDISCLOSED PARTNER—ADJUDICATION—INSOLVENCY—ADMINISTRATION OF ASSETS.

Since under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419), a partnership is treated as in entity, which may be adjudged a bankrupt if it has committed an act of bankruptcy, irrespective of any adjudication of the individual partners, and the adjudication of the firm will subject the separate estates of the partners, as well as the firm property, to administration in bankruptcy, where a firm has become a bankrupt, the individual assets of an undisclosed partner were subject to administration in the bankruptcy proceeding, without reference to whether he was insolvent or not.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51-53, 56; Dec. Dig. § 69.*]

2. BANKRUPTCY (§ 93*)—UNDISCLOSED PARTNERS—RELATION TO FIRM—JURY TRIAL.

On an application for administration of the personal assets of an alleged undisclosed partner of a bankrupt firm, he was not entitled to a jury trial of the issue whether he was in fact a partner.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 140; Dec. Dig. § 93.*]

3. BANKRUPTCY (§ 69*)—PARTNERSHIP—INDIVIDUAL ASSETS OF PARTNER.

The only remedy of a partner of a bankrupt firm to prevent administration of his personal estate in bankruptcy proceedings against the firm is to pay off the firm creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51-53, 56; Dec. Dig. § 69.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Samuels & Lesser. Petition by Edward F. Quinn directing an undisclosed partner of the firm to file a schedule of his individual assets and liabilities. Granted.

This is a petition by a creditor, in which the trustee joins, for an order directing a partner to file a schedule of his individual assets and liabilities preparatory to administering his estate in this court. A petition was filed against the two bankrupt partners, and they were adjudicated, both individually and as a firm. In the course of the proceedings the testimony disclosed the possibility of a third undisclosed member of the firm, one Valentine, who had never been joined in the proceedings, and therefore, of course, had never been adjudicated.

Grenville M. Clark, of New York City, for petitioner.
Irving M. Dittenhoefer, of New York City, for trustee.
J. Charles Weschler, of New York City, for Valentine.

HAND, District Judge (after stating the facts as above). [1] This motion presents a question which has been much contested in the books; i. e., may a court of bankruptcy draw to itself for administration the estate of a partner, not adjudicated, as part of the administration of the firm bankruptcy? In this case two partners and the bankrupt firm have been adjudicated, but Valentine never has. The greater

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

number of authorities appear to be in favor of the motion, but there is a strong decision to the contrary in the Eighth circuit, by a divided vote. In *re Bertenshaw*, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986.

The law has taken its rise from what was certainly an obiter remark of Judge Wallace in *Re Meyer*, 98 Fed. 976, 979, 39 C. C. A. 368, which affirmed Judge Thomas in the same case (D. C.) 92 Fed. 896. That remark was the basis of a decision of Judge McPherson, in *Re Stokes* (D. C.) 106 Fed. 312, and it was followed by Judge Severens, for the Sixth circuit, in *Dickas v. Barnes*, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, although the actual decision went off on a question of appeal. It was likewise a basis of the decision of Judge Holland in *Re Lattimer* (D. C.) 174 Fed. 825, which was affirmed in an elaborate opinion by Judge Lanning, for the Third circuit, in *Francis v. McNeal*, 186 Fed. 481, 108 C. C. A. 459. The doctrine in that case was limited to a case where the firm adjudication involved the insolvency of the partnership; the theory being that the firm could not be insolvent unless the partners were also insolvent, under the rule in *Re Blair* (D. C.) 99 Fed. 76, *Vaccaro v. Security Bank*, 103 Fed. 436, 43 C. C. A. 279, and other cases. It was the basis also, of Judge Hook's dissent in *Re Bertenshaw*, *supra*. Judge Quarles, in *Re Junck & Balthazard* (D. C.) 169 Fed. 481, ruled in the same way, as did Judge Lanning in *Re Ceballos & Co.* (D. C.) 161 Fed. 445. In *Re Kaufman*, 176 Fed. 96, 99 C. C. A. 107, in our own Circuit Court of Appeals, expressly reserved this question from the decision, and, so far as it bears upon the question at all, favors the rule in *Re Meyer*, *supra*. I have found nothing to the contrary, unless it be in *Re Solomon* (D. C.) 163 Fed. 140, where Judge Chatfield ruled that the partner should administer the estate, yet file schedules in this court. I do not understand that he did not think in *re Meyer* controlling.

On principle the entity theory forbids considering the solvency of the partners, in determining the firm adjudication. They are guarantors of the firm's solvency, and though they may have to pay the whole deficiency of the firm debts, they still have a right against the firm. While from the point of view of the creditors the partner's liability is an asset, the firm books would show it as a liability of the firm to the contributing partners. It is only when the firm entity is forgotten that the partner's liability may be regarded as a firm asset. If the firm be regarded as an individual for a moment the thing is plain. Suppose that A. guarantees all of B.'s debts and B. then becomes bankrupt. From the point of view of the creditors the claim against A. is an asset, and it might be thought that A.'s insolvency was a necessary condition of B.'s bankruptcy. However, this is not true, because, though A. could not prove in competition with any of the creditors against B.'s estate, having guaranteed all equally, still he would have a claim in case he took up all the debts, or in case he paid the deficiency after the assets were exhausted. Precisely the same relations exist between the firm and the partners.

If this be so, then it follows that the separate estates should not

be drawn into bankruptcy administration without separate adjudication. The firm as an entity may be solvent or insolvent, as its assets are sufficient, and the deficiency which the partners will have to pay will be great or small according to this insufficiency. That deficiency is an individual liability of the partners, and under any adequate grasp of the entity theory ought to be a provable claim against the separate estate, though, of course, the law has been settled to the contrary for 100 years, unless section 5g may some day be held to effect the more consistent rule. In determining the partner's solvency, that liability would, of course, be reckoned, even though under the law the individual debts are preferred claims, and his solvency would depend upon whether his estate can answer all these debts. It seems to me obvious justice that his whole separate estate ought not to be drawn into the bankruptcy court for administration unless that be true; and so far, indeed, Judge Lanning felt bound to go in *Francis v. McNeal*, supra, to avoid unjust results.

But, though the worst aspect of the doctrine would be relieved by its limitation to cases where the partner was individually insolvent, it is none the less always obnoxious in principle, since the partner's estate ought not to be drawn into bankruptcy at all unless he has committed an act of bankruptcy. It is true that he avoids the stigma of the name, but there may be more concerned than that to his creditors. For instance, does the administration of the separate estate presuppose that the firm acts of bankruptcy invalidate execution liens of the individual creditors? If not, the bankruptcy court will administer the separate estate, without regard to section 67c or 67f. If, on the other hand, the firm acts of bankruptcy do affect the status of the individual creditors, it is a clear anomaly under the law. Suppose, for instance, that on January 1st the first made a fraudulent transfer of which an insolvent partner is innocent, and that on April 15th a petition is filed against the firm. Suppose that on December 20th an individual creditor of the innocent, but insolvent, partner had levied on his goods, and that the application to administer his separate assets in this court is made on May 25th. Does the petition against the firm invalidate the lien of the execution? I confess I cannot see upon what principles; yet, if not, does the date of the application to administer the separate assets control, though no petition be filed against him, and though he has committed no act of bankruptcy?

Again, under Judge Lanning's qualification of the rule, how can we treat a case like this? The firm is insolvent, but we do not know whether or not Valentine can meet all the obligations, if he turn out to be a partner. Suppose he can; then this application must fail. In such a case, may the firm adjudication itself be opened upon the newly discovered evidence that the firm after all is solvent?

It is said that general order No. 8 (89 Fed. vi, 32 C. C. A. xi) controls, but that is by no means clear. The order was copied from one drawn under Act March 2, 1867, c. 176, 14 Stat. 517, which did not recognize the firm entity, and it does not assume the possibility of a firm adjudication without an adjudication against the partners separately. As applied to the present act, it, of course, may bear the in-

terpretation put on it by the doctrine in question; but it may equally well be limited to cases where the objecting partner is separately adjudicated along with the firm, which was the case contemplated under the old act. As to section 5h, I agree that it may not mean that the unadjudged partner shall administer the firm assets if the firm be adjudged; that would be a strange result. The more reasonable interpretation is that, while a separate bankruptcy may dissolve the firm, the solvent partners may wind it up, just as used to be the law. *Amsinck v. Bean*, 22 Wall. 395, 403, 22 L. Ed. 801. But all this is of no consequence anyway, because I cannot see what section 5h has to do with the question here at bar. The question is, not whether the unadjudged partner shall administer the firm assets, but whether his own assets shall be brought to this court. One question has absolutely nothing to do with the other.

The whole subject of partnership has undoubtedly always been exceedingly confused, simply because our law has failed to recognize that partners are not merely joint debtors. It could be straightened out into great simplicity, and in accordance with business usages and business understanding, if the entity of the firm, though a fiction, were consistently recognized and enforced. Like the concept of a corporation, it is for many purposes a device of the utmost value in clarifying ideas and in making easy the solution of legal relations. It would, moreover, avoid what must appear to every unsophisticated person the very grave injustice of seizing the separate estate of a man who has committed no act of bankruptcy, or who may even be solvent, and administering it in this court. Nevertheless, the law was too well fixed until 1898 to allow a change, at which time the present act gave an opportunity to construe the law in accordance with principle. Yet I cannot disregard the language of *In re Meyer*, *supra*, even though it was obiter in the case there at bar. It was probably intended as a direction for the future conduct of that very case, and as such it was perhaps followed. Nor do I think that Judge Lanning's distinction ought to be followed, though it would somewhat mend the hardship of the rule.

[2, 3] Therefore the only question open is whether Valentine was in fact a partner at the time of the petition. Upon that he is not entitled to a jury, as I understand the theory, because, although this court administers his estate, it does not declare him a bankrupt, and need not even find him insolvent. His only recourse, if he would escape such administration, is to pay off the firm creditors.

A reference is therefore ordered upon this question.

UNITED STATES *ex rel.* PROCTOR MFG. CO. *v.* STANNARD *et al.*
(District Court, N. D. New York. August 8, 1913.)

1. UNITED STATES (§ 67*)—PUBLIC WORKS—CONTRACTOR'S BOND—ACTION—COMPLAINT.

The complaint of a subcontractor in an action on the bond of a contractor with the United States for construction of public works *held to* allege and show complete performance of the contract and final settlement

thereof, that no action on the bond had been brought by the United States, and that plaintiff's action was brought more than six months and less than one year after such performance and settlement, entitling plaintiff, under Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), to bring the action.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

2. COURTS (§ 275*)—DISTRICT IN WHICH SUIT IS BROUGHT—COMPLAINT.

The legal capacity of plaintiff to sue is shown by the complaint, alleging that plaintiff is a corporation organized under and pursuant to the laws of the state, and having its principal office and place of business in a certain county, which county is within the district of the federal court in which the action is brought.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 275.*]

3. EVIDENCE (§ 25*)—JUDICIAL NOTICE—LOCATION OF COUNTIES.

A federal court will take judicial notice that certain counties are within the district of such court in which the action is brought.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 31-33; Dec. Dig. § 25.*]

4. ACTION (§ 22*)—LEGAL OR EQUITABLE—PROCESS.

The action which Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), authorizes a subcontractor to bring against a contractor with the United States for construction of public works, and the sureties on his bond, is, as regards the kind of process required, an action at law, and not a suit in equity; it being on contract obligations and to recover money, and the fact that all other subcontractors may come in and prove their claims, and share pro rata in the recovery, not affecting the question.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124-139, 143, 145; Dec. Dig. § 22.*]

At Law. Action by the United States of America, on relation of the Proctor Manufacturing Company, against Ambrose B. Stannard and others, in which the American Hardware Corporation intervened. On demurrers to complaint in suit at law, commenced by the issuing and service of a summons and publication of notice required, under the provisions of the act of Congress approved August 13, 1894, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," and the act amendatory thereof, approved February 24, 1905, and on motion to dismiss. Demurrers overruled. Motion denied.

D. B. Lucey, of Ogdensburg, N. Y., for plaintiff.

H. J. Cookinham, of Utica, N. Y., for defendant Illinois Surety Co. Martin & Jones, of Utica, N. Y., for intervener.

RAY, District Judge. This action was brought by the Proctor Manufacturing Company, in the name of the United States, against Ambrose B. Stannard, contractor with the United States for the construction of a public building (post office building) at Malone, Franklin Co., N. Y., in the Northern district of New York, under the provisions of the act approved August 13, 1894 (28 Stat. 278, c. 280), en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

titled "An act for the protection of persons furnishing materials and labor for the construction of public works," and the act amendatory thereof approved February 24, 1905 (33 Stat. 811, c. 778).

Ambrose B. Stannard is in bankruptcy, and his trustee, Henry A. Wise, has been brought in as a party defendant. The American Hardware Corporation has duly intervened, setting up and alleging its claim. The Illinois Surety Company, surety on the bond of said Stannard, the contractor, demurs to the complaint of the plaintiff on the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action; and (2) that said Proctor Manufacturing Company does not show its capacity to sue. Said Illinois Surety Company demurs to the complaint of the intervener, American Hardware Corporation, on the ground (1) that Henry A. Wise, such trustee, is not a party; (2) that said Hardware Corporation does not show its capacity to sue or to be made a party to this action; and (3) that its statement of claim is not sufficient to show a cause of action against the Illinois Surety Company, or to entitle the American Hardware Corporation to share in the benefits of the bond or undertaking set forth in the said statement of claim of said Hardware Corporation. The said Illinois Surety Company also moves to dismiss, on the ground that both the complaint and the intervening complaint show a suit in equity, while this action was brought as an action at law by the service of a summons under the attestation of the Chief Justice of the United States and the seal of the court, signed by the clerk of this court, and also by the plaintiff's attorney, as required in bringing actions at law, and not by the service of a subpoena, as required in equity actions.

[1] The specific objection to the sufficiency of the complaint pointed out on the argument of these demurrers was that the complaint does not specifically allege that the contract had been completely performed and that there had been a final settlement thereof, giving the date, and thereby show that the action was commenced within one year thereafter. The act of February 24, 1905, provides amongst other things:

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall upon application therefor * * * be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States, in the district in which said contract was to be performed and executed, * * * and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That when such suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced *until after the complete performance of said contract and final settlement thereof*, and shall be commenced *within one year after the performance and final settlement of said contract*, and not later."

If the contractor does not fully perform the contract, the government may do so, and settle and adjust the rights of the parties, and it is only after full performance and settlement of the rights of the parties to the contract, and after the expiration of six months from

that event during which the United States may sue, and within the ensuing six months, that a subcontractor may bring suit on the bond. It is essential that the complaint allege, not only full performance of the contract, but final settlement thereof, and the date of such final settlement. Has the plaintiff done this? The complaint contains the following allegations:

"And your orator further alleges, upon information and belief, that the said Ambrose B. Stannard, after the execution and delivery of the said contract and the said undertaking, duly entered upon the performance of his said contract for the construction of the said post office building and equipment at Malone, and did through himself and his subcontractors furnish the labor and material necessary for the construction of the said post office building, and did erect and construct the said post office building, and did complete the same.

"And upon information and belief that the work and material so performed and furnished by the said Ambrose B. Stannard was duly accepted by the said United States of America, through its duly constituted officers, and final settlement under said contract and final payment of the contract price by the said United States of America to the said Ambrose B. Stannard was duly authorized on or about the 10th day of October, 1912, and full and final payment of the said contract price was thereupon made to the said Ambrose B. Stannard. * * *

"And your orator further shows and alleges, upon information and belief, that on or about the 10th day of October, 1912, a full and final settlement and payment of the amount due the said Ambrose B. Stannard under his said contract with the said United States of America was duly authorized by the proper officers and authorities of the said United States of America, and that he did forthwith receive his final payment in full settlement under said contract with the said United States of America, and more than 60 days have elapsed since the final settlement and payment to the said Ambrose B. Stannard, at which time final payment under his contract with the said Proctor Manufacturing Company became due and payable. * * *

"And your orator further shows and alleges that more than six months' time has elapsed since the final settlement and payment by the United States of America to the said Ambrose B. Stannard, and upon information and belief that the said United States of America has commenced no action against the said Ambrose B. Stannard on any matter growing out of his said contract, or upon the bond or undertaking furnished by him to the said United States of America for the faithful performance of his said contract, dated October 26, 1910, and upon information and belief that no other action has been commenced against the said Ambrose B. Stannard and the said Illinois Surety Company by any creditor upon the said undertaking hereinbefore mentioned, and that one year has not yet elapsed since the final settlement with the said Ambrose B. Stannard under his said contract with the United States of America."

It seems to me that here are clear allegations that on or before the 10th day of October, 1912, there had been a full and complete performance of the contract by Stannard, and that on that day there was a full and a final settlement thereof between Stannard and the United States, and a full and final payment to Stannard of the full amount due and to grow due, if any, thereunder, and that more than six months had expired after such performance and settlement, and that neither the United States nor any other person had commenced any action on such contract and bond, and that one year from the date of said complete performance and final settlement and payment had not expired.

In *Stitzer v. United States*, 182 Fed. 513, 518, 105 C. C. A. 51, 56, it is said:

"If we were to accept the government's statement that the work was completed March 25, 1909, as meeting the requirements of the statute, it would follow that the suit was timely instituted. But this cannot be done; the language of the act prohibits the commencement of a suit by a creditor, not only, as the plaintiff contends, until six months from the completion of the contract, but until six months 'from the completion and final settlement of the contract.' These terms are not equivalent. They do not mean the same thing. The latter may perhaps by inference be held to include the former, but the former cannot by any fair construction be made to include the latter. Each is an essential prerequisite to the institution of a creditor's suit. The contract might well be completed, and yet divers disputes and differences exist between the parties, which would require adjustment before final settlement could be made, as in the case at bar."

Here the complaint alleges that Stannard was to erect the post office building; that he did, and "did complete the same"; and that it was accepted and final settlement and payment under such contract made.

[2, 3] The making and execution and delivery of such contract and bond are duly alleged, as is the making and execution of the contract between Stannard and the Proctor Manufacturing Company to furnish labor and material in the construction and erection of such building, and the full performance of same by said Proctor Company, and the default of Stannard. It is not necessary to recite the allegations of the complaint of the intervener. It seems to me, and I hold, that the complaint is sufficient. It clearly shows the legal capacity of the plaintiff to sue, for it alleges: (1) That it is "a corporation organized under and pursuant to the laws of the state of New York, and having its principal office and place of business in the city of Ogdensburg, St. Lawrence county, N. Y." This court will take judicial notice of the fact that St. Lawrence county, N. Y., and Jefferson county, N. Y., where the contract was performed, are in the Northern district of New York, in which district the action was brought.

[4] Is the action authorized by these statutes one at law or one at equity? Clearly it is an action at law. It is an action on a contract and a bond, the contract made between Stannard and the United States, and the bond made between Stannard as principal and the Illinois Surety Company as his surety, as first parties, and the United States and all persons supplying Stannard with labor and materials in the prosecution of the work referred to in such contract and bond, as parties of the second part, or possibly we may better say between said principal and surety of the one part, and the United States of the second part, and for the benefit of all such persons furnishing labor and materials. It is also an action on a second contract, the one between Stannard and the plaintiff, Proctor Manufacturing Company, wherein and whereby Stannard was to pay said company for certain work and materials furnished and used in the construction of such building a specified price. The undertaking of the Illinois Surety Company is to pay such sum agreed to be paid in case Stannard does not. To save trouble, expense, and a multiplicity of actions, and insure justice to all concerned, Congress has provided that all persons supplying the contractor with labor and materials in the prosecution of the work, and not paid, may intervene in the action, and prove their

contract and claims and the default of the contractor, and have a money judgment and execution. The defendants are liable, if liable at all, to a money judgment. The action is to recover money, and not a suit for some equitable relief, as from fraud, or to compel the specific performance of some contract or act, or to enjoin the commission of some act. It is not a suit to marshal assets and distribute on equitable principles, or one for an accounting. It is not an action of discovery, or one resorted to because legal remedies are inadequate, but is expressly authorized by statute to enforce pure legal remedies. There is no trust or trust or equitable estate to administer. For the distinction between actions at law and suits in equity, see Fletcher's Equity Pleading & Practice, 1, 2, 3; 16 Cyc. 236. The action is against said contractor and his sureties on their contract obligations to pay money in a certain event, and the plaintiff is authorized "to prosecute the same to final judgment and execution."

The fact that all subcontractors having unpaid claims may come in and prove their contracts and claims, and establish the amount due them, and share pro rata in the judgment or recovery, does not make the case equitable in its nature, or deprive either party of his or its right to a trial by jury of all issuable facts. The apportionment of the recovery on the claims established by the verdict is a mere matter of computation, and not as intricate a matter as the apportionment of a recovery in case of death by wrongful act, when by statute in some of the states the jury is required to apportion the recovery in unequal amounts among those entitled thereto, as in the case of a widow and children, or children and grandchildren, etc. In *United States v. McGee et al.* (C. C.) 171 Fed. 209, 212, 213, the learned judge repeatedly refers to what the jury could do, etc., demonstrating his conception that these actions are at law and not in equity. In the numerous cases where this statute has been considered by the United States Supreme Court, the action is always referred to as an action, and never as a suit in equity. The process issued was the proper one, and the Surety Company will be protected against all other suits after judgment in this, into which all claimants must come under the notice authorized by the act.

The demurrers are overruled, and the defendant Illinois Surety Company may have 20 days in which to answer. The motion to dismiss is denied.

In re TENNESSEE CONST. CO.

(District Court, S. D. New York. August 2, 1913.)

1. BANKRUPTCY (§ 16*)—JURISDICTION—PRINCIPAL PLACE OF BUSINESS OF CORPORATION.

In determining in what jurisdiction the principal place of business of a bankrupt corporation is located, doubt should be resolved in favor of that jurisdiction where it obtained its corporate existence, and where it is usually required to maintain an office.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 16.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **BANKRUPTCY (§ 16*)—JURISDICTION—PRINCIPAL PLACE OF BUSINESS OF CORPORATION.**

Where the assets and most of the creditors of a corporation, organized under the Laws of Missouri and required to maintain a general office there, were in that state, and the principal business transacted by it in New York during the last six months was trying to work out a reorganization, it not having been in active business for some time, its principal place of business was not in New York, and the court in New York will not assume jurisdiction to declare it bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 16.*]

3. **EVIDENCE (§ 73*)—PRESUMPTIONS—CORPORATIONS—COMPLIANCE WITH LAWS.**

Where a Missouri corporation was required by the statute through which it derived its existence to maintain an office in that state, it will be presumed that the law has been complied with.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 94; Dec. Dig. § 73.*]

In Bankruptcy. In the matter of the bankruptcy of the Tennessee Construction Company. On report of special master. Report not confirmed.

McLaughlin, Russell, Coe & Sprague, of New York City, for petitioner.

Hirsch, Scheuerman & Limburg, of New York City, opposed.

MAYER, District Judge. The petition in bankruptcy was filed on January 23, 1913, and issue was joined by filing an answer which denied the allegation of the petition to the effect that the alleged bankrupt had "its principal place of business" in the Southern district of New York for the greater portion of the six months next preceding the filing of the petition. The special master, to whom the matter was referred, has recommended the granting of the prayer of the petitioner.

The alleged bankrupt was incorporated under article 1, chapter 33, of the Revised Statutes of Missouri of 1909. That statute provides:

"Sec. 3035. Every corporation created by or existing under the laws of this state shall have and keep a general office for the transaction of business, and shall have and keep such office within this state."

The company was designed to construct the Tennessee Central Railroad, but for a considerable period has not been in active business. For some time prior to the beginning of the six months period the securities were held in pledge against obligations to creditors, nearly all of whom resided and had their place of business in St. Louis. As near as I can discover from the record, the principal business of the company during the six months period has been to try to work out a reorganization, so that its assets might be made valuable and its debts paid.

I doubt very much whether the acts done in the Southern district of New York, to which the special master refers in his report, can be regarded as doing business, so as to lay the foundation for finding a place of business in this jurisdiction. But if these acts be regarded as doing some business, the proof falls far short of demonstrating that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the principal place of business was in this district. The locus of the principal place of business of a corporation is always a question of fact; but it is desirable to determine the facts, if possible, upon some principle.

[1] In a case and situation such as here presented, the doubt should be resolved in favor of that jurisdiction in which the corporation obtained its corporate existence and where, as is usually the case, the state law requires the maintenance of an office.

[2, 3] Under the section of the Missouri law above quoted, this corporation was required to have and keep a general office for the transaction of business, and to have and keep that office within the state of Missouri. Presumptively the law has been complied with, and there is some evidence (not entirely satisfactory) that an office was maintained in St. Louis for the purposes of the statute. The residence of the officers is a matter of little consequence, if any. We all know that corporations have nonresident officers, and that routine and clerical work may be done in one jurisdiction, and the principal office, within the meaning of the statute, may be in another jurisdiction.

Under these circumstances it is the duty of the court to carry out the spirit and purpose of this enactment of Congress. It is conceded that shortly before this petition was filed, to wit, on January 7, 1913, the circuit court of the city of St. Louis took possession of the assets of the Tennessee Construction Company, through its receiver appointed for that purpose, by decree of the circuit court for the Eighth judicial circuit of the state of Missouri. The assets are therefore in Missouri, most of the creditors are there, and the concern was there incorporated. If it has any principal place of business, that place, in my opinion, is not in the Southern district of New York, and there is no occasion for this court to strain itself to acquire jurisdiction in a very doubtful case.

For the reasons outlined, the report of the special master is not confirmed. Settle order on two days' notice.

ADAMS v. PUGET SOUND TRACTION, LIGHT & POWER CO.

(District Court, W. D. Washington, N. D. September 3, 1913.)

REMOVAL OF CAUSES (§ 79*)—TIME FOR FILING PETITION—"REQUIRED."

Under Judicial Code, § 29 (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]), providing that one entitled to and desiring to remove a suit from a state court to the federal court may file a petition for removal in the state court any time before defendant is "required" by the laws of the state or the rule of the state court to answer or plead to the complaint, he must file the petition within the 20 days given by the law of the state in which to answer, notwithstanding a rule of the state court that a party may respond to any pleading any time before a default is claimed, and failure to immediately claim a default for defendant's failure to answer in the 20 days does not enlarge the time to remove.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139-160; Dec. Dig. § 79.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by Earl Adams, by Robert D. Hamlin, guardian ad litem, against the Puget Sound Traction, Light & Power Company. Remanded to state court.

William M. Watson, of Seattle, for plaintiff.

James B. Howe and H. S. Elliott, both of Seattle, for defendant.

NETERER, District Judge. This is an action commenced in the state court by service of summons and complaint on May 1, 1913. Notice of intention to file petition for removal, together with petition and bond, were served upon counsel for plaintiff May 21st following. The petition and bond were filed on May 22d, and an order entered by the judge of the state court approving the bond and ordering removal of the cause. Motion is here made to remand on the ground that the petition was not filed in time. Section 29, c. 3, of the Judicial Code (Act of March 3, 1911, c. 231, 36 St. at L.), provides:

"Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court," etc.

The underscored portion of the section is identical with a similar provision in the Acts of March 3, 1875, c. 137, § 3, 18 Stat. 470, p. 349, vol. 4, Fed. St. Annotated (U. S. Comp. St. 1901, p. 510). Rem. & Bal. Annotated Codes and Statutes of Washington, § 221, provides:

"The summons must be * * * directed to the defendant requiring him to answer * * * within twenty days after the service of the summons, exclusive of the day of service."

Section 222 provides that the summons shall contain title of the cause, etc., a direction to the defendants to appear within 20 days after service of summons, exclusive of the day of service, and defend the action.

"In case of failure so to do judgment will be rendered * * * according to the demand of the complaint."

Section 24, art. 4, Constitution of the state of Washington, provides:

"The judges of the superior courts shall, from time to time, establish uniform rules for the government of the superior courts."

Rem. & Bal. Code, § 280, provides:

"The court shall establish the rules prescribing the time in which pleadings subsequent to the complaint shall be filed."

Rule 4 of the General Rules of the superior courts of Washington, adopted by the several superior court judges at a meeting held at Bellingham July 26, 1910, and which is one of the court rules of the court where the action was commenced, provides:

"A party may respond to any pleading at any time before a default is claimed. A default shall be deemed claimed whenever a motion therefor is filed, accompanied with the affidavit of the party or his attorney, claiming such default, that no appearance has been made in the action, but will not be granted against a party who has appeared in the action by attorney, until the motion has been served."

The defendant has full 20 days to answer, and the time within which to exercise the right of removal by filing its petition is coextensive with the right to answer. On failure to answer the right of default inures to plaintiff. Does the failure to claim default by plaintiff enlarge the time to file such petition by virtue of court rule No. 4? Does this rule confer a right which extends the time to plead or answer until the default is claimed, and hence enlarge the time to file removal petition? Is the limitation of time in which removal petition may be filed a floating one resting upon the vigilance of counsel for plaintiff? It is clear that no *right* to answer, as distinguished from a privilege, is conferred by rule 4. The grace extended by it could be cut off at any moment. The law of the state of Washington *required* the defendant to plead on or before the 21st. The petition for removal can be filed "any time before the defendant is by the laws of the state *required* * * * to answer." The state law *required* the defendant to answer and the federal statutes *required* it to file its petition for removal on or before May 21st. Court rule No. 4 does not enlarge the time within which to file removal petition. The right of removal is conferred by statute; it is not a floating privilege, depending upon any contingency, but is fixed by definite limit of time—the time to answer.

"The statute is imperative that the application to remove must be made when the plea is due, and, because the plaintiff in error does not take advantage of his right to take judgment by default, it cannot be properly held that he thereby extends the time for removal." *Kansas City R. Co. v. Daughtry*, 138 U. S. 298, 303, 11 Sup. Ct. 306, 308 (34 L. Ed. 963).

Justice Gray, speaking for the Supreme Court in *Martin v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311, says:

"The Judiciary Act of September 24, 1789, c. 20, § 12, required a petition for removal of a case from a state court into the Circuit Court of the United States to be filed by the defendant 'at the time of entering his appearance in such state court.' 1 Stat. 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. * * * Construing the provision now in question, having regard to the natural meaning of its language and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States."

In *Daugherty v. Western Union Tel. Co.* (C. C.) 61 Fed. 138, Judge Baker says:

"The right of removal is created and regulated by the act of Congress, and its enjoyment cannot be claimed except within the time and in the manner prescribed by the statute. It is firmly settled that the time within which

the removal may be had cannot be enlarged by continuances, demurrers, motions to set aside service of process, pleas in abatement, or by stipulations of the parties, or by orders of the court extending the time to answer. This doctrine rests upon the solid foundation that the statute is mandatory and that the right of removal ceases to exist when the time limited therefor has elapsed. The limitation of time within which a removal may be had is not a floating one, to be regulated by stipulations, motions, dilatory pleas, or orders of the court bottomed upon considerations of diligence or unavoidable accident. The right of removal is fixed and stable, measured in regard to the time of its exercise by the statute of the state when it fixes the time to answer or plead, or by the rule of court where the time of pleading is so determined in the absence of state law. The act of Congress limiting the time of removal would cease to be mandatory if the federal courts are invested with power to relieve from its operation because of the intervention of the vis major or the act of God. The court is clothed with no such dispensing power. The time within which the right of removal may be exercised is a subject for legislative, and not for judicial, discretion. If the court may enlarge the time because the making of the application to remove has been prevented by the act of God, it can do so only because it is clothed with discretionary power to extend the time prescribed by the act of Congress. If it possesses such discretionary power, it may enlarge the time to apply for a removal whenever, for any cause, the court might be of opinion that the delay was without fault on the part of the party asking a removal. Under such a construction, the time within which the application to remove must be made would not be prescribed by law but would be determined by the discretion of the court, to be exercised upon the facts of each case. In my judgment an inflexible rule of law determines the time within which an application to remove must be made, and the court possesses no discretionary power to enlarge it. This construction of the statute may at times operate with harshness, but any other would defeat its plain language and manifest intent."

Other authorities supporting this conclusion are: *Bank v. Appleyard & Co.* (C. C.) 138 Fed. 939, 940; *Wabash Western Ry. v. Brow*, 164 U. S. 271, 277, 17 Sup. Ct. 126, 41 L. Ed. 431; *Simkins*, Federal Suit, § 818, and cases cited. The following cases have been cited by counsel for petitioner as supporting the right of removal in this case: *Lockhart v. Railroad Co.* (C. C.) 38 Fed. 274; *Mayer v. Railroad Co.* (C. C.) 93 Fed. 601; *Lord v. Railroad Co.* (C. C.) 104 Fed. 929; *Chiatovich v. Hanchett* (C. C.) 78 Fed. 193; *Groton, etc., v. Am. Bridge Co.* (C. C.) 137 Fed. 284, 297, 298, 299; *Tevis v. Palatine Ins. Co.* (C. C.) 149 Fed. 560; *Hansford v. Stone-Ordean-Wells Co.* (D. C.) 201 Fed. 185; *Powers v. Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. Each and all of these cases are readily distinguishable from the case at bar.

The time within which the right of removal may be exercised is a matter for legislation. The time having been fixed within which the petition *must be filed*, there is nothing for judicial discretion.

The application for removal was made too late, and the cause must be remanded to the state court. An order to that effect may be entered.

THOMPSON TOWING & WRECKING ASS'N et al. v. MCGREGOR et al.

(Circuit Court of Appeals, Sixth Circuit. August 4, 1913.)

No. 2,262.

1. SEAMEN (§ 29*)—INJURY IN SERVICE—LIABILITY OF VESSEL.

The duty of a shipowner to see that she is seaworthy and equipped with proper appliances when starting on a voyage or other assigned work is a positive one which cannot be delegated, and he is liable for any injury to a seaman arising from his failure to perform it.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

2. SHIPPING (§ 209*)—LIMITATION OF LIABILITY—PROCEEDINGS—SURRENDER OF VESSELS.

Where a lighter without motive power was being used by a tug, the property of the same owner, to aid in floating a stranded steamer by receiving a part of the cargo, when a defective pump boiler on the lighter exploded, injuring members of her crew, the two vessels are to be regarded as having been a single instrumentality, and both were properly required to be surrendered by the owner in proceedings for limitation of liability.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

3. SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—BURDEN OF PROOF.

Under admiralty rule 54, which requires claimants, upon issuance of a monition in proceedings for limitation of liability, to appear and "make due proof of their respective claims," the burden rests on a claimant of damages for a death to prove the time and place of such death where those facts are material.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

4. DEATH (§ 8*)—ACTION FOR WRONGFUL DEATH—JURISDICTION—VESSEL ON GREAT LAKES.

Claimant's intestate was killed by the explosion of a boiler on a lighter temporarily engaged in assisting to release a steamer stranded in Mud Lake, an extension of Lake Huron through which passes the boundary line between Michigan and Ontario; the lighter being at the time near the line but probably on the Canadian side. The vessel was owned and registered in Michigan. *Held* that, while in such waters, she constructively constituted a part of the territory of Michigan, and that, in the absence of any legislation by Congress on the subject, the Michigan statute giving a right of action for wrongful death was applicable.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8.*]

5. COURTS (§ 366*)—FEDERAL COURTS—FOLLOWING STATE LAW—INTEREST AS DAMAGES.

Where damages for wrongful death are recovered in a court of admiralty under a state statute, the rule as to the allowance of interest, established under the statute by the court of last resort of the state, will be followed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

State laws as rule of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 207 F.—14

Appeal from the District Court of the United States for the Western District of Michigan; Arthur C. Denison, Judge.

Proceeding in admiralty by the Thompson Towing & Wrecking Association and the Great Lakes Towing Company for limitation of liability. Appeal by petitioners from decrees in favor of William McGregor and Matilda Workman, administratrix. Affirmed.

This is an appeal from a decree entered in a proceeding to limit liability respecting a boiler explosion on the lighter Stewart, which resulted in the instant death of Workman on board the vessel and in permanent injury to McGregor, who were members of her crew; such proceeding having been commenced pursuant to sections 4283 et seq., and amendments, of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 2043 et seq.). The explosion occurred in Mud Lake, an arm or bay of Lake Huron, near the mouth of St. Mary's river. *Ainsworth v. Munoskong Hunting & Fishing Club*, 159 Mich. 61, 123 N. W. 802. The ore-carrying steamer Elwood had grounded there, and the lighter Stewart with other vessels of appellants had been engaged to float the Elwood. The immediate occasion of appellants' proceeding was the commencement by appellees of separate suits in a county court of Michigan to recover damages for the death and permanent injuries mentioned. Under the usual averments of a petition both to limit and to contest liability, surrender and appraisal alone of the Stewart were sought and made and stipulation covering such appraisal was substituted for the lighter; monition and publication addressed specially to appellees and also to all other persons claiming damages or liens on account of injuries caused by the explosion were issued and made, citing appellees and such other persons to appear in the court below and make proof of their respective claims; and an order was made restraining all from prosecuting suits arising out of the explosion, except as against such stipulation. Subsequently default was taken against all persons claiming injuries from the explosion, except only the appellees; and thus the controversy was reduced to the parties to this appeal.

Appellees filed answers to the petition; and, upon complaint that the original surrender and stipulation should have included further vessels and certain pending freight, additional stipulations were required and filed embracing the value of the steam tug Merrick, which belonged to appellants and was engaged with the Stewart in lightering and floating the Elwood, and also distinct pending freight. September 6, 1911, final decree was entered in favor of each of the appellees, which resulted in this appeal. Further necessary facts appear, with objections passed upon, in the opinion.

Keena, Lightner, Oxtoby & Oxtoby, of Detroit, Mich. (Hermon A. Kelley, of Cleveland, Ohio, of counsel), for appellants.

John W. Shine and E. S. B. Sutton, both of Sault Ste. Marie, Mich., for appellees.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SATER, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). The claims of both appellees have been presented and considered together.

[1] 1. It is objected that the appellants are not shown to have been guilty of negligence, which was the proximate cause of the explosion. The effort is to show that all who were at the time engaged on the Stewart, including the captain, were members of the crew, and so to excuse the owners under the fellow-servant doctrine. This fails to give due effect to the condition of both the boiler and the hull of the Stewart. The boiler was formerly in use on the Crusader. In 1896 the Crusader burned to the water's edge and the remnants of its hull,

including the boiler, sank. Some four years later the boiler was raised and placed in the Stewart. Besides the proved impairment of the boiler by reason of the fire and the time it was under water, it was suffered to fall into serious disrepair while on the Stewart. The year before the explosion, the safety valve of the boiler had been taken off and the opening plugged. The steam gauge was so broken and otherwise out of order that the steam pressure could not be ascertained, even approximately, except by tapping and manipulating the gauge; and the water gauge would not disclose the stage of water in the boiler. Thus the appliances for avoiding excessive pressures of steam or stages of water below the normal were grossly defective; and, as to substituting "plugging" for a safety valve, we agree with Judge Denison, who in deciding the case below said:

"The absence of the safety valve might well be presumed the cause of the explosion and, for the purposes of this case, I think that fact should be considered as established."

These matters were common knowledge among those who had to do with the boiler. Moreover, the boat itself was old; it had been a schooner and converted into a lighter; it carried two boilers, one for operating its derrick and the other (the one that exploded) for pumping water. The Stewart had not been "fitted out" in the year of the explosion; it leaked badly when heavily loaded, as it appears to have been at the time; indeed, the boiler that exploded was then in use to pump out her hull.

These details are sufficient, without more, to warrant turning to the inquiry whether the owners of the Stewart were chargeable with knowledge of such conditions as these. Capt. Thompson was the local manager of the owners in Sault Ste. Marie, Mich., and, although his "orders came from officials at Cleveland," he testified that he had "general charge of the sending of the expedition to the Elwood," and further that he ordered "the outfit down there to do the work that was required to get that vessel afloat." There was evidence tending to show that he had knowledge of these conditions. True, he disclaimed such knowledge, but their proved existence made denial vain; they had been allowed to remain too long, almost a year; and we think it is not too much to say that the owners were chargeable with knowledge of them and of the danger their existence meant to the crew when the vessel was hired and started on its mission to lighter the Elwood.

It is the duty of a shipowner, for the purposes either of a voyage or of an undertaking like this, to furnish a vessel, with the usual and necessary appliances, in such condition and repair as reasonably to attain the objects intended; in a word, the vessel as an entirety must be seaworthy; and the owner's duty in this behalf is positive and non-assignable. *La Fernier v. Soo River Wrecking Co.*, 129 Mich. 596, 89 N. W. 353; *The Drumelton* (D. C.) 158 Fed. 455, 456; *Hughes on Admiralty*, 184, and citations announcing the rule, although the facts of the particular cases did not warrant its application. See, also, *Cornell Steamboat Co. v. Fallon*, 179 Fed. 293, 294, 295, 102 C. C. A. 345 (C. C. A. 2d Cir.); *The Lowlands* (D. C.) 142 Fed. 888; *Lafourche*

Packet Co. v. Henderson, 94 Fed. 872, 873, 36 C. C. A. 519 (C. C. A. 5th Cir.). In short, we must regard the applicable rule of liability as settled by *The Osceola*, 189 U. S. 158, pages 173, 174, 23 Sup. Ct. 483, 47 L. Ed. 760, where Mr. Justice Brown in the course of the opinion pointed out the distinction between the duty of the shipowner as to seaworthiness and fitness of appliances and his duty concerning matters of navigation and the like, and then, in summing up in four propositions, said in the second (189 U. S. 175, 23 Sup. Ct. 487, 47 L. Ed. 760):

"That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

This rule does not differ in principle from the rule which holds a master liable in damages for neglect of his positive duty to his injured servant, no matter whether such injury is due in part to neglect of fellow servants or not. *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 257, 29 Sup. Ct. 619, 53 L. Ed. 984.

[2] 2. Objection was next made to the action of the court below in requiring a stipulation to include the tug *Merrick*; the insistence being that the appellants' liability is limited to the *Stewart*. The appraised value of the *Stewart* was \$1,400; and the value of the *Merrick*, as ultimately reduced, was \$10,000. Objection is also made to the valuation placed upon the *Merrick*; but in view of the evidence, which need not be recited, we are not disposed to interfere with the value fixed below. The argument that the stipulation regarding the *Merrick* should not have been exacted is that the *Merrick* was not concerned in the accident. The *Stewart* was not equipped with motive power and in her movements was wholly dependent upon that of some other vessel. Capt. Thompson sent to the relief of the *Elwood* the tug *Merrick* and the lighter *Stewart*; the former towing the latter to the *Elwood*. It is true that he sent other boats to engage in the same operation, but the effort to force either the surrender of those boats or the giving of a stipulation covering their value failed. The situation of the *Merrick* and *Stewart* before and at the time of the explosion and the conditions in effect converting those boats into a unitary instrumentality while working to release the *Elwood* were aptly described and, as we conceive, the applicable law forcefully stated by Judge Denison. He said:

"I think, however, that the *Merrick* and the *Stewart*, under these circumstances, belong together. The *Merrick* was the motive power of the combination, without which the lighter could not move. They were, at the moment, physically connected, through the *Elwood*. The *Merrick* could not move the *Elwood* until part of her cargo was taken out, and the most effective way was to keep on removing cargo to the *Merrick's* attendant barge while the *Merrick* kept on pulling. Both boats were jointly engaged in floating the *Elwood*, the *Stewart* in one way and the *Merrick* in another; and the work which the *Stewart* was doing was a necessary element in the work which the *Merrick* was doing. The fact the *Stewart* had, for a short time, discontinued removing cargo while the *Merrick* was pulling cannot be controlling. Whether or not the master of the *Elwood* had general control, the *Stewart* was, as between the *Merrick* and the *Stewart*, under the direction of the *Merrick's* captain. The *Merrick* had placed the *Stewart* and would soon

take her away, unless the Thompson Company substituted some other tug for that duty. Under such circumstances, the two boats together constituted the unit that must be surrendered in order to justify a limitation of liability. *The Northern Belle*, 9 Wall. 526, 19 L. Ed. 746; *The Arturo* (D. C.) 6 Fed. 308, Lowell, C. J.; *The Alabama* (C. C.) 22 Fed. 449, Pardee, C. J.; *The Bordentown* (D. C.) 40 Fed. 686, Brown, D. J.; *The Columbia*, 73 Fed. at page 237, 19 C. C. A. 436 (C. C. A. 9). Even if the more limited rule of *The Mason*, 142 Fed. 913, 74 C. C. A. 83 (C. C. A. 2), reversing (D. C.) 131 Fed. 632, was to prevail in this court, still I think that the character of the Stewart's work as incidental to the main service being performed by the Merrick, and the fact that the good condition of this boiler was indirectly necessary in order that the Elwood might yield to the Merrick's pull, distinguish the present case. See, also, *The Anthracite* (D. C.) 162 Fed. 384, Adams, D. J."

And on rehearing the court further said:

"There has been exhaustive argument upon the meritorious question whether the tug Merrick should have been included in the surrender, or her value in the stipulation. I cannot doubt that the question of the liability of the Merrick is a close one, but I find no controlling authority which prevents what seems to me the very proper course of holding her liable in this case. Unquestionably both the Merrick and the lighter were engaged in a common enterprise; they were physically connected, although, instead of being lashed rail to rail, the Elwood and a tow line intervened; the then existing act of the Stewart in lightering the Elwood was an act in aid of and in co-operation with the then existing pull of the Merrick on the tow line; and the act of the Merrick in so pulling was in co-operation with and in aid of the lightering being conducted by the Stewart. In addition, I think the fair assumption is that the captain of the Merrick was in practical control of the lighter and the tug. There is no very clear testimony to this effect, but the natural relations between the captain of a powerful tug, the flagship of the wrecking fleet, and the man in charge (perhaps by courtesy called captain) of what was practically only a scow would be to this effect. There is no practical doubt that the captain of the lighter would have obeyed any instructions which the captain of the tug had seen fit to give.

"The situation would be different if the negligent act which is to condemn the particular, guilty rem had been the independent act of an agent who had to do with the Stewart only (as in *The Mason* and similar cases). Here, however, the damage(d) claimant(s) count upon the negligence of the agent in charge of both boats who equipped and sent out the defective boiler as part of a working unit, and the damage happened at a moment when these possibly separable parts were in fact united."

It is strenuously argued by counsel that to hold the Merrick would be to establish a rule that would be most injurious to the shipping interests of the Great Lakes. The reason assigned is stated in the margin.¹ The most obvious answer to this complaint is that, although the appellants furnished at least four vessels to release the Elwood, the

¹ "In relation to vessel owners generally, that doctrine would involve in a common liability the steamer and all the barges in a tow, regardless of the question of the fault of the respective vessels; in relation to the wrecking business it would involve all tugs, pumps, lighters, diver's outfit, and all wrecking apparatus merely because they happened at some time to have been engaged upon the release of the same vessel, and irrespective not only of their fault but of the extent or character of the service in which they were engaged, or even the terms of their employment; and in general it would practically nullify the right of the owner to limit his liability to the value of the vessel or vessels actually responsible for an injury and extend that liability to all other vessels and property which such owner happened to have and which chanced to be directly or indirectly connected with the expedition upon which the accident occurred."

effort made in the court below, as we have already said, to hold any of them except the Merrick and the Stewart failed. We should add that the appellees sought also to have the Elwood and her cargo held, but the application was denied. These eliminating processes of the trial court do more than to illustrate the error of the criticism made of the decision. They point out the necessity of studying the facts not only of the case in hand but also of the cases cited and relied on as precedents, for the purpose of identifying in each instance the offending thing, whether that be a single or a composite instrumentality. The particular feature, then, constantly to be borne in mind here is the mutual dependence of the Merrick and the Stewart in the work of releasing the Elwood; as Judge Addison Brown said in *The Bordentown*, 40 Fed. 687, when speaking of the *Bordentown* and the *Winnie*, although engaged in towing, they "were in effect one vessel." Attention to a fact like this cannot be effectively diverted by allusion to the terms of employment of the Merrick and Stewart, because their unitary characteristics existed at the crucial moment of the explosion. We think this fact alone brings this case within the principles of the decisions relied on in the opinion below and distinguishes it from the cases claimed to be opposed to it. The existence of a similar fact in the *Bordentown* Case was regarded as a distinguishing feature even in the *Mason* Case, 142 Fed. 916, 74 C. C. A. 83 (C. C. A. 2d Cir.), upon which so much reliance is placed by appellants. Again, we think it is fairly to be inferred from the opinion in the *Mason* Case that, while the steam tugs, the *Mason* and the *Babcock*, were engaged in towing the steamship *Gratwick*, they were acting in independent capacities and so did not present the fact which is controlling here; and of this Judge Wallace said (142 Fed. 918, 74 C. C. A. 88):

"If the liability of the owner for the tort or wrong of a vessel, arising from the misconduct or negligence of her master or crew, could be enforced against another vessel belonging to the same owner, whenever she might happen to be engaged in the same enterprise with the other vessel, though acting in an independent capacity, and under the control of her own master and crew, in performing her part of it, the spirit and meaning of the statute limiting the liabilities of vessel owners would be disregarded."

There is nothing contained in the report of *The Sunbeam*, 195 Fed. 469, 115 C. C. A. 370 (C. C. A. 2d Cir.), following the ruling in the *Mason* Case, to show what, if any, vital relations existed between the work of the offending scow, the *Sunbeam*, and the other vessels which were not surrendered. We conclude that it is to effectuate, not to defeat, the intent of Congress in its enactment of the laws empowering shipowners to limit their liability respecting marine disasters,² to deny to an owner the right to surrender only one of two interdependent vessels, which he had negligently united and furnished, as here, for a joint service in releasing a stranded ship; it is enough in such circumstances to permit him to avail himself of the benefits of the limitation statutes at all.

3. Objection is also made to the claim of Matilda Workman, as administratrix. The grounds are that the explosion occurred in Canadian

² *Monongahela River Consol. Coal & Coke Co. v. Hurst*, 200 Fed. 711, 715 (C. C. A. 6th Cir.), and cases there cited.

waters; that the right of recovery for the death of her intestate is governed by the laws of the province of Ontario; and that her suit was not commenced within the time prescribed by the statute of that province respecting such actions. The explosion and the death occurred November 25, 1900, and, as we have said, separate suits were brought by the appellants in a county court of Michigan; but Mrs. Workman's suit was not commenced until November 29, 1901, while the statute of the province required every such action to be "commenced within 12 months after the death of the deceased person" (R. S. O. 1887, c. 135, § 5); thus her suit was begun four days after this period had expired.

[3] Where, then, did the accident happen? Appellants allege in their petition that it occurred in Canadian waters, and Mrs. Workman in her answer denies this. Each side now claims that the burden of proof rested upon the other to show just where the Stewart was at the time of the death; but admiralty rule 54 requires claimants, upon issue of a monition, to appear before the court and "make due proof of their respective claims," etc. We do not see how a death claim can be validly proved without disclosing the place and circumstances of the death. Such a right of action depends solely upon a statute, and no presumption arises as to where the act causing the death was committed; the case would be different in this respect if the right of action existed at common law. *Wooden v. W. M. Y. & P. R. R. Co.*, 126 N. Y. 10, 14, 15, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400; *Burdick v. Mo. Pac. Ry. Co.*, 123 Mo. 221, 229, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; *Cuba R. R. Co. v. Crosby*, 222 U. S. 473, 479, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40. The most that is claimed on behalf of Mrs. Workman is that the "channel is sinuous and crosses many times the boundary line, and the exact spot where the Elwood was is not shown by the evidence." Such an inquiry is attended with inherent difficulties, for no physical objects seem to exist by which the ordinary observer can ascertain the boundary through Mud Lake. The trend of the evidence indicates that the Elwood grounded on the easterly or Canadian side of the channel; and that at the time of the explosion the Stewart was lying on the American side of the Elwood and very close to the boundary line. Upon the whole, we think the conclusion reached by the trial court must be accepted:

"Although the proof is thus indefinite, I think it is to be taken as the fact that the Stewart, at the time of the accident, actually was in Canadian waters."

However, it is to be observed and remembered that the Stewart had been taken from the American side for a temporary object only and with intent to return her without touching at any Canadian port, and that she was brought back to the nearest American port directly after the accident.

[4] Concededly the state suit was begun within the time fixed by the Michigan death statute. Can the right of action in terms preserved to the widow by that statute be enforced? If so, it is because

at the time of the death the Stewart was through ownership and registration domiciled in Michigan and was, as respects the enforcement of such a right, part of the territory of Michigan. So far as this question is concerned, the ultimate basis of the decree was "that the explosion of this boiler was a matter which did not directly involve the 'peace, dignity, or tranquility' of the Canadian government but rather involved the 'internal discipline and management' of the ship." This was regarded as being in accordance with the ratio decidendi in *United States v. Rodgers*, 150 U. S. 249, 260, 266, 14 Sup. Ct. 109, 113, 116 (37 L. Ed. 1071), in which it was held that the federal courts have jurisdiction, under section 5346 of the Revised Statutes (U. S. Comp. St. 1901, p. 3630), to try a person for a crime "committed on a vessel belonging to a citizen of the United States when such vessel is in the Detroit river, out of the jurisdiction of any particular state, and within the territorial limits of the Dominion of Canada."

Thus the question confronting us is at last narrowed to the inquiry whether, since the act causing the death of Workman occurred on a vessel owned and territorially situated similarly to the vessel involved in the *Rodgers* Case, jurisdiction extends to the enforcement of a civil liability, like the one urged here. At least two differences, we do not say distinctions, are readily observable between the question decided in the *Rodgers* Case and the one now under consideration. The charge in the former case was the violation of an act of Congress, entailing, if sustained, a prescribed penalty, while here the claim is that the acts of negligence described entitle the claimant to a right of action under the statute of Michigan. The one concerns criminal responsibility and the other civil liability. Similarity in the two cases in all other material respects is in principle clearly observable. We shall consider the effect of the differences and the similarity mentioned as we progress. We do not dwell at this point upon the rule settled by the *Rodgers* Case. So far as the question of jurisdiction is concerned, if the Canadian waters in question could be regarded the same as the waters of one of the open oceans, recovery in this case might be warranted by decisions like that of *The Hamilton*, 207 U. S. 398, 405, 28 Sup. Ct. 133, 134 (52 L. Ed. 264); but that case grew out of a collision at sea, without the territorial jurisdiction of any particular nation, and concerned lost members of the crew of the sunken vessel and claims made on account of their deaths against a fund derived from the *Hamilton*, under the limitation acts of Congress; Mr. Justice Holmes stating:

"The jurisdiction commonly expressed in the formula that a vessel at sea is regarded as part of the territory of the state, was held, upon much consideration, to belong to Massachusetts," etc.

It is strongly contended that the *Hamilton*, and the class of cases it represents, are inapplicable because the Stewart was at the time of the accident lying in waters of another nation. The idea, of course, is that the local law of the place of injury and death must govern. No doubt this is the general rule; still, in determining the place of Workman's death, we must not overlook the question whether, in the circumstances of this case, the Stewart was constructively part of Mich-

igan, so far as her "internal management and discipline" were concerned. This cannot be solved by such cases as *Smith v. Condry*, 1 How. 28, 32, 11 L. Ed. 35, where, in passing upon the rights of two American vessels which had collided at the dock of the port of Liverpool, it was held that certain British statutes enacted for the regulation of pilots conducting ships were controlling. Mr. Justice Nelson said in *The Eagle*, 8 Wall. 15, 22 (19 L. Ed. 365), when speaking of *Smith v. Condry* and of other similar decisions, one by Dr. Lushington:

"These are exceptional cases and furnished no rule to the court below for the trial of the collision in question."³

We need not recapitulate the great variety of citations employed by counsel to show that the statute of the province of Ontario is controlling. They are not either in the points determined or in principle decisive of the present issue.

We come now to consider the question on its merits. Congress has passed no statute to take a case like *Workman's* out of the operation of the common-law maxim that personal actions die with the persons. The act of Congress approved June 15, 1836, admitting the state of Michigan into the Union, made the easterly boundary of the state coterminous with "the boundary line between the United States and Canada, through the Detroit river, Lake Huron, and Lake Superior to a point where the said last line touches Lake Superior." Act June 15, 1836, c. 99, 5 Stat. L., 49. It is settled that, where Congress has not acted, a state may, as respects its interests, enact appropriate statutes concerning matters also within the federal power; such laws of course become operative throughout the state, as well upon navigable waters as upon land within its boundaries; and this right of the state includes the power to enact and enforce statutes providing damages for wrongful death. *The Hamilton*, supra, 207 U. S. at page 404, 28 Sup. Ct. 133, 52 L. Ed. 264; *The Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, recently decided by the Supreme Court. Thus the municipal law appertaining to the waters of Mud Lake embraces the statutes of the state of Michigan and the province of Ontario, before pointed out. Both of these statutes were in force at the

³ Judge Denison said: "That local laws will not be controlling where the matter involved has to do with the 'internal management or discipline' of the vessel. Bearing these limitations in mind, it will be seen that the collision and towage cases are not applicable. *Smith v. Condry*, 1 How. 28 [11 L. Ed. 35]; *Bigelow v. Nickerson*, 70 Fed. 113 [17 C. C. A. 1, 30 L. R. A. 336]; *Humbolt v. Christopherson*, 73 Fed. 239 [19 C. C. A. 481, 46 L. R. A. 264]; *Robinson v. D. & C. Co.*, 73 Fed. 883 [20 C. C. A. 86]; *Alaska Co. v. Williams*, 128 Fed. 362 [63 C. C. A. 92]. Those cases involve the maritime law and the sailing rules of the country having authority over the waters. Not so with the obligation of the owner of the boat to furnish its crew with a safe place to work. This obligation is sometimes, and not improperly, spoken of as an implied contract obligation; but, whether its violation is a matter of contract or of tort, it seems to pertain quite distinctly to the 'internal management and discipline' of the ship. As applied to this case, it is not a matter which concerns the local government, excepting by the indirect connection between the safety of such machinery and the safety of adjacent Canadian citizens and property. Nor is the question between the *lex loci* and *lex fori* (as in *A., T. & S. F. Ry. v. Sowers*, 213 U. S. 68 [29 Sup. Ct. 397, 53 L. Ed. 695]); but only what *locus*."

time of Workman's death; and we need not repeat that Mrs. Workman's right under the foreign statute was barred, while her right under the domestic statute survived, at the time she commenced her suit.

It is well known that for a time some of the leading admiralty judges of this country, in administering the maritime law, disregarded the limitations fixed by such statutes, as also the maxim that a personal action dies with the person (*The Harrisburg*, 119 U. S. 199, 205 to 214, 7 Sup. Ct. 140, 30 L. Ed. 358, where the subject was reviewed by Chief Justice Waite); but the effect of the decision in *The Harrisburg* was to overrule that class of cases. The case so considered by the Chief Justice concerned a suit in rem begun in a federal court of Pennsylvania against the steamer *Harrisburg* to recover damages for a death caused by the negligence of the steamer in a collision with a schooner in a sound of the sea, embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, and within the state of Massachusetts. The offending ship belonged to the port of Philadelphia, where she was enrolled according to the laws of the United States. Both Pennsylvania and Massachusetts had enacted statutes authorizing recovery of damages for death occasioned by negligence, etc.; but the suit in question was brought after the limitation of time fixed by each of the statutes had expired, and the court was satisfied that the suit was begun too late. 119 U. S. 214, 7 Sup. Ct. 140, 30 L. Ed. 358. This is tantamount to saying, as Chief Justice Waite there in substance said, and as the present Chief Justice, when speaking of that case in *La Bourgogne*, 210 U. S. 95, 138, 28 Sup. Ct. 664, 679 (52 L. Ed. 973), in terms said:

"That no damages can be recovered in admiralty for the death of a human being on the high seas, or on the waters navigable from the seas, caused by negligence, in the absence of an act of Congress, or a statute of a state, giving the right of action therefor."

And this in turn plainly implies that, if there be either such a federal or state statute, damages are recoverable. Since the right of action here has been preserved in Mrs. Workman by the Michigan statute, there is no perceivable reason why the right cannot under the facts of this case be enforced. If that statute were an act of Congress and limited in its operation to the waters of the Great Lakes, navigable rivers, etc., the instant case could not be rationally distinguished from the *Rodgers Case*.⁴ As Congress has chosen to remain silent, the subject-matter of the Michigan statute, both as to lands and navigable waters within its borders, was plainly within the legislative power of the state (*Bigelow v. Nickerson*, 70 Fed. 113, 117, et seq.).

⁴ Indeed, under such an act of Congress, the present case would be stronger than the *Rodgers Case*, for the difficulty in that case was not, as it clearly could not have been under the long-settled rule of the *Genesee Chief* (12 Howard, 443), either that the admiralty jurisdiction in civil cases did not extend to, or that Congress could not pass an act providing for the punishment of crimes committed anywhere upon the Great Lakes, navigable rivers, etc.; but it was that the Crimes Act then under consideration did not in terms embrace such internal navigable waters. See dissenting opinions in the *Rodgers Case*.

17 C. C. A. 1, 30 L. R. A. 336 [C. C. A. 7th Cir.]; Chicago Transit Co. v. Campbell, 110 Ill. App. 366, 370, 371); and there should be accorded to it the same operation and effect concerning the Stewart and her location as would be to an appropriate similar act of Congress. In speaking of the vessels passing through the Detroit river, Mr. Justice Field said in the Rodgers Case, 150 U. S. 260, 14 Sup. Ct. 113, 37 L. Ed. 1071:

"All of them, however, so far as transactions had on board are concerned, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong. Whilst they are on the navigable waters of the river they are within the admiralty jurisdiction of that country. This jurisdiction is not changed by the fact that each of the neighboring nations may in some cases assert its own authority over persons on such vessels in relation to acts committed by them within its territorial limits. * * * The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquility, in which case it may assert its authority. Wildenhus' Case, 120 U. S. 1, 12 [7 Sup. Ct. 385, 30 L. Ed. 565]; Halleck on International Law, c. 7, § 26, p. 172."

The pertinence of this language to the case in hand is obvious; and it scarcely need be said that in giving effect to the Michigan statute it is not meant to say that the legislation of a state, any more than that of Congress, can in terms be given extraterritorial effect; it is only meant to say, as we have just pointed out in the Rodgers Case, that vessels situated like the Stewart *constructively* "constitute a part of the territory of the nation to which the owners belong." It is manifest that such a constructive extension of territorial sovereignty as to matters occurring on board a ship domiciled and situated as the Stewart was, and not involving the peace, dignity, or tranquillity of the nation in whose waters she was lying, rests upon the necessities, not to say the comity, of nations whose conventional boundaries adjoin in navigable waters. This is well illustrated by a portion of the opinion below:

"If the proper conclusion in this case was doubtful, I should hesitate to decide that the existence of this liability depended upon a few minutes of time or a few feet of distance, as would be the case with a vessel situated nearly upon the line and frequently crossing and recrossing; or that upon this subject there could be one rule upon the Stewart and another rule upon the Merrick; or that there might be one rule forward and another aft, on the same boat."

The cases of Robinson v. Detroit & C. Steam Nav. Co., 73 Fed. 883, 20 C. C. A. 86 (C. C. A. 6th Cir.), and Wingert v. Circuit Judge, 101 Mich. 395, 59 N. W. 662, are not applicable. It distinctly appears that the persons on account of whose deaths suits were brought in those cases were drowned in Canadian waters, and the questions we have here considered did not arise and of course were not determined in either of the cases.

[5] 4. The last objection concerns the interest and the costs as allowed below. The award made in favor of Mrs. Workman was \$3,500 and that of McGregor \$3,000, both as of the date of the commencement of their respective suits, and interest thereon at 5 per

cent. from the time of the accident until the date of the decree. Counsel for appellants admit that, "in cases involving the destruction of specific property, interest may, in the discretion of the court or jury, be awarded to the plaintiffs," but they claim that this cannot be done "in actions based only upon injuries to the person, including death claims"; reliance being placed on cases cited in the margin.⁵ If the rule of these decisions as applied to ordinary cases at law for tortious personal injuries not resulting in death were conceded, it would not follow that the rule should be applied to the claim of Mrs. Workman. Her claim, as we have seen, is based upon the death act of the state of Michigan, and we are unable to see any reason why the rule of the court of last resort of the state should not be controlling as to the construction of that statute. In *Larsen v. Home Telephone Co.*, 164 Mich. 295, 324, 129 N. W. 894, 905, it was held with reference to a death claim:

"The accident occurred September 1, 1906. The verdict was taken on or about July 20, 1909. It was in terms for \$9,000 damages and \$1,312.50 interest, for which sums judgment was rendered. It may be said that a more accurate computation would be to estimate the damages suffered to the date of the verdict and add to it the present value of prospective damage, but the difference would be small. The damage supposed to have been recovered was the then present value of the contribution that deceased would have, as of the date of the judgment, made to the widow and children had he lived. They were entitled to that sum when he died, and where the present value was fixed as of that date, as it would seem that it was in this instance, we see no reason for omitting interest to the date of the judgment."

Although one feature of the opinion in which this language is found was not concurred in by the majority, yet all the judges did concur "in the allowance of interest." 164 Mich. 328, 129 N. W. 906. It may be remarked that the measure of damages under the death act, as distinguished from the survival act, of Michigan is uniformly "confined to those damages which are capable of being measured by a pecuniary standard" (*Cooper v. L. S. & M. S. Ry.*, 66 Mich. 261, 271, 272, 33 N. W. 306, 314 [11 Am. St. Rep. 482]; *Kyes v. Valley Telephone Co.*, 132 Mich. 281, 283, 284, 93 N. W. 623); the rule being to fix upon a 5 per cent. basis the present worth of the ascertained annual contribution that the deceased, if he had lived, would during his expectancy have made in favor of the beneficiary (*Rivers v. Traction & Electric Co.*, 164 Mich. 696, 708 to 710, 128 N. W. 254, 131 N. W. 86). Since it was held in the *Larsen Case*, *supra*, that the beneficiaries were entitled to that sum at the time of the death and to interest to the date of the judgment, it would seem that the recoverable amount was in effect treated as in the nature of a debt.

Concededly the measure of damages thus pointed out is not applicable to *McGregor's* claim, and this is true in Michigan as else-

⁵ *Burrows v. Lownsdale*, 133 Fed. 250, 251, 66 C. C. A. 650 (C. C. A. 9th Cir.); *Railroad v. Wallace*, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548; *Ortolano v. Morgan's L. & T. R. & S. S. Co.*, 109 Ia. 902, 911, 33 South. 914; *Cochran v. Boston*, 211 Mass. 171, 172, 173, 97 N. E. 1100, 39 L. R. A. (N. S.) 120, Ann. Cas. 1913B, 206. To the same effect is the recent decision in *Penny v. Atlantic Coast Line R. Co.* (N. C.) 77 S. E. 774.

where (*Cooper v. L. S. & M. S. Ry.*, supra, at page 271 of 66 Mich., 33 N. W. 306, 11 Am. St. Rep. 482); but this is only to say that some elements of damages, like those of mental and physical suffering, should be added in the ordinary common-law case for tortious personal injury. Our attention has not been called to any case in admiralty in which the question of interest upon a claim like McGregor's has been considered, except *Burrows v. Lownsdale*, supra, and there interest was denied. And yet it is not easy to distinguish effectively between the admitted principle which allows interest in respect of an unliquidated claim for a tortious injury to property and that which would deny a similar allowance as part of an unliquidated claim for a tortious injury to the person, for the ordinary theory of debt and demand of payment is seemingly as difficult to perceive in the one instance as in the other.⁶ However, we need not decide the question, because (1) denial of interest could in any event be made only against McGregor, and (2) the evidence satisfies us that he was entitled to recover as damages substantially as much as the sum assessed, with interest, in his favor. No prejudicial error, then, was committed by his allowance of interest if, indeed, this was error at all; and while, in view of the settled rule that an appeal to this court in an admiralty proceeding brings the case under review upon both the law and the facts (*City of Cleveland v. Chisholm*, 90 Fed. 431, 434, 33 C. C. A. 157 [C. C. A. 6th Cir.]; *The San Rafael*, 141 Fed. 270, 275, 281, 72 C. C. A. 388 [C. C. A. 9th Cir.]; *Loveland*, App. Jur. § 181, and citations), we might formally increase his damages in the sum indicated, it could serve no meritorious end to do so. This case was pending

⁶ The rule in admiralty concerning the allowance of interest on damages (true, damages to the value of a ship) was never stated more clearly than it was in *The Scotland*, 118 U. S. 507, 518, 6 Sup. Ct. 1175, 30 L. Ed. 153, where Mr. Justice Bradley said: "Were the libelants entitled to interest on the amount received from the strippings? In answering this question it must be borne in mind that this is not a question of debt but of damages. The limitation of those damages to the value of the ship does not make them cease to be damages. The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury." The rule was stated in effect the same by Mr. Justice Brown in *The Albert Dumois*, 177 U. S. 240, 255, 20 Sup. Ct. 595, 44 L. Ed. 751; by Judge Taft, speaking for this court, in *The North Star*, 62 Fed. 71, 87, 10 C. C. A. 262; by Judge Severens, speaking for this court, in *Great Lakes Towing Co. v. Kelly Island L. & S. Co.*, 176 Fed. 492, 498, 100 C. C. A. 108; and by Judge Addison Brown in *The North Star* (D. C.) 44 Fed. 492; *The Alaska* (D. C.) 44 Fed. 502. Instructive discussion as to the allowance of interest on damages arising in cases of tort generally may be found in *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 128, 4 N. E. 620, by the present Mr. Justice Holmes, although the rule there laid down is not extended to personal injury cases in Massachusetts (*Cochran v. Boston*, supra); also in *Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.*, 61 Fed. 237, 250, et seq., 9 C. C. A. 468, by Judge Putnam. See, also, *District of Columbia v. Robinson*, 180 U. S. 92, 107, 21 Sup. Ct. 283, 45 L. Ed. 440; *Drumm-Flato Commission Co. v. Edmisson*, 208 U. S. 534, 539, 28 Sup. Ct. 367, 52 L. Ed. 606; *Taylor v. Railway Co.*, 101 Mich. 141, 145, 146, 59 N. W. 447.

about eight years before trial was had below and should be brought to a close.

The decree must be affirmed, with costs of this court, including costs below as therein taxed.

MASSEE v. WILLIAMS.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913.)

No. 2,267.

1. LIBEL AND SLANDER (§ 41*)—PRIVILEGED COMMUNICATIONS—QUALIFIED PRIVILEGE.

Where an interview between plaintiff and defendant at which alleged slanderous remarks were made was for the purpose of effecting the compromise of a pending suit and related to the business matters out of which such suit arose, the occasion was qualifiedly privileged as a matter of law, and the subject-matter of the discussion was also privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 41.*]

2. LIBEL AND SLANDER (§ 123*)—ACTIONS—QUESTIONS FOR JURY.

In an action for slander, whether utterances on an occasion which was qualifiedly privileged were made in good faith was a question for the jury, and hence, notwithstanding the privilege, evidence of what was said was admissible.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

3. LIBEL AND SLANDER (§ 24*)—PUBLICATION—SUFFICIENCY.

Utterances on an occasion which was qualifiedly privileged in excess of the privilege were actionable, although made only in the presence of the party slandered and his counsel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 106; Dec. Dig. § 24.*]

4. LIBEL AND SLANDER (§ 24*)—PUBLICATION—SUFFICIENCY—"ACTIONABLE PUBLICATION."

To constitute an "actionable publication," slanderous remarks must be made to, or in such public manner as to reach, some person other than the author or publisher and the party slandered.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 106; Dec. Dig. § 24.*]

5. LIBEL AND SLANDER (§ 34*)—"PRIVILEGED COMMUNICATION."

A "privileged communication" comprehends all bona fide statements in the performance of any duty, legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them or the person to whom they are made.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 113; Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5591-5598; vol. 8, p. 7764.]

6. LIBEL AND SLANDER (§ 41*)—"CONDITIONALLY PRIVILEGED COMMUNICATION."

A "conditionally privileged communication" is a publication made on an occasion which furnishes a prima facie legal excuse for the making of it and which is privileged unless some additional fact is shown which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

so alters the character of the occasion as to prevent its furnishing a legal excuse.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 41.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1410, 1411.]

7. LIBEL AND SLANDER (§ 41*)—PRIVILEGED COMMUNICATIONS.

At an interview between the parties to a pending suit and the counsel for one of the parties, with reference to an attempted compromise, defendant had a right to state his defense thereto, although his statements involved fraud and misconduct on the part of the plaintiff or were intemperate or excessive from overexcitement, and if in good faith, and from reasonable cause he believed that he had a valid defense resting on plaintiff's embezzlement, misappropriation of funds, or obtaining money under false pretenses, knowledge of such defense might properly be communicated without liability as for slander.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 41.*]

8. LIBEL AND SLANDER (§ 51*)—MALICE—EVIDENCE.

Honest indignation and want of sound judgment on the part of the defendant to a pending suit, and the employment of strong words in discussing an attempted compromise with plaintiff and his attorneys, if he thought them justified, were not evidence of malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 51.*]

9. LIBEL AND SLANDER (§ 50*)—PRIVILEGED COMMUNICATIONS.

In an action for slandering plaintiff by charging him with embezzlement, misappropriation of money, etc., in discussing an attempted compromise of a pending action, whether defendant in employing the language used acted honestly and under a sense of duty was to be determined by the jury from the circumstances as they presented themselves to the mind of the defendant at the time of the publication and not from the true facts as shown at the trial.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 50.*]

10. LIBEL AND SLANDER (§ 50*) — PRIVILEGED COMMUNICATIONS — EXCEEDING PRIVILEGE.

Where a party to a pending suit obtained a conference, not for the purpose of a compromise, but as an opportunity to defame the adverse party, and indulged in defamatory language not germane to the business for which the meeting was held, or in good faith obtained a conference to negotiate a settlement, and in the course of the negotiations made slanderous, criminary accusations against the adverse party which were neither pertinent nor necessary, or without honest effort to compromise, and from a spiteful and malicious feeling accused the adverse party of criminal wrongdoing and resorted to intimidation and threats to secure a dismissal of the suit, he abused the occasion and destroyed the privilege, and malice would be inferred by law.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 50.*]

11. LIBEL AND SLANDER (§ 51*)—PRIVILEGED COMMUNICATIONS—MALICE.

Utterances in connection with negotiations for the compromise of a pending suit do not amount to actionable defamation unless they had their origin in actual malice; the occasion being privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 51.*]

12. LIBEL AND SLANDER (§ 101*)—BURDEN OF PROOF—MALICE.

In an action for slandering plaintiff, during negotiations for the compromise of a pending suit, by charging him with embezzlement in con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nection with the matters giving rise to the suit, the burden was on plaintiff to show actual malice and was not on defendant to show that he did not abuse the privilege.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 150, 273, 275-280; Dec. Dig. § 101.*]

13. **LIBEL AND SLANDER (§ 109*)—EVIDENCE—MALICE.**

In an action for slandering plaintiff, in connection with the negotiations for a compromise of a pending suit, by charging plaintiff with embezzlement in connection with the matters out of which the suit arose, malice in fact might be shown not only by extrinsic evidence of personal ill feeling but also by intrinsic evidence, such as the language used, the mode and extent of the publication, and other matters in excess of the privilege.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 306; Dec. Dig. § 109.*]

14. **TRIAL (§ 29*)—CONDUCT OF TRIAL—COMMENTS ON EVIDENCE.**

In an action for slander, based on language used in an interview between the parties thereto, relative to an attempted compromise of a pending suit, it was improper for the court, in the presence of the jury, to state while the evidence was being received that he did not think the proof showed that the language was so within the scope of the interview and its object as to prevent its being a publication; this being a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.*]

15. **LIBEL AND SLANDER (§ 45*)—"PRIVILEGED COMMUNICATION."**

A communication is privileged when made in good faith in answer to one having an interest in the information sought, or when volunteered, if the party to whom the communication is made has an interest therein, and the one making it stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 138-140; Dec. Dig. § 45.*]

16. **LIBEL AND SLANDER (§ 50½*)—PRIVILEGED COMMUNICATIONS.**

Where the evidence showed that defendant in an action for slander called at the office of plaintiff's attorney for the purpose, as he testified, of settling an action against him by the plaintiff for breach of contract, his statements, if germane to the subject of discussion, were privileged, but, if he indulged in language not pertinent to the occasion and of a slanderous character, the protection of privilege was lost.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 50½.*]

17. **LIBEL AND SLANDER (§ 105*)—EVIDENCE—ADMISSIBILITY.**

On a trial for slander, where it appeared that defendant went to the office of plaintiff's attorneys and while there arranged for a subsequent interview with a view to effecting the compromise of a pending suit, evidence as to the first conversation with the attorneys was admissible as leading up to the second interview, even though no slanderous language, as alleged in the complaint, was shown to have been used in the first conversation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 282, 283, 292-294; Dec. Dig. § 105.*]

18. **LIBEL AND SLANDER (§ 6*)—ACTIONABLE WORDS.**

It is not slanderous, in the absence of special damages, to call a man a rascal, although such a charge, if made in writing, is libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3-16; Dec. Dig. § 6.*]

19. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Error could not be predicated on the court's statement and direction, in an action for slander, that proof of the substance of the statement alleged was sufficient, where it subsequently instructed broadly and favorably to defendant that, to warrant a recovery, the proof must show that the alleged slanderous utterances were made in the exact language alleged.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

20. LIBEL AND SLANDER (§ 100*)—PLEADING—VARIANCE.

In actions for slander, the plaintiff is not required to prove all the words alleged in the declaration unless it takes all to constitute a cause of action, but he must prove enough to entitle him to the relief sought.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-256, 258-272, 291, 322, 323; Dec. Dig. § 100.*]

21. LIBEL AND SLANDER (§ 5*)—MALICE—NECESSITY.

In the absence of privilege, malice in law is sufficient to render one liable in damages for slander without any malice in fact.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 5.*]

22. TRIAL (§ 214*)—INSTRUCTIONS—DUTY.

It is the court's duty to charge the law arising upon the facts as applicable to such facts, so as to aid the jury in arriving at a correct conclusion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 480; Dec. Dig. § 214.*]

23. LIBEL AND SLANDER (§ 59*)—MITIGATION—GROUNDS.

Good faith, honesty of purpose, and provocation due to a plaintiff's conduct may minimize and fix the degree of malice and thus operate to fix the amount of actual damages recoverable for slander.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 159, 166, 319; Dec. Dig. § 59.*]

24. LIBEL AND SLANDER (§ 100*)—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

In Tennessee the defendant in an action for slander may under the general issue introduce testimony not amounting to justification in mitigation of damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-256, 258-272, 291, 322, 323; Dec. Dig. § 100.*]

25. LIBEL AND SLANDER (§ 63*)—DAMAGES—MITIGATION.

The amount of damages for slander should be governed or graduated by the degree of malice by which defendant was actuated, and malice or misconduct on the part of plaintiff which provoked anger and passion and the injury complained of, and a reasonable belief on defendant's part that the charges were true, should reduce the damages to which plaintiff would otherwise be entitled to the extent which the circumstances warrant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 164, 318; Dec. Dig. § 63.*]

26. LIBEL AND SLANDER (§ 59*)—DAMAGES—MITIGATION.

Nothing should be received in mitigation of compensatory damages for slander which does not tend to show what those damages actually were, and where actual damages are once ascertained they cannot be mitigated, though they are to be determined in view of all mitigating circumstances.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 159, 166, 319; Dec. Dig. § 59.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
207 F.—15

27. NEW TRIAL (§ 162*)—EXCESSIVENESS OF VERDICT—REQUIRING REMITTITUR.

Where the damages in an action for slander were excessive, the court properly required a remittitur as a condition to sustaining the verdict instead of awarding a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

28. LIBEL AND SLANDER (§ 101*)—EVIDENCE—REPUTATION OF PLAINTIFF.

In an action for slander, there is a presumption of law in favor of plaintiff's good reputation until it is legally impeached, and hence evidence in chief of his good reputation is generally unnecessary.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 150, 273, 275-280; Dec. Dig. § 101.*]

29. LIBEL AND SLANDER (§ 104*)—EVIDENCE—MALICE.

On a trial for slander, evidence that when defendant was served with the summons he told the officer that he called plaintiff a thief that morning was admissible on the question of defendant's animus, although no one was shown to have heard the original utterance admitted by defendant so as to render it actionable, since defendant's state of mind when he made the alleged slanderous utterances was involved, and, while his acts and words on those occasions were the best evidence thereof, a subsequent expression of ill feeling should be received.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. § 104.*]

In Error to the Circuit Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Action by H. A. Williams against W. J. Massee. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

This is an action for slander. The plaintiff in error (hereinafter called the defendant) seeks a reversal of the judgment rendered against him in favor of the defendant in error (hereinafter called the plaintiff).

In early 1907 plaintiff and defendant and one Moore made an arrangement, tentative at least, to raise and train horses at a farm near Macon, Ga. The plaintiff's contribution was to be horses on which he owed \$6,500, the title to them being in one Donovan, which sum a contemplated corporation was to assume. Plaintiff was manager of the business (which was loosely conducted and proved unprofitable) and also kept and has always had possession of its books, accounts, and vouchers. He incurred numerous debts, on account of which defendant and Moore, in addition to their original contribution of the farm and an advance of \$3,000, were compelled to pay the further sum of \$7,000 to avoid suits. Plaintiff submitted no written statement of the business to his associates. The evidence is conflicting as to whether he ever reported to them orally. He agreed, if permitted to sell a horse at Memphis, to apply the proceeds on debts at Macon, but did not do so or account for the same except to report that he had applied them on the most pressing debts. Twenty-two horses were placed for keeping with Giddens at Pulaski, Tenn., of which four belonged to the plaintiff and four to the farm; the title to the others being in Donovan. In June, 1908, and twice in March, 1909, plaintiff suggested a closing of the farm business. He had previously accepted employment at Memphis without consulting his associates. Defendant demanded of him an immediate settlement in August, 1908, and afterward sent him four telegrams and a letter on the same subject. Plaintiff did not meet his associates until the following December. No settlement was then made. On March 27, 1909, plaintiff informed defendant that Giddens had advertised the horses at Pulaski for sale to pay a \$2,000 feed bill, of his borrowing money to pay bills, of the importunities of farm creditors and his desire to avoid a sacrifice of the horses. About April 1st he visited Macon to induce the defendant to pay the feed bill but says he obtained no promise in that respect. Evidence offered by defendant Moore and another

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tends to show that at that time plaintiff expressed his solicitude for the payment of such bill and his resulting embarrassment, including the loss of his position at Memphis should the horses be sold; that he wished defendant to go to Pulaski and settle with Giddens, whom he characterized by an opprobrious epithet and as trying to rob him; that a full settlement of all farm matters was then had, defendant and Moore to pay the feed bill and plaintiff to relinquish all interest in and claim to the business, but to have the horses and secure the defendant's and Moore's release on account of them from Donovan; that plaintiff, when asked about the proceeds of the horse which he had sold, hesitated, was embarrassed, evasive, and gave no satisfactory answer; and that he expressed his great appreciation of the treatment accorded him by his associates. Plaintiff disputes this evidence. The defendant went to Pulaski, paid the Giddens bill, and prevented the sale. Plaintiff says he and the defendant disagreed before the payment was made, and that he then decided to sue defendant. The defendant denies any disagreement or that he had any intimation that plaintiff made any claim against him. After the bill was paid, plaintiff asked defendant for a loan of \$50 and was told to draw for that amount. On the same day, April 6th, plaintiff, through his attorneys, Hatcher & Hatcher, sued defendant in Tennessee on account of the farm business for breach of contract. Evidence offered on plaintiff's behalf tends to show: That on the morning of April 7th, at the Fair Grounds, defendant said to one Jones: "He (the plaintiff) has brought suit against me since I have been here in Tennessee, and * * * I am going to put him in the penitentiary. * * * He has appropriated money and he has sold horses that belonged to me and I have got him down dead to rights. * * * He is a d— thief and scoundrel, and I am going to put him in the penitentiary." That later on the same morning the defendant voluntarily called at the office of the Hatchers and asked to employ them as his counsel (the evidence on this point being uncertain), and began to talk "ugly, * * * began some kind of an abuse of Mr. Williams, spoke of what he had done for him, what an ingrate he was and what a rascal he was," etc., but "made no direct charges against Mr. Williams." That, at defendant's request for a friendly conversation with plaintiff to compromise the then pending suit, an afternoon interview was arranged at Hatcher's office, at which the defendant said: "You brought a lawsuit against me, and you know d— well that I don't owe you anything; you have stolen my money, and have robbed me, and you know it; and you have embezzled my money and squandered it, obtained it under false pretenses, and if you don't dismiss that lawsuit—and you have made use of a lawsuit to compel me to pay you something that I don't owe you, and if you don't dismiss it * * * I am going to put the stripes on you and send you to the penitentiary." That the discussion related to the stock farm, which had been operated under plaintiff's management, to a settlement of the pending suit concerning their partnership affairs, and to the plaintiff's sale of a horse and failure to account for the money; the defendant charging plaintiff with appropriating money belonging to the farm to his own use, but subsequently admitting that the horse perhaps belonged to the plaintiff. That the defendant was cool, angry, and greatly hurt because he had been sued. That each party informed the other of his bad reputation for truth and veracity, and that the plaintiff, when about to leave, in response to the defendant's request for a settlement of their matters out of court, told the defendant "to go to h—." The defendant's evidence tends to show that he went to Hatcher's office on the morning of April 7th to arrange a compromise of the pending suit; that he made no statement at any time at Columbia derogatory of the plaintiff, excepting that he was a "bad egg"; that he had been informed by Giddens on April 6th that plaintiff claimed ownership of several of the horses and had given one worth \$300 to an attorney for personal services; that plaintiff admitted such information to be correct and, when asked where he obtained the money to buy certain horses at Indianapolis, admitted that he had used the farm money to buy those which Giddens said the plaintiff claimed; that he had lured defendant into Tennessee under the pretense of paying Giddens for the purpose of suing him; and that such admissions greatly angered defendant in view of his kindness to and previous trust reposed in plaintiff.

Evidence in behalf of defendant disputed the making of such admissions. On April 7th plaintiff brought the present action, counting on defendant's conversation at the Fair Grounds, his two conversations in Hatcher's office, and in an indefinite way on accusations made on the streets of Columbia of theft, dishonesty, and appropriation to his own use of money collected in the conduct of the farm business, but offered no evidence on this last charge. Evidence to show plaintiff's general good reputation for truth, integrity, and fair dealing was offered in chief, and also of defendant's having said to the deputy sheriff, when served with a summons in the present case, that he slapped the plaintiff in the face and called him a thief on the streets of Columbia that morning. The defendant was indicted under a Tennessee statute for maliciously charging plaintiff with crime to coerce him against his will to dismiss the suit for breach of contract. The evidence of the defendant, in the form of a deposition taken before the trial, goes to show his inability, on account of a physical ailment, to attend the hearing of his case, and that he was indicted to prohibit his presence in the state of Tennessee.

The plaintiff is 42 years of age, was born in Nashville, lived in Columbia, Tenn., from 1884 to 1892 (being three of those years in a bank), had been employed by three packing firms, and had on different occasions been connected with a Jersey farm, a farm paper, live stock business, and sales stables, respectively, with some four or five fairs, and with the breeding of horses. The defendant is president of a power company and an electric street railway company. His answer tendered the general issue. A verdict was rendered in favor of the plaintiff for \$16,250. A remittitur of \$8,750 ordered by the trial judge was accepted, and judgment was entered for \$7,500.

George T. Hughes, of Columbia, Tenn., Walter Stokes, of Nashville, Tenn., and M. Felton Hatcher, of Macon, Ga., for plaintiff in error.

J. C. Voorhies, of Columbia, Tenn., and Harry S. Stokes and John A. Pitts, both of Nashville, Tenn., for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge (after stating the facts as above). Exception to the competency of the evidence offered as to the respective morning and afternoon conversations held at the office of the Hatchers was sufficiently reserved on the grounds that any communication made by the defendant at either of such meetings (1) was privileged on account of the mutual interest of the parties in the matter under discussion, and (2) was not a publication, although made in the presence of the Hatchers, who were plaintiff's attorneys, and (3) the parties were endeavoring to compromise the pending action for breach of contract, and, as the conversations related to such subject-matter, they were both privileged. Exception was also taken to that part of the charge to the jury as erroneously locating the burden of proof in which the court said, regarding the second conversation, that the burden was on the defendant to establish by a preponderance of the evidence that the words employed by him, which otherwise would be slanderous, were uttered in good faith, without malice, and within the scope of the compromise negotiations, and that, if he thus made proof in the respects named, his communications were privileged and afforded no ground of recovery against him, even if his statements were made in the presence of plaintiff's counsel; but if he failed to make such proof, and if the greater weight of the evidence showed that his

statements went beyond any attempt at compromise and were in the nature of threats and intimidation to cause the plaintiff to dismiss his suit, they were not then privileged.

[1, 2] The evidence of both parties shows that the second interview was for the purpose of effecting a compromise. It therefore was the duty of the court to declare the occasion qualifiedly privileged. Newell, Slander and Libel (2d Ed.) 392, 770; Folkard's Starkie, Slander and Libel, § 674. The subject-matter of discussion was also privileged. Whether the defendant's utterances on that occasion were made in good faith was a question for the jury. Folkard's Starkie, Slander and Libel, § 674; Robinson v. Van Auken, 190 Mass. 161, 166, 76 N. E. 601.

[3, 4] If the defendant's utterances, delivered as they were at a meeting on which all of the parties had agreed, were actionably slanderous, was there, on account of the presence of the plaintiff's counsel, such a publication of them as to confer a remedy by civil action? To constitute an actionable publication, it is essential that it be made to some third person or in such public manner as to reach third persons; that is, to some person other than the author or publisher and the party whom or whose affairs the language concerns. *Sylvis v. Miller*, 96 Tenn. 94, 95, 33 S. W. 921; *Townsend, Slander and Libel*, §§ 93, 95; *Fry v. McCord Bros.*, 95 Tenn. 691, 33 S. W. 568; *Cooley on Torts* (3d Ed.) p. 366; *Newell, Slander and Libel*, 756. Sending a libelous letter or speaking defamatory words to a plaintiff's agent, solicitor, or counsel is a sufficient publication to a third person. *Odgers, Libel and Slander* (5th Ed.) 161; *Townsend, Slander and Libel*, 439, 440; *Tuson v. Evans*, 12 A. & E. 175; *Huntley v. Ward*, 1 F. & F. 552, cited with approval in *Brewer v. Chase*, 121 Mich. 526, 534, 80 N. W. 575, 46 L. R. A. 397, 80 Am. St. Rep. 527; *Hancock v. Case*, 2 F. & F. 711; *Jacobs v. Lawrence*, 4 L. R. Ir. 579; *Clerk & Lindsell on Torts* (4th Ed.) 568; *Folkard's Starkie, Slander and Libel*, § 308; *Middleby v. Effler*, 118 Fed. 261, 263, 264, 55 C. C. A. 355 (C. C. A. 1), approving *Brow v. Hathaway*, 13 Allen (Mass.) 239, 242; *Commonwealth v. Pavitt*, 2 Del. Co. Rep. (Pa.) 16. The inference to be drawn from *Railroad v. Delaney*, 102 Tenn. 289, 52 S. W. 151, 45 L. R. A. 600, points in the same direction. In that case *Delaney's* agent solicited and procured, with knowledge of its contents, a letter of recommendation for him as a former employé from the company's superintendent to enable him to get employment with another road. The court held that the case did not present such language as constituted a libel per se; and, there being no special damages alleged, the action could not be sustained. We are unable to reconcile this statement and the court's discussion of the rule of damages with the theory that a libelous communication made on a privileged occasion to a party's agent is not a publication. *Dickinson v. Hathaway*, 122 La. 644, 48 South. 136, 21 L. R. A. (N. S.) 33, is expressly in conflict with the conclusion above reached; but with great deference to the court that decided it, we do not think it states the better rule. Our conclusion is that, if the words attributed to the defendant were in excess of his privilege, there was a publication not-

withstanding their utterance was in the presence of only the plaintiff and his counsel, and that, although the subject-matter under discussion was the compromise of the then pending suit, evidence of what defendant said was admissible for the reason that under the circumstances of the case the question as to whether or not the language was in excess of the privilege was for the determination of the jury.

[5, 6] Did the burden of proof rest on the defendant to show that he did not exceed his privilege, or on the plaintiff to show that it was abused? A privileged communication comprehends all bona fide statements in the performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them or the interest of the person to whom they are made. Post Pub. Co. v. Hallam, 59 Fed. 530, 540, 8 C. C. A. 201 (C. C. A. 6); Merchants' Ins. Co. v. Buckner, 98 Fed. 222, 223, 39 C. C. A. 19 (C. C. A. 6); Newell, Slander and Libel, 388, 389. A conditionally privileged communication is a publication made on an occasion which furnishes a prima facie legal excuse for the making of it and which is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent its furnishing a legal excuse. Cooley v. Galyon, 109 Tenn. 1, 9, 10, 70 S. W. 607, 60 L. R. A. 139, 97 Am. St. Rep. 823; Townsend, Slander and Libel, 347.

[7-9] The defendant's answer was a denial of all slanderous utterances. His contention was, as stated by the court, and there is evidence tending to sustain it, that his statements were made in good faith, without malice, and with reference to the attempted compromise of the then pending suit, and that under all the circumstances, and in view of the previous dealings of the parties, whatever statements he made were, on account of plaintiff's misconduct in such dealings, believed to be true. He had a right at such interview for his own protection to state his defenses to the action brought against him, although his statements involved fraud and misconduct on the part of the plaintiff or were intemperate or excessive from overexcitement (Brow v. Hathaway, 13 Allen [Mass.] 239, 242; Newell, Slander and Libel, 510); and if, in good faith and from reasonable cause, he believed that he had a valid defense to the action for breach of contract, resting on plaintiff's embezzlement, misappropriation of funds, and obtaining money under false pretenses, knowledge of such defense was a matter of interest to both the plaintiff and his counsel and, under such circumstances as the defendant claims, might properly be communicated to them, although the communication necessarily contained criminary matter which, but for the privilege, would be slanderous and actionable. Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794, 800; Folkard's Starkie, Slander and Libel, § 671; Newell, Slander and Libel, 509. Honest indignation and want of sound judgment on the part of the defendant and his employment of strong words, if he thought them justified, were not evidence of malice. Odgers, Libel and Slander, 345; Newell, Slander and Libel, 324. He was privileged to say what a due regard to his interest necessitated and to employ such

words as the situation compelled; and it was the duty of the jury under proper instructions to look at the circumstances as they presented themselves to the mind of the defendant at the time of the publication, not what may have been proved at the trial to have been the true facts of the case, and then ask: Did the defendant act honestly and under a sense of duty, using such language as he might bona fide have employed under the circumstances? Did he in good faith believe the statements he made were true? *Odgers, Libel and Slander*, 352. An affirmative answer to these questions would repel the legal inference of malicious intent on the part of the defendant and would exonerate him from liability. *Newell, Slander and Libel*, 392; *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387, 389.

[10] If, however, he obtained a conference, not for the purpose of a compromise, but as an opportunity to defame the plaintiff, and having so done indulged in defamatory language not germane to the transaction of the business for which the meeting was held, or if in good faith he obtained a conference to negotiate a settlement and in the course of the negotiations made slanderous criminary accusations against the plaintiff which were not pertinent, and yet could have done all that his duty or interest demanded without thus slandering him (*Newell, Slander and Libel*, 509; *Smith v. Smith*, 73 Mich. 445, 41 N. W. 499, 3 L. R. A. 52, 16 Am. St. Rep. 594), or if having thus induced a conference, without an honest effort to compromise, from a spiteful and malicious feeling, he accused the plaintiff of criminal wrongdoing and resorted to intimidation and threats to secure a dismissal of the then pending suit, he abused the occasion and destroyed the privilege, and a malicious intent in the making of his statements would be inferable by law.

[11-13] The occasion being privileged, the communication did not amount to actionable defamation until it appeared that it had its origin in actual malice. *Lea v. White*, 4 Sneed (Tenn.) 111, 113; *Newell, Slander and Libel*, 391. It was therefore incumbent on the plaintiff to show such malice in addition to injurious utterances, and that the defendant seized upon the occasion as a pretext or otherwise availed himself of it maliciously in fact to slander him. *Crockett v. McLanahan*, 109 Tenn. 517, 522, 72 S. W. 950, 61 L. R. A. 914; *Shadden v. McElwee*, 86 Tenn. 146, 151, 5 S. W. 602, 6 Am. St. Rep. 821; *Folkard's Starkie, Slander and Libel*, § 670; *Townsend, Slander and Libel*, 349, 350; *Newell, Slander and Libel*, 389; *Dunn v. Winters*, 2 Humph. (Tenn.) 512; *Mattson v. Albert*, 97 Tenn. 232, 36 S. W. 1090; *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591; *National Cash Reg. Co. v. Salling*, 173 Fed. 22, 28, 97 C. C. A. 334 (C. C. A. 9). In *Saunders v. Baxter*, 6 Heisk. 382, the Tennessee court thus quotes with approval the clear statement made in *Wright v. Woodgate*, 2 Crompt. M. & R. 573:

"A privileged communication means nothing more than the occasion of making it rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only; he has still the right to require that the alleged libel

itself shall be submitted to the jury that they may judge whether there is evidence of malice on the face of it."

The presumption of freedom from malice running in favor of the defendant, the burden of proving that he did not abuse his privilege did not rest on him. On the contrary, the burden was on the plaintiff to prove malice in fact, which might be done not only by extrinsic evidence of personal ill feeling but also by intrinsic evidence, such as the original language of the slander, the mode and extent of the publication, and other matters in excess of the privilege. Any other words spoken by the defendant of the plaintiff and indeed all previous transactions or communications between the parties were competent on such issue. *Newell, Slander and Libel*, 770. If plaintiff's evidence fell short of establishing actual malice, the defendant was not called upon to answer as to that issue. If his evidence tended to show such malice, the defendant, to avoid an adverse verdict, was required to meet it but not to overcome it by a preponderance of the evidence. If the defendant's evidence was merely sufficient to counterbalance that of the plaintiff, or if the evidence adduced was, as a whole, equally consistent with either the existence or nonexistence of such malice, there was then nothing to rebut the presumption which existed in favor of the defendant from the privileged occasion. *Odgers, Libel and Slander*, 345; *Newell, Slander and Libel*, 324. The portion of the charge above considered contains prejudicial error.

[14] At an early stage of the trial, when plaintiff's evidence was coming in, the court said in the presence of the jury that he did not think the proof showed the language attributed to the defendant in such second conversation was to such an extent within the scope of the interview and the object for which it was held as to prevent its being a publication. No subsequent allusion was made to this statement. It was in effect an announcement of the court's opinion that the defendant's language was not privileged and was consequently slanderous and malicious in fact. We fear that this unqualified declaration on a question whose decision was within the province of the jury must have operated to the defendant's prejudice.

As regards the first conversation at Hatcher's office, the court charged the jury that as the defendant, after the suit for breach of contract had been instituted against him, went to the office of the Hatchers voluntarily and not at their instance or suggestion, no element of privilege attached to such conversation, and that if he there made the statements attributed to him, and if they were in substance such as referred to the embezzlement and misappropriation of funds and the obtaining of money under false pretenses, there was then, on account of them, a right of action against him in favor of the plaintiff. To this portion of the charge the defendant excepted.

[15, 16] E. H. Hatcher's evidence, notwithstanding the uncertainty of his recollection, that the defendant's express purpose in voluntarily coming to his office was to employ him as an attorney justified the admission of the conversation, but the subsequent evidence of the defendant that his visit was made to bring about a settlement of the then pending suit and the fact that at that time a subsequent meeting

of the parties was arranged for that purpose injected into the case a question of fact for the jury's determination. That the communication was voluntarily made did not necessarily render it nonprivileged. A communication is privileged within the rule, when made in good faith, in answer to one having an interest in the information sought; it is also privileged, if volunteered, if the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information. *Locke v. Bradstreet Co.* (C. C.) 22 Fed. 772, 773; *Erber v. Dun* (C. C.) 12 Fed. 526; *Sunderlin v. Bradstreet*, 46 N. Y. 191, 7 Am. Rep. 322; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794, 798, 801; *Fresh v. Cutter*, 73 Md. 87, 20 Atl. 774, 10 L. R. A. 67, 25 Am. St. Rep. 575. If the jury accepted the defendant's evidence as to the object of his visit, his statements, if germane to the subject of discussion, were innocent and privileged, but if he transcended the bounds of his privilege to indulge in language not pertinent to the occasion and subject-matter and of a slanderous character, the protection of the privilege was lost. If his language was such as the jury might properly have found to be defamatory of the plaintiff, both of the above phases of the situation should have been presented to it in the charge.

[17, 18] No specific and perhaps no adequate exception was taken to that portion of the charge which left it to the jury to determine whether the defendant's statements made at such first conversation were of the character alleged in the declaration regarding embezzlement and misappropriation of funds and the obtaining of money by false pretenses; but, as the case must be retried, we are constrained to say that, while the evidence of such conversation was competent as leading up to the second interview, it fails to show any utterances such as are made the basis of the plaintiff's complaint. No mention of any accusation on the part of the defendant is made by C. P. Hatcher, and E. H. Hatcher's version of the conversation is a recital not of the language employed by the defendant but of his conclusion as to its import. He explicitly states that the defendant made no direct charges against the plaintiff. If we misinterpret his evidence, and if the defendant did call the plaintiff a "rascal," the application of that term to him was not, in the absence, as here, of proof of special damages, slanderous (*Cooley on Torts* [3d Ed.] 393, 401), although had the charge been in writing it would have been libelous. *Williams v. Karnes*, 4 Humph. (Tenn.) 9; *Newell, Slander and Libel*, 48.

[19, 20] Error cannot be predicated on the court's statement and its earlier direction that proof of the substance of the statements set forth in the declaration is sufficient, for the reason that, when its attention was called to the language thus inadvertently employed, it broadly and favorably to the defendant instructed the jury that the proof must show that the alleged slanderous utterances were made in the exact language charged in the declaration in order to warrant a recovery. The plaintiff was not required to prove all the words laid in the declaration unless it took all of them to constitute the cause of

action, but he was required to prove enough of them to entitle him to the relief sought. *Roberts v. Lamb*, 93 Tenn. 343, 27 S. W. 668; *Hancock v. Stephens*, 11 Humph. (Tenn.) 508; *Robinson v. Van Auken*, 190 Mass. 161, 166, 76 N. E. 601; *Broughton v. McGrew*, 39 Fed. 672, 674, 5 L. R. A. 406; *Linville v. Earlywine*, 4 Blackf. (Ind.) 469.

It is alleged that the court erred in announcing the rule as to mitigation of damages in that, briefly stated, it told the jury that, if it found that the defendant made the remarks attributed to him and that they were not privileged, the plaintiff was entitled to actual compensation regardless of the defendant's good faith and of actual malice; that, if he had a reasonable ground to believe from plaintiff's previous conduct that his statements were true, that fact would rebut any inference or proof of malice, and a recovery of punitive damages could not then be had, but that the existence of such reasonable ground would not affect the question of compensatory damages; and that provocation induced by plaintiff's conduct, although to be considered on the questions of actual malice and punitive damages, did not affect the question of compensatory damages.

[21, 22] As the existence of malice in fact was essential to a recovery on the utterances alleged to have been made at the second interview at Hatcher's office, the plaintiff was left remediless as to them, if such malice was rebutted. If, however, the defendant was guilty of only malice in law in any utterances he may have made at the Fair Grounds, he was liable in damages. The two conversations do not stand upon the same plane, because the former occasion was privileged and the latter was not. It was the court's duty to charge the law arising upon the facts as applicable to such facts so as to aid the jury in arriving at a correct conclusion. *Hackett v. Brown*, 2 Heisk. (Tenn.) 264, 271.

[23] Good faith, honesty of purpose, and provocation due to a plaintiff's conduct may minimize and fix the degree of malice and thus operate to fix the amount of actual damages. *Odgers, Libel and Slander*, 398, states the rule applicable in all cases of slander to be that:

"Where the occasion is privileged, the motive or intention of the speaker is material to the right of action. In all cases the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury which he has sustained; but if the injury was unintentional or was committed under a sense of duty, or through some honest mistake, clearly no vindictive damages should be given. In every case, therefore, the defendant may, in mitigation of damages, give evidence to show that he acted in good faith and with honesty of purpose and not maliciously."

[24] In the early and leading case of *West v. Walker*, 2 Swan, 32, 33, the Tennessee court held that it was competent for the defendant in a slander suit under the general issue to show that the charge was occasioned by the misconduct of the plaintiff either in attempting to commit the crime or leading the defendant to believe him guilty of it. That case established the local rule that a defendant is permitted under the general issue to introduce testimony which does not amount to justification in mitigation of damages (*Haws v. Stanford*, 4 Sneed

[Tenn.] 520, 524), to rebut the malice with which it might otherwise be presumed the defendant's words were uttered. *Shirley v. Keathy*, 4 Cold. (Tenn.) 29, 31. In *Hackett v. Brown*, in which the matter of provocation and anger as mitigating circumstances was under consideration, it was said that there is a wide difference between malicious and remorseless slander and words spoken in the heat of blood and under provocation, and that a jury in fixing the measure of damages should be permitted to consider all the circumstances of mitigation as well as of aggravation. The record suggests that both parties were angry; that both were accustomed to indulge at times in offensive language; and that, viewed from the defendant's standpoint, there was much to arouse his indignation and his belief of want of good faith and fair dealing on the part of the plaintiff.

[25, 26] We conceive the rule to be that the amount of damages should be governed or graduated by the degree of malice by which a defendant was actuated (*Huson v. Dale*, 19 Mich. 16, 30 [top paging], 2 Am. Rep. 66), and that, if his malice may be punished by the imposition of smart money, then malice or misconduct on the part of the plaintiff which provoked anger and passion and the injury of which he complains, and a reasonable belief on the part of the defendant that the charges were true, should also be punished by withholding, to the extent which the circumstances warrant, the damages to which he would otherwise be entitled. A plaintiff who so deports himself has less to lose in the way of reputation and consequently sustains less actual damage than a person who does not thus misbehave. Nothing should be received in mitigation of compensatory damages which does not tend to show what those damages actually were, and where actual damages are once ascertained they cannot be mitigated, though they are to be determined in view of all mitigating circumstances. *Sedgwick on Damages* (9th Ed.) § 448; *Cheadle v. Buell*, 6 Ohio, 67; *Wilson v. Apple*, 3 Ohio, 270; *Haywood v. Foster*, 16 Ohio, 88; *Ritchie v. Stenius*, 73 Mich. 563, 567, 568, 41 N. W. 687; 25 Cyc. 417; 18 Am. & Eng. Ency. Law, 1107 et seq. The instruction as to mitigation of damages should have been in accordance with the foregoing.

[27] The court very properly, considering the state of the record, refused to sustain the verdict unless the plaintiff remitted a large portion of the damages awarded by the jury. It is urged that it should have set aside the verdict and awarded a new trial, because the verdict was so excessive as to indicate passion and prejudice on the part of the jury. The course pursued is supported by both state and federal authority. *Packet Co. v. Hobbs*, 105 Tenn. 29, 46, 58 S. W. 278; *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642, 646, 647, 6 Sup. Ct. 590, 29 L. Ed. 755.

[28] The defendant complains that, over his objection and exception, the plaintiff was permitted to offer evidence in chief that his general reputation for truth, integrity, and fair dealing is good. Whether thus to admit evidence of that character, under pleadings and circumstances such as are here presented, constitutes reversible error or not is a controverted question. Some of the authorities

which have answered it in the affirmative are *Martin v. Hooker*, 7 Cold. (Tenn.) 130; *Chubb v. Gsell*, 34 Pa. 114; *Burkhart v. N. Am. Co.*, 214 Pa. 39, 42, 43, 63 Atl. 410; *Blakeslee v. Hughes*, 50 Ohio St. 490, 34 N. E. 793; *Cooper v. Phipps*, 24 Or. 357, 33 Pac. 985, 22 L. R. A. 836; *Rhodes v. Ijames*, 7 Ala. 574, 42 Am. Dec. 604. And see, also, as reflecting on the question, *McCabe v. Platter*, 6 Blackf. (Ind.) 405; *Newell, Slander and Libel*, 771; 5 Am. & Eng. Ency. Law, 852. To the contrary are *Bennett v. Hyde*, 6 Conn. 24; *Adams v. Lawson*, 17 Grat. (58 Va.) 250, 94 Am. Dec. 455; *Williams v. Haig*, 3 Rich. (S. C.) 362, 45 Am. Dec. 774; *Shroyer v. Miller*, 3 W. Va. 158, 161; *Stafford v. Morning Journal*, 142 N. Y. 598, 37 N. E. 625; *Sutherland on Damages*, §§ 1210, 1211. We do not find it necessary to determine the question. As the case must be retried and as the plaintiff will have the undoubted right to rebut any assault made on his character by the defendant, we content ourselves by saying that it was not necessary to make such proof in chief; the presumption of law being in favor of plaintiff's good character until it was legally impeached. To say the least of this kind of evidence so offered, it is generally unnecessary and, if allowed, may tend inconveniently to procrastinate trials.

[29] The court received the evidence of the deputy sheriff regarding his conversation with the defendant subsequent to the commencement of the present action, not as a basis of damages, but merely as an admission that the defendant on the morning of the day in question applied an epithet to the plaintiff. Error is predicated on its introduction. If the defendant made such an admission it was not that of an actionable slander, because there is no evidence that any one heard the original utterance. The evidence of both the plaintiff and the defendant and by necessary inference that of the Hatcher's also distinctly negatives a meeting on that day between the parties to this action prior to that held in the afternoon at Hatcher's office, and consequently the occurrence of an incident such as the deputy sheriff says the defendant admitted. It is difficult to believe that the plaintiff would have consented to meet the defendant to compromise their differences had he previously been denounced as a thief and slapped in the face by the latter. The admission attributed to the defendant does not relate to any occurrence or utterance concerning which evidence was given. The evidence of the deputy sheriff was, however, competent, but for the sole purpose of showing the animus of the defendant. *Newell, Slander and Libel*, 331; 8 Ency. Ev. 268; *Townsend, Slander and Libel*, §§ 390, 394. What was in the defendant's mind when he is alleged to have made the slanderous utterances charged in the declaration was one of the questions involved. Although his acts and words on those occasions are the best evidence on this point, still if he afterward gave expression to an ill feeling, such expression is to be received for what it is worth in pointing to his motive at the respective times of publication laid in the counts. *Knapp v. Fuller*, 55 Vt. 311, 45 Am. Rep. 618. It was for the jury to say, under proper instructions from the court, what it would do with the evidence given by the deputy sheriff.

Having discussed what we believe to be the material points in issue, other assignments of error will not be considered. We wish, however, to add the caution that any allusions we have made to the evidence relate only to the record before us, and that we do not undertake to do more than lay down general propositions, leaving the terms in which they should be submitted at a new trial, if one occurs, and also the limitations and explanations thereof, to be then settled as the actual facts then develop.

The judgment is reversed, with costs, and the case remanded for retrial.

WARRINGTON, Circuit Judge. I concur in the judgment of reversal.

COAL & COKE RY. CO. et al. v. NEASE.

(Circuit Court of Appeals, Fourth Circuit. July 7, 1913.)

No. 1,141.

CONTRACTS (§ 322*)—PERFORMANCE—ACCEPTANCE BY PARTY—ESTOPPEL.

Complainant and associates entered into a contract with second parties relating to certain coal options acquired by the respective parties which were conveyed to a trustee. The second parties undertook to organize a corporation to repay advances made in the purchases and complete payment for the property, and to develop and operate the same, paying complainant a royalty on the production. The second parties were also to procure money to finance the operation, and to complete a railroad to the property. In case they failed to do such things by a date specified, complainant and his associates were to receive an undivided $\frac{49}{100}$ interest in the property in specie. Within the time fixed the second parties organized a corporation which contracted to carry out such agreement, and also presented a man who contracted to finance the mining and complete the railroad. Repayment of complainant's advances was tendered; but he refused it, and brought suit to enjoin the trustee from conveying the land and to recover $\frac{49}{100}$ thereof. Some months later he dismissed the suit and accepted the money, and the corporation completed payment for the lands. *Held*, that by such action complainant accepted the contracts made by the second parties as a compliance with their agreement, and could not, several years later, maintain a new suit to recover the specific interest in the property against another corporation which had in the meantime purchased it and executed a mortgage thereon, with other property, to secure a large issue of bonds outstanding in the hands of innocent purchasers.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1465, 1534; Dec. Dig. § 322.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Suit in equity by David A. Nease against the Coal & Coke Railway Company, the Washington Coal & Coke Company, and others. Decree for complainant (195 Fed. 987), and defendants appeal. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

B. M. Ambler, of Parkersburg, W. Va. (Van Winkle & Ambler, of Parkersburg, W. Va., on the brief), for appellants.

W. E. Chilton, of Charleston, W. Va., and C. D. Merrick, of Parkersburg, W. Va., for appellee.

Before PRITCHARD, Circuit Judge, and BOYD and SMITH, District Judges.

SMITH, District Judge. The appellee, David A. Nease, filed a bill against the appellants on the 8th of May, 1909, praying that he be decreed entitled to an undivided interest of $\frac{49}{100}$ of coal lands and coal interests mentioned and described in the bill of complaint, and that the same be partitioned and set off to him, and, if it be impossible to partition and set off the same in kind, that all of the said coal lands and coal rights be sold for partition, and that $\frac{49}{100}$ of the proceeds be paid over to the complainant. The defendants filed demurrers which on the 31st day of March, 1910, were overruled, and thereupon the defendants filed their answers, and, the cause being at issue, testimony was taken, and on the 23d of April, 1912, the court below rendered its opinion upholding the contention of the complainant, and on the 14th of June, 1912, a final decree was accordingly entered decreeing the plaintiff to be entitled to an undivided interest of $\frac{49}{100}$ of all of said coal and coke lands containing about 26,000 acres situated in the counties of Gilmer, Braxton, and Lewis in the state of West Virginia, and was further entitled to a sale thereof in case a partition in kind could not be had, and to $\frac{49}{100}$ of all the proceeds of sale less certain deductions in procuring and paying the purchase money for the same.

The facts, briefly stated, appear from the record to be as follows: In 1899 Henry C. Jackson and two others were the owners of a majority of the stock of the Little Kanawha Railroad, and were procuring options for the purchase of coal lands and coal interests in the counties of Gilmer, Lewis, and Braxton. The present complainant, David A. Nease, was also negotiating and attempting to procure options upon coal lands at the same time in the same counties. On the 25th day of November, 1899, Jackson and his associates entered into an agreement with Nease and his associates, whereby they agreed to organize a coal company to take over and acquire coal options procured by both parties, respectively, each party contributing \$5,000 with which to secure them, and all coal rights secured to be held jointly, one half interest belonging to Johnson and his associates, and the other half interest belonging to Nease and his associates. A controversy arose between the parties leading up to litigation by the Jackson party against Nease; but all controversies and litigation were settled by a new agreement which was entered into between Nease and his associates of the first part, Jackson and his associates of the second part, and one George Gillmor, trustee, of the third part, and V. B. Archer of the fourth part. This contract, which was dated May 5, 1900, superseded and did away with all previous contracts between the parties, and became the one binding contract, fixing the rights of the

parties, and is the contract upon which the right of the complainant, D. A. Nease, in these present proceedings is based. According to this last contract of May 5, 1900, all the coal options and rights were to be held in trust by George Gillmor as trustee, and he was to convey them to a new corporation to be organized by Johnson and his associates upon their request. Before making conveyance under this agreement, however, Gillmor was to acquire from this new corporation a duly executed and acknowledged agreement, whereby this new corporation should undertake to pay all the unpaid purchase money to be paid under the options, it was to bind itself not to lease the coal or any part thereof to any concern or persons, retaining to the corporation an interest in the lease, and further was to undertake to pay to Nease and his associates a royalty on all coal mined from lands covered by the said coal rights and options equal to one-fifth of the amount of the average prevailing royalty paid on coal of like character and mined under similar conditions in the vicinity or region where and at the time that such coal is actually mined, said royalty to be payable monthly.

The new corporation was further to agree that the representative nominated by Nease and his associates should have free access to the coal lands and rights to be conveyed to it, and they were also to have free access to the books of the said new corporation for the purpose of establishing how much coal was actually mined. The new corporation was further to undertake not to mine any other coal as long as the said 25,000 acres covering the said coal lands and interests could be mined as profitably as any other coal owned or controlled by the corporation. In addition to all this, before making a transfer to the new corporation of the interests held by him as trustee, Gillmor was to require that all moneys paid to him by Nease and his associates and Jackson and his associates should be refunded to him by the new corporation, and thereupon Gillmor was to immediately pay the same over to Nease and his associates and Jackson and his associates in the same proportions in which they had been contributed by them. It was further provided in this contract that Jackson and his associates should make diligent efforts for the financing of the new corporation and for causing the construction of a railroad to the coal lands and coal interests above mentioned, and that, if Jackson and his associates should not on or before December 1, 1900, substantially arrange with some responsible person or persons for financing the construction of a railroad to the said coal lands and for financing the new corporation, and perform or cause to be performed the provisions of the contract with reference to the repayment to Nease and his associates of the moneys advanced by them, then and in that event the rights, interests, and shares of the respective parties in the coal lands, rights, and property above referred to should be finally fixed, determined, and defined as follows, viz.: Nease and his associates to have $\frac{49}{100}$, and Jackson and his associates to have $\frac{51}{100}$ of said property. This contract was duly acknowledged and admitted to record in Lewis, Gilmer, and Braxton counties in November, 1900. Under these contracts Nease and his associates advanced in all \$11,200 to secure the options

as required by Gillmor, the trustee, and Jackson and his associates advanced a similar sum.

On the 17th of November, 1900, Jackson and his associates executed a contract with one B. E. Cartwright. The contract was between B. E. Cartwright of the first part, and Jackson and his associates of the second part, Gillmor, trustee, of the third part, and the Little Kanawha Railroad Company of the fourth part. Under this contract Cartwright was declared to be ready in conjunction with the parties of the second part to perform or cause to be performed all of the acts under the agreement of May 5, 1900, to entitle Jackson and his associates to require Gillmor, trustee, to account to them for all of the proceeds, benefits, and profits from the coal and coke rights in his name, except the royalty therein provided for Nease and his associates, and thereupon it was agreed that the parties should at once form the new coal corporation referred to in the agreement of May 5, 1900, to which Gillmor, as trustee, was requested to transfer the options so soon as its organization was effected and the receipt by him of the money and the undertakings specified in the agreement of May 5, 1900. Cartwright agreed to subscribe and pay in cash for enough of the stock of the new corporation to enable it as soon as organized to pay to Gillmor, trustee, the money which Gillmor was to repay to Nease and his associates and Jackson and his associates, and also to make any future payments required under the coal options and agreements, and to furnish it with sufficient money, if any required, to operate said coal, should the operation thereof by the company itself be deemed by it wise and to its best interests. Further, Cartwright agreed to pay the Little Kanawha Railroad Company \$25,000 in cash, as needed to meet its exigencies, and to pay all of its outstanding indebtedness, and supply the necessary funds needed to extend it to the coal field. In case Cartwright made default, the railroad company was to retain the \$25,000 as liquidated damages.

On November 23, 1900, the Braxton Coal Company was chartered with Cartwright and Jackson and others as incorporators, and seven days after the attorney for Gillmor, trustee, tendered to Nease the \$11,200, which had been advanced by him. Nease refused this payment, upon the ground, first, because the contract just mentioned of November 17, 1900, which was shown to him, was not in his judgment a compliance with the contract of May 5, 1900; second, because Cartwright was not a man of sufficient financial ability to comply with the requirements of the contract of May, 1900. On the 28th November, 1900, an agreement was entered into between the Braxton Coal Company and George Gillmor, trustee, which recited that the Braxton Coal Company had paid to Gillmor all moneys to be paid the parties under the contract of 5th May, 1900, and then proceeded on the part of the Braxton Coal Company in consideration of the premises and of the conveyance to be made to it by Gillmor, trustee, of the coal options and coal rights held by him to covenant and agree to perform and abide by all the conditions required by the agreement of 5th May, 1900.

Thereupon Nease, on December 7, 1900, filed his bill in equity in the United States Circuit Court for the Northern District of West Virginia, setting forth the facts as substantially hereinbefore given, charging that the agreement of the 17th of November, 1900, was not in compliance with the agreement of May 5, 1900, and that Cartwright was financially unable to comply therewith, and that the agreement of 28th November, 1900, was invalid, and praying that Gillmor, trustee, be enjoined from transferring to the Braxton Coal Company the coal options and interests, and also on the part of Nease tendering the sums necessary to pay his share of the purchase price for the coal embraced in the options, and asking that he be decreed to be the holder of $\frac{49}{100}$ undivided interest therein. On the 21st of January, 1901, Nease received from Gillmor, trustee, \$11,200, being the amount contributed by him and his associates as payment for the coal options and coal rights held by him, as trustee, in Gilmer, Lewis, and Braxton counties, comprising about 25,000 acres, which amount was refunded under the terms of the contract dated May 5, 1900, and also under the agreement mentioned and required under the agreement of May 5, 1900, to be executed by the Braxton Coal Company of West Virginia of the first part, and George Gillmor, trustee, party of the second part, dated November 28, 1900. It will be seen, therefore, that on the 21st of January, 1901, Nease knew of the agreement dated the 28th of November, 1900, which had been executed between the Braxton Coal Company and George Gillmor, trustee, as being the agreement to be executed by the Braxton Coal Company as the new coal corporation referred to in the agreement of May 5, 1900, upon the execution of which Gillmor was to convey to the Braxton Coal Company as such new corporation the 25,000 acres of coal lands, and it further appears that on January 21, 1901, Nease accepted from Gillmor, trustee, the repayment to him of the \$11,200 advanced by Nease and his associates to secure the coal options, which was to be repaid to him under the terms of the contract of May 5, 1900. Four days later, viz., on the 25th of January, 1901, Nease dismissed his bill of complaint against Gillmor, trustee, and the Braxton Coal Company.

In the meantime, Gillmor, trustee, had conveyed by deed, recorded in Braxton county on December 20, 1900, the coal rights and options held by him to the Braxton Coal Company. On November 2, 1901, the Braxton Coal Company conveyed all the coal rights and options conveyed to it by Gillmor, trustee, to Richard C. Kerens, as trustee, for a consideration of \$17 per acre. This deed to Kerens, trustee, expressly refers to the contract of May 5, 1900, and is made subject to its terms, which provide for the payment of one-fifth as his royalty to Nease of the coal mined. This deed was duly recorded. Kerens was to complete all payments due for the purchase money of the coal lands and coal rights and options, which he apparently did. Richard C. Kerens on November 28, 1903, executed a deed in his own right and as trustee, together with Stephen B. Elkins and his wife and Henry G. Davis, conveying this same coal and coal rights to the Washington Coal & Coke Company, a corporation. In this deed it is recited that Kerens had taken title to all these coal and coal rights in trust for himself and

Davis and Elkins, and the deed of conveyance to the Washington Coal & Coke Company also refers to the contract of May 5, 1900, and is made subject to the royalty therein. This deed was duly recorded. By a deed dated January 23, 1904, the Washington Coal & Coke Company conveyed all these coal lands and coal interests to the Coal & Coke Railway, subject to all conditions contained in the deed to it from Kerens, Davis, and Elkins of November 28, 1903. The Coal & Coke Railway Company had on October 1, 1903, executed to the Trust Company of West Virginia a general mortgage on all its road, branches, coal and coke lands in the counties of Randolph, Barbour, Upshur, Braxton, Gilmer, Clay, and Kanawha, aggregating about 100,000 acres, which the Coal & Coke Railway was then engaged in acquiring. Under an after-acquired clause in this mortgage the 25,000 acres of coal lands and coal rights formerly held by Gillmor, trustee, upon its acquisition by the Coal & Coke Railway became subject to its mortgage. Of the bonds acquired by this mortgage some \$4,500,000 have been issued since the conveyance to the Coal & Coke Railway Company of the said coal and coal rights, and are now outstanding in the hands of innocent holders.

On the 7th of April, 1903, Nease and his associates filed a bill of complaint against Braxton Coal Company, Jackson and his associates, Elkins, Davis, Kerens, and others, and George Gillmor, trustee, setting out the facts in the case chronologically, and praying that the defendants, George Gillmor, trustee, and the Braxton Coal Company, and Richard C. Kerens, be required to convey to Nease ⁴⁹/₁₀₀ undivided interest in said 26,000 acres of coal lands. An amended bill of complaint was filed in this cause in December, 1903; but, so far as the record discloses, nothing further seems to have been done, except that in 1905 demurrers filed to the bill of complaint by H. C. Jackson, S. B. Elkins, Henry G. Davis, and Richard C. Kerens for want of jurisdiction were sustained, and on the 19th of June, 1906, a final decree was made dismissing the bill for want of jurisdiction. The bill of complaint now before the court and filed on the 8th day of May, 1909, is therefore the third bill of complaint filed by Nease, and he sets up as the ground of his equity in this case that a fraud has been practiced upon him by Jackson and his associates, in that matters had been concealed from him which he was entitled to know, and the concealment of which from him affected the action which he had taken; that on the 17th of November, 1900, two contracts between Jackson and his associates and Cartwright were executed, but only one of which were shown to him. And by the second agreement between Jackson and his associates and Cartwright, which was not shown to him, it had been agreed that, in order to carry out the first agreement of that date, which had been shown to him, there was to be organized a new corporation to be known as the consolidated company, which was to take over the properties to be conveyed to the new coal corporation mentioned in the agreement of May 5, 1900, and also the Little Kanawha Railroad Company, in which Nease had no interest. The agreement further mentioned that, in case Cartwright should fail to finance the consolidated company within 12 months from its date, then Jackson and his associates had the right to repay to Cartwright the \$25,000

which would be forfeited to the Little Kanawha Railroad Company under the contemporaneous agreement, and then they should succeed to all the rights and interests of Cartwright.

Complainant in his bill rests strongly on the alleged concealment from him of the second agreement dated 17th November, 1900, between H. C. Jackson, the Little Kanawha R. R. Co., A. B. White, G. E. Newlon, W. W. Jackson, George Gillmor, trustee, and B. E. Cartwright. It is difficult to see, however, how the concealment of this contract could have in any wise prejudiced Nease. Nease alleges it was concealed from him; but a paper cannot be said to have been concealed from another when its disclosure was not called for by any obligation to him, and when its concealment could not operate to deprive him of any of his rights. The rights of Nease were fixed by the agreement of May 5, 1900. Whatever rights he had in the matter were those that he held under the terms of that deed. If he received the rights given to him by that deed, then he had no cause to complain. By that deed he agreed that George Gillmor, trustee, was bound to convey the coal options and the coal rights held by him as trustee to a new corporation to be organized not by Nease, but by the parties of the second part, viz.: H. C. Jackson, Albert B. White, Dennis O'Brien, G. H. Newlon, and W. W. Jackson. Gillmor, trustee, was to convey all these interests to the new corporation upon the request of these parties of the second part. At the time of such conveyance and before transferring the interests to the new corporation, however, Gillmor was to require from said new corporation an agreement duly executed and acknowledged to the effect set forth in section 4, subdivisions (b), (c), and (d) of said agreement of the 5th of May, 1900, and section 6 of said agreement. Gillmor, trustee, had no discretion in the matter. Upon the organization of the new corporation by the parties of the second part named in said agreement and their request he was bound to transfer all the coal options and coal rights to the new corporation, upon the new corporation paying the amount required by section 6, and executing the agreement required by the subdivisions mentioned of section 4 of said agreement. The only thing that would affect it would be the stipulation in section 11 of the agreement that, if the parties of the second part thereto should not before December 1, 1900, have substantially arranged with some responsible person or persons for financing the construction of a railroad to the coal lands and for financing said corporation, and have performed or caused to be performed the provisions of the contract with reference to the repayment to the parties of the first part (Nease and associates) of the moneys advanced by them, then and in such event the parties to the agreement were to hold the coal rights and coal property according to certain definite proportions.

The testimony shows that the parties of the second part did, prior to the 1st of December, 1910, organize a new corporation and they did, prior to that date, arrange for a person by them submitted as responsible for financing as required by the agreement of May 5, 1900, and the person so submitted was known to Nease, for he was made fully aware of the agreement of the 17th November, 1900, which disclosed these facts. Nease, however, was dissatisfied, and on the 7th

day of December, 1900, filed his bill in equity in the U. S. Circuit Court for the Western District of Virginia, to have Gillmor enjoined from making any conveyance to any such new corporation, to set aside the contracts of November 17, 1900, and November 28, 1900, and to have Nease himself decreed to be the owner and holder of an undivided interest of $\frac{49}{100}$ in all of said coal options and rights.

At the time of filing his bill Nease was fully aware of the contents of the agreement between Gillmor, trustee, and the Braxton Coal Company, dated 28th November, 1900, which recited the contract of the 5th of May, 1900, recited that the Braxton Coal Company had refunded to Gillmor, as trustee, the moneys paid to him by the parties to the contract of May 5, 1900, recited that Gillmor was to transfer to the Braxton Coal Company all of the coal options and coal rights, and contained, on the part of the Braxton Coal Company, all the covenants and stipulations required to be made under the terms of the agreement of May 5, 1900, by the new corporation to which Gillmor should convey. It is not shown how the agreement of the 5th of May, 1900, had not been fully carried out. The parties of the second part had organized the new corporation; they had found a man that they submitted as capable of financing it; the new corporation had paid to Gillmor the amount to be repaid by him to the parties to the contract of May 5, 1900. Gillmor had been requested to convey the coal options and coal rights to this new corporation, and before procuring the conveyances the new corporation had executed an agreement duly acknowledged, containing all the covenants and stipulations required by the agreement of 5th of May, 1900. All these matters were known to Nease. The contracts both of the 17th of November, arranging for the financing with Cartwright, and the contract of the 28th of November, 1900, between Gillmor and the Braxton Coal Company were known to Nease. He at first refused to receive the \$11,200 to be paid to him, and he actually went into court and filed his bill of complaint raising all the questions, desiring that these contracts of 17th of November, 1900, and 28th of November, 1900, should be set aside as not in accord with the agreement of the 5th of May, 1900, and praying in that bill, as he does in the bill now before the court, that there having been a failure on the part of the parties of the second part to perform as they were required to perform by the agreement of May 5, 1900, before December 1, 1900, that he be decreed to be the owner and holder of an undivided interest of $\frac{49}{100}$ in these coal interests.

Having taken this view and with all this knowledge before him, Nease then, on the 21st of January, 1901, does receive from George Gillmor, trustee, the sum of \$11,200, to be refunded to him by the new corporation in pursuance of the terms of the agreement of 5th of May, 1900. In addition to this, on the 21st January, 1901, upon motion of Nease himself, a consent decree was entered in this cause which he had filed, dismissing his bill.

It is difficult to see in what way Nease could have more openly and finally indicated his assent to and acceptance of the agreements of 17th of November, 1900, and 28th of November, 1900. With full knowledge of those agreements, and in face of his having filed in court a proceeding in equity to set them aside, he has proceeded by his own

motion to dismiss that bill, and accepted the sum of \$11,200, to be paid him as stipulated in those agreements. What follows after these agreements, the subsequent conveyances made, the mortgage entered, do not in any wise affect Nease's rights. He agreed and assented that these agreements were performance of the requirements to the effect covered by these agreements in the contract of May 5, 1900, and his act was in substance to agree that he accepted these agreements as performance of that contract, and to abandon any claim to a $\frac{49}{100}$ interest in the land or coal rights themselves. All subsequent conveyances posterior to the date of these two agreements made in November, 1900, have been made subject to Nease's rights as declared in these agreements and in the contract of May 5, 1900. Whatever rights those agreements gave him he has the power to enforce against the present holder of the coal rights and options. They do not, however, include the right to him to have a $\frac{49}{100}$ interest in the specific coal interests themselves. Under the terms of the agreement of 5th of May, 1900, when the matters to be performed by the parties of the second part were performed prior to December 1, 1900, Nease lost any right to an interest in the coal land itself, and was limited to his royalty, and the enforcement of the other stipulations embodied in the contract of the 5th of May, 1900, and the agreement on the part of the Braxton Coal Company and Gillmor, trustee, of the 28th of November, 1900, so far as the same are chargeable upon the parties themselves and upon the coal rights and interests in the hands of the present holder. The present holders in substance are the innocent holders of the bonds secured by the mortgage to the Trust Company of West Virginia. That company holds a mortgage upon these coal rights and lands given by the holder of the rights therein conveyed by Gillmor under the agreements of the 5th of May, 1900, the 17th of November, 1900, and the 28th of November, 1900, and accepted by Nease. The holders of these bonds are innocent holders of the same without notice, and, as such, entitled to the benefit of the security they have taken relying upon the conveyances made by Gillmor, trustee.

The holders of these bonds had the right to infer from the inspection of the record that Nease had accepted the deeds of 17th of November, 1900, and the agreement and conveyance of 28th of November, 1900, between Gillmor, trustee, and the Braxton Coal Company, as performance of the agreement of 5th of May, 1900, and that Nease no longer claimed any interest in the specific coal and coal rights beyond his royalty as stipulated in the deed from the Braxton Coal Company to R. C. Kerens on the 2d of November, 1901.

The entire amount paid out by Nease was \$11,200. This amount he has been refunded. The coal rights referred to in the agreement of 5th of May, 1900, were not owned and paid for by the parties thereto. Those parties including Nease had only acquired *options*. To convert these options into ownership required the payment of about \$250,000 additional to be paid largely before the 15th of January, 1901. A large part of this amount would have had to be paid between 1st of December, 1900, and 15th of January, 1901, say within 46 days after the time limit of 1st of December, 1900, as stipulated in the agreement of 5th of May, 1900. Of this Nease and his associates

would have had to pay 49 per cent. By reason of the arrangements made by the parties of the second part to the agreement of May 5, 1900, the result was the purchase price of these coal options was paid and the property acquired. To the payment Nease contributed not one cent. He accepted the repayment of the \$11,200 originally paid out by him. His interests, whatever they are, have been acquired without cost to him. He accepted this \$11,200 on the 21st of January, 1901, after the 15th of January, 1901, when he must have known that the options had expired unless saved by the agreements of 17th of November and 28th of November, 1900. The deed from the Braxton Coal Company to R. C. Kerens was recorded in November, 1901. The deed from R. C. Kerens to the Washington Coal & Coke Company was recorded in February, 1904. The deed from the Washington Coal & Coke Company to the Coal & Coke Railway Company was recorded in March and April, 1904. These deeds, if not constructively known to Nease, could have been ascertained by any sufficient examination.

So far as the record discloses Nease has never, prior to the present bill, paid or offered, outside of the allegations in the bills dismissed, to pay any part of the \$250,000 cost price of these coal interests. He has not even returned or offered to return the \$11,200 refunded to him. The decree of the learned judge who tried the cause below would require Nease *now* to bear his due share of the cost of these properties; but the equity to be considered is more whether he was willing and able to do so in December, 1900, and January, 1901. At those dates when it was necessary to bear that expense he was willing to leave it to be met by the financing arrangements made by the Braxton Coal Company, and allowed the record to speak to that effect to subsequent purchasers. The learned judge who heard the cause below construed the agreement of 5th of May, 1900, as recorded, as notice to all subsequent purchasers that the means to build the railroad, pay for the coal, and to conduct mining operations should be secured within seven months from 5th of May, 1900, and that the railroad should be actually built and mining operations commenced within a reasonable time thereafter, and with notice also that a failure in these respects would vest absolutely in Nease $\frac{49}{100}$ of the coal interests involved. In this we think he erred. That agreement was only notice that on or before 1st of December, 1900, a new corporation should have been organized, that the parties of the second part should have "substantially arranged" with some responsible party for financing the construction of the railroad and of the corporation, and should have performed or caused to be performed the provisions of the contract with reference to the repayment to Nease and his associates of the \$11,200 advanced by them, or in default of all thereof Nease should have $\frac{49}{100}$ interest in the coal interests.

If performance in these respects was had, then the recorded contract of 5th of May, 1900, was notice to all subsequent purchasers that Nease no longer had any specific interest in the coal lands themselves. The record shows performance, and a performance known to and accepted by Nease. It follows that subsequent purchasers would take free from any obligation except that reserved in the deeds to R. C.

Kerens and subsequent grantors. It appears that the Coal & Coke Railway Company and the Trust Company of West Virginia (as representing the innocent holders of the bonds secured by the mortgage) are purchasers and incumbrancers for value, and without notice of any rights or equities on behalf of Nease other than as expressed in the deed from the Braxton Coal Company to R. C. Kerens, and the bill of complainant presents no equity as against them.

For the reasons stated the decree of the lower court is reversed, and the cause remanded, with instructions to dismiss the bill.

Reversed.

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN GESELL-
SCHAFT v. GYE.

(Circuit Court of Appeals, Fifth Circuit. June 2, 1913. On Rehearing, October 6, 1913.)

No. 2,475.

1. SHIPPING (§ 84*)—LIABILITY FOR INJURIES TO STEVEDORES—DEGREE OF CARE REQUIRED.

The duty of a ship to longshoremen employed thereon is limited to the exercise of ordinary care in providing them with a reasonably safe place to work while engaged in loading or discharging and going to and from such place, and to giving them notice of any latent dangers where they are engaged in work and where their duties require their presence, and, where a longshoreman not at the time engaged in work is permitted to go to a part of the ship where no duty calls him, he is at most a licensee, and the extent of the duty owed him is not to knowingly let him run on a hidden peril or willfully cause him injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.*]

2. SHIPPING (§ 80*)—LIABILITY FOR INJURIES TO LICENSEES—DANGEROUS APPLIANCES.

The duty of a ship toward a mere licensee with respect to appliances is fully discharged when she is equipped with appliances reasonably suited to the purpose for which they are used, and such as are customary and usual for ships of that kind.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 335, 341, 352; Dec. Dig. § 80.*]

3. SHIPPING (§ 86*)—LIABILITY FOR INJURY TO LICENSEE.

Libellant's husband was employed as a longshoreman in loading respondent's ship. After taking on cargo at a point across from New Orleans, she crossed the river, and the longshoremen, who had ceased work for the day, stayed on board to be carried across. Libellant's husband, who with others had gone upon the poop deck, where there was an awning, seated himself on a grating covering the rudder quadrant, and while there his foot was caught and crushed by the movement of the steering gear, causing his death. He had been for three years engaged in working on similar vessels, having similar steering apparatus, which was of a usual pattern. None of the longshoremen had any right on such deck, which was for the exclusive use of those navigating the ship, but they went there because of the awning. There was no evidence that any one of the crew saw deceased after he sat upon the grating. *Held*, that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

facts did not disclose any negligence on the part of respondent which rendered it liable for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353-360; Dec. Dig. § 86.*]

4. ADMIRALTY (§ 118*)—REVIEW ON APPEAL—FINDINGS OF TRIAL COURT.

The rule that findings of fact by the district court in admiralty cases are entitled to great weight in the appellate court is modified when they are based on depositions.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758-775, 794; Dec. Dig. § 118.*]

5. ADMIRALTY (§ 18*)—JURISDICTION—ACTIONS OF TORT.

In an action of tort in a court of admiralty, the *locus injuriæ* is the test of jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 206-231; Dec. Dig. § 18.*]

Jurisdiction of torts, see notes to *Campbell v. H. Hackfeld & Co.*, 62 C. C. A. 279; *Monongahela River C. C. & C. Co. v. Schennerer*, 117 C. C. A. 205.]

Shelby, Circuit Judge, dissenting.

Appeal from the District Court of the United States, for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by Sarah Gye, widow of John Gye, against the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft. Decree for libellant, and respondent appeals. Reversed.

James Legendre and Edward Rightor, both of New Orleans, La., for appellants.

John Alonzo Woodville and J. L. Warren Woodville, both of New Orleans, La., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge. Sarah Gye, relict of John Gye, brought her libel in the District Court of the United States for the Eastern District of Louisiana in personam, with an order for foreign attachment, against the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft, for an injury causing the death of her husband, which was due it is alleged to the faulty and negligent construction or arrangement of the covering of the rudder quadrant, a part of the steering gear of the steamship Dortmund, situated on the deck of the poop, consisting of a lattice or grating structure extending about 30 inches above the steering apparatus. Around the rear part of this grating which covered, but did not entirely conceal the quadrant, was a railing which had to be crossed in order to reach the steering wheel. This lattice platform was intended exclusively for the use of those manning the wheel, when it became necessary to maneuver the ship from this locality. Situated about 10 inches directly in front of this lattice platform, and entirely exposed, was a heavy iron "stop," set upright on the deck, intended to arrest the rotary motion of the quadrant as it responded to the tension of the tiller. The quadrant plays underneath this grating until the rudder is put hard to the port or starboard,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at which time it projects from the cover described and sweeps against this post which obstructs its circular motion. The negligent omission of duty charged as the direct cause of the injury was the failure of the owners to cover or protect this space between the grating and this "stop" post in which the end of the quadrant played during the operation of the steering apparatus.

There was no material conflict in the testimony as to the cause and circumstances of the accident. The only conflict worthy of notice is the alleged warning conveyed to the deceased and expressed orders forbidding deceased, with others, the use of the platform constructed over the poop deck. Gye, libellant's decedent, with about 80 longshoremen, had been engaged in the forenoon of May 30, 1911, in stowing cargo on the steamship Dortmund at Westwego, opposite the city of New Orleans. The vessel, having finished taking the cargo at this point, was shifted down to Clouet street, on the left bank of the river. It was Saturday, and it is a reasonable inference supported by all the evidence that the longshoremen aboard had "knocked off" work for that day. They remained on board, preferring to leave the ship at Clouet street on the New Orleans side, presumably to save ferry and car fare. It was not an inhibited practice or unusual for longshoremen to remain aboard while the vessel shifted in the manner stated from one point to another for cargo.

On the poop deck was spread an awning affording a shade and comfortable respite for the time from the glaring sun upon the decks. A number of the screwmen took refuge on this poop deck; Gye and another named Workman seating themselves on the front edge of the platform, their feet resting upon the poop deck. Gye's foot was close, but to the right of, the iron "stop" post, and while the ship was under way from Westwego to Clouet street the rudder either as a result of the current or the steering course caused the quadrant to swing around in the uncovered space, jamming the foot of the deceased hard against the "stop" post, crushing it, from which injury he died six days thereafter.

As to contemporaneous facts, there is some conflict; the testimony, however, at this juncture is important, and will be here quoted literally.

William Priestly, for libellant:

"Q. Do you know whether or not Gye had been told to move from this place previous to the accident? A. No, sir; there was nobody told him to move, because there was no member of the crew, or any officer, or anybody around there to tell us to move.

"Q. Are you sure of that? A. Yes, sir; I am sure of that."

S. G. Ivey, for claimant:

"Q. Well, what called Workman's attention to the dangerous quality of it? A. I don't know. He said to this fellow (Gye): 'Mind out, you will get your feet caught.' None of us were thinking about anything happening.

"Q. None of you thought about such an accident happening? A. No; not when it was shifting. He had no business sitting there really.

"Q. You knew that after the accident happened? A. No; I knew that all the time. The mate himself had ordered us not to go up there. But it was hot, and they had run us out from the other place, and we all went up there.

"Q. Was any officer of the crew up there? A. They ran us out from forward. It was hot, and we all went up there. The mate tried to get us from going up there but we went anyhow. * * *

"Q. You all went aft? A. Yes, sir.

"Q. Were there any members of the ship's crew or officers who told you not to stay there? A. The mate told us not to stay there. He said: 'You have got no business up here.'

"Q. He meant the deck generally? A. No; under that shed there. He didn't want them up there. He tried to get them to leave, and couldn't."

Hiram Workman, for claimant:

"Q. How long was it before he got hurt that you told him to look out that he would get hurt? A. How long?

"Q. Yes. A. Just from the time it would take my leg to go the full length of it, because my feet were on the steering gear. I had this foot on the steering gear. I was sitting a little higher than I am sitting now. I said, 'Look out you don't get your feet caught in the steering gear.' I looks up, and I says then, 'It's too late now, you are too late, you are caught.' I goes and notifies the foreman, and he asks if he has his arms in the wheel. And I said, 'No; his feet are caught.'

"Q. Did you hear anybody else tell him to move from where he was sitting before he got hurt? A. No, sir."

Henry Nepperschmidt, for claimant:

"Q. Who is allowed on that part of the deck marked "A" [referring to poop deck]? A. Nobody except the second officer and his watch that are working the ship. Nobody is allowed on that place; and whenever I see anybody off he goes, he must get off there.

"Q. When you say nobody is allowed on that part of the deck marked 'A,' do you mean that such are the regulations and orders now, or were those regulations and orders in existence in years past? A. Ever since the ship was built. * * *

"Q. On what part of the deck can the screwman or longshoreman be when the ship is moving as it was in this case from Westwego to Clouet street? A. In that case we allow the longshoremen to be all over the ship except the poop deck and the forecastle head."

Max Neureather, for claimant:

"Q. Did you hear the mate or second mate say anything to those men? A. Yes, sir.

"Q. What did he say, what did you hear him say? A. He said, 'Go away from that place out there; you don't leave a place for me to work myself.'

"Q. Were these men—where were those men when the mate spoke to them thus? A. They were on the poop. * * *

"Q. Do you remember whether the mate ordered the men away from the poop deck before or after the accident? A. Before the accident."

Dan Heggie, for claimant:

"Q. Will you say whether or not before this accident happened to Gye you heard any of the officers of the steamship Dortmund order the men away who were sitting on the poop deck? A. Yes, sir; I heard the chief officer, I saw him run them down off the forecastle head, he ran them down from there; and then there was an awning up on the poop deck, and they were all going up there.

"Q. And what did you hear the chief officer say to them? A. I heard him tell them to get down off of there, he ran them down. He made them get down off the forecastle head. But with the second officer, when he ordered them down they told him they would get out of the road, that they would not be in the road.

"Q. Did you hear any one order them away from the poop deck? A. That is where the second officer was. That is the deck he ordered them away from. He takes charge of the after end of the ship."

Upon this case as made by the foregoing summary of the proof, there was a decree by the district court in favor of libelant and against the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft for \$3,000, from which the claimant appealed, and assigns as error that the judgment was unwarranted by the law and the evidence, and that, notwithstanding the injury was received on navigable waters of the United States, the libelant's decedent died ashore; therefore, the court was without jurisdiction.

The liability of the shipowners, if any exists for the loss sustained by libelant, depends upon the duty owed by the owners of the steamship Dortmund to the libelant's husband. Gye was a longshoreman, and had been recently engaged working cargo. At the time of the injury he was not discharging any duty aboard ship; his crew had finished their work in the hold where their employment called them, and Gye for his own comfort and convenience had voluntarily resorted to the poop deck, where not only no duty required him, but at a place, according to a preponderance of the evidence, he had been ordered not to "gang." Assuming that he had not been forbidden the liberty of the poop deck, nor warned of the dangers of the place, no duty required him there, nor was there any express invitation to justify his presence on the platform, constructed for the particular use of those controlling the course and direction of the ship. The particular locality was not inherently dangerous to any one knowing of the operation of the steering apparatus. Gye had three years' experience as a longshoreman, with the opportunities that period afforded him of acquaintance with the construction, use, and operation of such apparatus, which the evidence shows was not unusual but of customary design as compared with vessels of that size engaged in like trade. To ascertain the particular duty owing the decedent at the time of the injury, it is necessary to determine his status as it related to the ship at the particular moment of the injury.

[1] The duty of the shipowners, like that of masters generally, is to exercise ordinary care in providing a reasonably safe place for the laborers while engaged in the work of loading or discharging and going to and from such place. *Pioneer S. S. Co. v. McCann*, 170 Fed. 873, 96 C. C. A. 49; *The General Knox* (D. C.) 180 Fed. 489; *The Italia* (D. C.) 178 Fed. 996; *Burrell v. Fleming*, 109 Fed. 489, 47 C. C. A. 598. This rule has been qualified to some extent by a line of cases which hold that the ship owes no duty to the stevedores as a class, except not to wantonly injure them when once they are put to work under reasonably safe environments with full information to the foreman of any latent or concealed danger in the place or surroundings. *The Auchenarden* (D. C.) 100 Fed. 895; *West India P. & S. S. Co. v. Weibel*, 113 Fed. 169, 51 C. C. A. 116; *Burrell v. Fleming*, *supra*. The authority of these cases, as well as those cited by proctor for li-

belant, are to the effect that longshoremen are entitled to a safe place and surroundings in which to work, and to notice of latent dangers where they are engaged in work, and where their duties require their presence. No duty was required of a longshoreman on the poop deck of the *Dortmund*—deceased was not in the discharge of any duty there. Therefore, it cannot be insisted that Gye was an employé at the time of the injury and entitled to the safeguards devolved upon the employer to provide; nor could he be from any aspect of the case an invitee and entitled as such to the care and attention of the employer.

Invitation is inferred when there is a common interest or mutual advantage. What common interest or mutual advantage induced Gye to seat himself upon this grating? Absolutely nothing apart from his own comfort and pleasure. Gye was or was not a trespasser, according to the fact whether he was or was not ordered away from the premises; but aside from resolving that fact one way or the other, and conceding *arguendo*, he was under the facts of the case a licensee. In that event, we find that the extent of duty devolving upon the owner would be not knowingly to let him run upon a hidden peril or willfully cause him injury. 4 Words and Phrases, p. 3760; *Zanone v. Oceanic Steam Navig. Co.*, 177 Fed. 912, 101 C. C. A. 192; *The Montrose* (D. C.) 179 Fed. 1000. Gye's employment had terminated, and he was merely biding his opportunity to leave the ship. In the case of *The Thomas Turnbull* (D. C.) 99 Fed. 781, a steamship was approaching the dock, a rope ladder was dropped over the side to enable a seaman to land upon the pier, in the hurry of the moment it was dropped in front of a siphon connected with a donkey engine, and while the ship was being moored a stevedore started to climb on board to seek employment, which was customary at the port. When opposite the exhaust pipe, the engine was started for some purpose, and the man was scalded. The end of the pipe could have been seen from the pier and its nature and use were known. It was held there was no liability, as there could be no claim that it was known that the stevedore was coming on board when the engine was started, and that he was chargeable with notice of the danger. In that case the employment had not begun; in the instant case, the employment had ended. It was not known that Gye would assume a place of danger, and furthermore, with his experience as a stevedore he must be chargeable with notice of the operation of the steering apparatus.

[2] At most, we think the duty of the ship to a mere licensee is fully discharged when she is equipped with appliances reasonably suited to the purpose for which they are adapted, and such as are customary and usual for ships of that kind. As has already been seen, Gye had three years' experience as a longshoreman; he ought to have known of the construction and operation of the steering apparatus on such vessels, and that the quadrant was necessarily in motion, and was such an apparatus as is usually found upon nearly all such steamships. The danger should be apparent to any longshoreman of experience.

The Burgundia (D. C.) 29 Fed. 464, is a case where a child left unattended was injured by placing its hands in a rudder chain box on the main deck. The child was a passenger. In that case, it was said:

"The wooden box or groove was such as is usual upon nearly all steamships, and," though left open, "no customary precaution was neglected. * * * It is plain that the child was where it had no business to be."

[3] Taking the most favorable view of the case for libelant, giving him the most favored status that could be predicated on the evidence, that of a licensee, we conclude there was no breach of duty for which the owners of the steamship could be held responsible. There is a strong preponderance of evidence that Gye was ordered not to go on the poop deck, and to leave it before the lamentable accident which caused his death.

We have seen that there was no relation of master and servant existing; we have seen that under no aspect of the case could Gye be regarded as a passenger. He could no more be regarded an invitee to this "poop" deck, which according to the evidence was for the exclusive use of those navigating the ship, than he could be legally contemplated a passenger. Gye was no more invited to this reserved quarter than was he to the rigging or the bridge. If Gye was a trespasser when he received the injury, and it only requires an application of the law to the facts of the case to make this conclusion inevitable, then the only duty devolving upon the owners of the ship was not to wantonly injure him after his perilous position was discovered. There is no evidence that any of the vessel's crew engaged in her navigation discovered the perilous position of deceased before the injury.

[4] While we recognize the rule that the findings of fact in admiralty causes by the district court are entitled to great weight by the appellate court, the reason for the rule is based upon the trial court's opportunity for judging the credibility of the witnesses; the reason for the rule ceases, however, when the trial court's finding is based, as it was in the present case, on depositions. *The Santa Rita*, 176 Fed. 890, 100 C. C. A. 360, 12 L. R. A. (N. S.) 1210; *The Edward Smith*, 135 Fed. 32, 67 C. C. A. 506; *Lazarus v. Barber*, 136 Fed. 534, 69 C. C. A. 310; *Royal Exch. Assur. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66.

The case of libelant has been most carefully and thoroughly presented by her counsel, and it has received at the hands of this court that careful consideration which the unfortunate consequences demand. Deplorable as were the results of this unfortunate occurrence to the libelant, the law cannot on the facts, as we see them, afford any redress.

[5] We deem it unnecessary in view of the conclusion reached on the merits to advert to the question of jurisdiction, more than to say that it is well settled by the weight of modern authority that the locus injuriæ is the test of jurisdiction. *The Strabo*, 98 Fed. 998, 39 C. C. A. 375; *The Aurora* (D. C.) 163 Fed. 634.

The decree is reversed, with directions to dismiss the libel, and it will be so ordered.

SHELBY, Circuit Judge (dissenting). The evidence, as I understand it, fully sustains the decree of the District Court, and I think it

should be affirmed. *Burrell v. Fleming*, 109 Fed. 489, and authorities cited on page 492, 47 C. C. A. 598; *West India & P. S. S. Co. v. Weibel*, 113 Fed. 169, 171, 51 C. C. A. 116.

On Rehearing.

PER CURIAM. No one of the judges who concurred in this opinion desiring a rehearing, the same is denied.

NOTE.—The following are the reasons of the court below for the decree entered:

FOSTER, District Judge. In this matter the libellant is seeking to recover damages for the death of her husband, who received injuries while acting as a longshoreman, or laborer, on the steamship *Dortmund*, owned by the respondent, from which he subsequently died. It appears that on the after deck of the ship the steering gear is so arranged as to be partly covered by a wooden platform, which conceals the movement of the tiller, or rudder quadrant. This platform is of a convenient height to afford a comfortable seat, and it consists of a grating intended as a platform for the steersman to stand upon when steering the ship by hand. The ship was proceeding from Westwego down the river to Clouet street, in the city of New Orleans, and had on board the men who were to continue the work of loading when she reached her destination. They were congregated on the main deck of the ship, were ordered to leave, and some 35 or 40 of them went up on the after deck, which was covered with an awning. There the deceased and two others seated themselves upon the platform covering the steering gear. About the center of the deck an iron stop was fastened, just at the edge of the platform. This stop was intended to prevent the rudder quadrant from going past the center line; but, as will appear from the sketch in evidence and the testimony of the witnesses, there was nothing to indicate that the quadrant would strike against this stop. The deceased was not warned by any officer of the ship of the danger, nor to avoid it. He was warned by one of his fellow workers, but too late to avoid the accident. Either the operation of the steam steering gear, or the force of the current in the river caused the rudder quadrant to come around with great force and catch the foot of the deceased between it and the stop, mashing it to a pulp. From the injury thus received the man died some few days after.

It was certainly the duty of the ship to protect any one lawfully on her from the hidden danger of this quadrant under the circumstances of the case. The platform was an attractive place to men who had been working, and I do not find that the deceased was guilty of any negligence in seating himself upon it, or that the danger was apparent or should have been known to him in the exercise of reasonable care. See *The Eddystone* (D. C.) 33 Fed. 925; *Boden v. Demwolf* (D. C.) 56 Fed. 846; *The Montrose* (D. C.) 179 Fed. 1001; *Burrell v. Flemming*, 109 Fed. 489, 47 C. C. A. 598; *Pioneer S. S. Co. v. McCann*, 170 Fed. 873, 96 C. C. A. 49.

There will be a decree in favor of libellant in the sum of \$3,000.

GAGE LUMBER CO. v. McELDOWNEY.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913.)

No. 2,276.

1. BANKRUPTCY (§ 140*)—PASSING TITLE.

Complainant purchased lumber of specified quantities, dimensions, kinds, and prices per 1,000 feet from the bankrupt, to be manufactured subject to guaranteed freight rates and inspection, the contract providing for an advancement of \$30,000 in notes and payment half cash on each invoice as rendered, the balance to apply on payment of the notes given, to continue until the advancement was paid, after which the invoices would be paid in full. *Held*, that title to lumber cut and piled in the yards of the bankrupt, and intended to be appropriated to the contract at the time bankruptcy intervened, had not passed to complainant, so as to entitle it to recover the value of such lumber from the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 188*)—SALES—PROPERTY TO BE MANUFACTURED—EQUITABLE LIEN.

Where complainant purchased a quantity of lumber, to be manufactured and shipped to it by the bankrupt, advancing large sums before the lumber was sawed, complainant acquired an equitable lien on lumber piled in the yards of the bankrupt and intended to be applied on complainant's contract for the balance of advances, etc., which was enforceable as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

3. BANKRUPTCY (§ 101*)—FILING PETITION—EFFECT—BANKRUPT'S PROPERTY—CUSTODIA LEGIS.

Filing of a petition in bankruptcy is an assertion of jurisdiction by the bankruptcy court, with a view to determining the status of the bankrupt and a settlement and distribution of his estate; the exclusive jurisdiction of the bankruptcy court being so far in rem that the estate is regarded as in custodia legis from the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 163; Dec. Dig. § 101.*]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 185*)—RECEIVERS (§ 76*)—BANKRUPTCY (§ 155*)—TRUSTEE—ASSIGNEE FOR THE BENEFIT OF CREDITORS.

A trustee in bankruptcy, prior to the amendment of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), by Act June 25, 1910, c. 412, 36 Stat. 838 (U. S. Comp. St. Supp. 1911, p. 1491), an assignee for the benefit of creditors, and a receiver under the state law, took the property of the debtor subject to the rights of third persons; the equitable rights of such persons not being changed by bankruptcy proceedings, but all obligations of a legal or equitable character remaining undisturbed thereby.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 558; Dec. Dig. § 185;* Receivers, Cent. Dig. § 137; Dec. Dig. § 76;* Bankruptcy, Dec. Dig. § 155.*]

5. BANKRUPTCY (§ 161*)—PREFERENCES—SHIPMENT OF GOODS—EQUITABLE LIEN.

Where complainant acquired an equitable lien on certain lumber manufactured for it under a contract of sale executed September 6, 1906, pursuant to which complainant had made large advances to the bankrupts, shipments of consignments under the contract as late as September 9,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1907, prior to the intervention of bankruptcy against the seller in September, 1907, did not constitute a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

Appeal from the District Court of the United States for the Eastern District of Kentucky; A. M. J. Cochran, Judge.

Proceeding by the Gage Lumber Company against M. T. McEldowney, trustee in bankruptcy of the Clairfield Lumber Company. Decree (194 Fed. 181) for defendant, and complainant appeals. Reversed and remanded.

This appeal presents an issue as to the ownership of two sums of money, one of \$7,485.16 and the other of \$3,500.47. These sums are the proceeds of sale of certain lumber received by appellant at times and under circumstances which are claimed to differentiate its rights thereto, if, indeed, it is entitled to either sum. The issue as presented and determined below was made to depend upon whether the title to the lumber had passed from the bankrupt to the appellant prior to the bankruptcy. The District Judge believing that the title had not passed, entered an order in favor of the trustee (194 Fed. 181), and hence the appeal.

The controversy grew out of a contract entered into at Providence, R. I., September 6, 1906, which, so far as it is claimed to have been in writing, was in the form of an order given by the L. H. Gage Lumber Company (hereinafter called the Gage Company) to and accepted by the Clairfield Lumber Company (hereinafter called the Clairfield Company); the former being a corporation of Rhode Island, with offices at Providence, and the latter a corporation of Kentucky and then operating a sawmill at Clairfield, in Claiborne county, Tenn. The order so far as necessary to state was in this language:

"As per conversation of same date you will kindly enter our order as follows: [Specifically describing the lumber by quantities, dimensions, kinds and prices per thousand feet.] * * * The above prices f. o. b. Clairfield, Tenn., guaranteed rate of 30½¢. to Boston points. * * * Inspection guaranteed on the rules of the National Hardwood Association now in force. We hereby agree to advance on account of said contract in four months paper \$10,000, under date of October 1st, \$10,000, and under date of November 1st, \$10,000; you agreeing at the same time to have put on sticks during the month of September at least \$10,000 worth of lumber to apply on our contract, and during the month of October at least \$10,000 worth additional, to apply on our contract. You also agree to have an additional \$10,000 worth of lumber on sticks by December 1st, making a total of \$30,000 worth of lumber which has been put on sticks to apply on our contract of this date. We hereby agree to pay half cash on each invoice as rendered, the balance to apply on the payment of notes given. The same shall continue in this manner until this said advance has been paid in full, after which your invoices will be paid in full."

The Gage Company gave its promissory notes, and they were duly paid. The Clairfield Company began shipping lumber to the Gage Company in October, 1906, and continued its shipments from time to time until September 9, 1907; 13 car loads having been shipped in 1906, and 140 in 1907. However, the lumber was not manufactured within the time specified, and the shipments were so delayed as to cause one of the representatives of the Gage Company to go to the mill in June, 1907, and also in July and September. Certain things were done at these times, which will be mentioned later.

September 7, 1907, one of the creditors of the bankrupt filed a creditors' bill in the Claiborne chancery court, averring insolvency of the Clairfield Company, praying that a receiver be appointed, and that the assets of the company be administered for the benefit of its creditors. On the same date, involuntary proceedings in bankruptcy were begun in the court below against the Clairfield Company, all of which resulted in the appointment in the state court of a receiver, and in the court below of the appellee as trustee in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankruptcy, who came into possession of the property and assets of the bankrupt. Meanwhile the Gage Company began an action in the nature of replevin in such chancery court, setting up title to certain lumber then in possession of the receiver appointed by the state court and in the yards of the bankrupt. Thereupon an adjustment was effected between the parties to this litigation, whereby the replevin suit was dismissed and an agreement made by which the claim of the Gage Company should be set up and litigated in the bankruptcy proceeding. Later the Gage Company filed a petition in intervention in the court below, stating in substance that the parties had agreed that upon execution of its bond petitioner might remove the lumber claimed by it and submit its claim to the property for the determination of the court below; that the bond had been filed; that on September 6, 1906, the written contract before set out was entered into; that pursuant to that agreement petitioner advanced to the Clairfield Company the sum of \$30,000, together with certain other sums, amounting in all to \$41,091.05, against which advancements petitioner had received lumber (not including that now in controversy) to the amount of \$24,851.32, leaving a balance due petitioner of \$16,239.73; that prior to the filing of the creditors' bill in the Claiborne chancery court the Clairfield Company had manufactured expressly for petitioner under the terms of the agreement, and delivered to it "by placing the same on sticks expressly for it under said contract," certain lumber therein particularly described; that such lumber had been paid for and was the property of petitioner; that it was "unlawfully taken in custody by the chancery court of Claiborne county, Tennessee; and that the trustee in bankruptcy has no right or title to the same." The prayer was that petitioner be decreed to be the true and lawful owner of such lumber.¹

Issue was joined by the answer of appellee; the agreement in effect to substitute a bond for the lumber in dispute and submit the issue for trial in the court below was admitted; counterclaim and set-off were alleged respecting the claim of petitioner for \$16,239.73 for moneys advanced by petitioner to the Clairfield Company on purchases of lumber, and in excess of the sum due for lumber actually received; a preference was also averred through the transfer of seven car loads of lumber represented by the second sum of money in dispute in the present case; and praying that the various controversies between the parties be consolidated and heard together, that petitioner's claim, before mentioned, be re-examined and disallowed, unless petitioner should surrender the amount of such preference.

C. L. Marsilliot, of Memphis, Tenn. (Walter C. Chandler, of Memphis, Tenn., of counsel), for appellant.

Jouett & Jouett, of Winchester, Ky., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. [1] The lumber represented by the two sums of money in dispute was admittedly manufactured and placed on sticks—that is, was piled in the yards of the Clairfield Company—prior to the bankruptcy. We agree with the learned trial judge in the conclusion that the title to the lumber did not pass; but we have not been satisfied that this conclusion is determinative of the case. Indeed, we were so strongly impressed with this doubt that we requested counsel for the respective parties to submit briefs, and they have done so, upon the question in substance whether at the time of the bankruptcy the Gage Company had acquired an interest in the lumber in the nature of an equitable lien, which was enforceable against the trustee of the bankrupt, within the principles laid down in *Sexton v. Kessler*,

¹ Amendment and testimony touching alleged collateral oral agreement need not be mentioned or passed upon under present view of the case.

225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, *Hurley v. Atchison, Topeka & Santa Fé Ry.*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, and kindred decisions.

[2] We are disposed to believe that this question must be answered in the affirmative. It was thrice stated in distinct terms in the contract that the Clairfield Company should, during the three months in which the advances were to be and in fact were made, "put on sticks" quantities of lumber worth at least the sums of such advances respectively "to apply on our contract." We think the provisions for making advances toward the manufacture of particular lumber and for stacking it "to apply on our contract" disclose an intent to create a loan and security, as well as an ultimate sale, and so as between the parties to place the transaction outside of the ordinary category of unsecured claims. The contention that the lumber was to be inspected, measured and placed on cars at the yards is not important in the view we take of the case. At most, inspection and loading were for the benefit of the Gage Company and might have been waived by it (*Van Winkle v. Crowell*, 146 U. S. 42, 49, 13 Sup. Ct. 18, 36 L. Ed. 880; *Belding-Hall Manufacturing Co. v. Mercer & Ferndon Lumber Co.*, 175 Fed. 335, 339, 99 C. C. A. 123 [C. C. A. 6th Cir.]); and measurement was simply to ascertain the amount to be charged against the advances (*Leonard v. Davis*, 66 U. S. [1 Black] 476, 483, 17 L. Ed. 222).

We do not understand that there is any substantial dispute touching the means of identifying this lumber as it stood in piles in the yards. It was distinctive in kinds and dimensions, and the witnesses seem to be in harmony as to the fact that it was manufactured for the fulfillment of this contract. The general manager of the Clairfield Company forwarded monthly lists showing the lumber "put on sticks to apply on this contract." No other lumber like this appears to have been in the yards. This was made plain when an accredited representative of the Gage Company visited the yards in June, July, and September, 1907 (prior to the bankruptcy), and easily identified the lumber, examined it, and gave repeated orders to have it shipped, even stating in respect of the lumber, as testified to by the general manager of the Clairfield Company:

"Ship it green, and it will be our loss if it stains in the car, as the lumber had only been on sticks a short time."

Concededly the required inspection and loading on cars were not waived, but the identity of the lumber and its fitness to apply on the contract were complete.

What, then, were the rights of the parties to the contract? Plainly the Gage Company advanced its money and was to be repaid in lumber of specified kinds, dimensions, and qualities. At the date of the contract the lumber had not been manufactured; but the contract required its manufacture, and its distinctive character identified it with its purchasers. The provision of the contract obligating the Gage Company only "to pay half cash on each invoice as rendered, the balance to apply on the payment of the notes given," cannot affect the present question. Upon the theory that title to the lumber passed to the Gage Company—that is, on the current deliveries it was simply receiving its own

property—there was no occasion to pay anything, and each of these 50 per cent. payments was a new advance; but, treating the contract as one of equitable lien, this complication disappears, and the original advances, so far as unpaid, always remained a lien on all the undelivered lumber manufactured thereunder. The advances accumulated, as we understand the fact, through the failure of the Clairfield Company to manufacture and ship the lumber as fast as the advances were made.

A court of bankruptcy views transactions of this kind upon the broadest equitable principles, and does not hesitate to effectuate the actual intent of transactions honestly had with a bankrupt, without much restraint as to formality or procedure. *Hurley v. Atchison, Topeka & Santa Fé Ry.*, supra, 213 U. S. at page 132, 29 Sup. Ct. 466, 53 L. Ed. 729, approving language of Circuit Judge Putnam. When we regard the substance and effect of the present transactions, apart from their form, it is reasonably plain that the Clairfield Company would not be heard to say that the Gage Company did not, through its advances and the other company's actual production and stacking of the lumber, acquire an interest, certainly an equitable interest, in this lumber. The essence of the purchaser's right was the fact, constantly to be remembered, that each advance was made for the very purpose of having a particular thing produced. The last analysis of such a transaction is that, when the lumber was produced and placed on sticks, it was in effect appropriated toward the payment of the loan as required and promised under the contract.

It is true that, in the negotiations leading up to the contract, efforts were made, which failed, to have the lumber as it was piled marked with the name of the Gage Company, also to have a lease made to that company of part of the yard upon which to set aside the lumber as it was manufactured; the representatives of the Clairfield Company expressing, as to the one plan, fears that it would injure the credit of the company, and, further, that they did not wish Mrs. Anderson, the president of the company, to know of the advances, and declaring in respect of the latter plan that the company held the property under lease and had no right to sublease. But (aside from any question of admissibility of such statements) these features of the negotiations concerned an endeavor of the Gage Company to secure a transfer to it of the *title* to the lumber as fast as it was produced; and while it must be conceded that in one sense such statements would seem to be opposed to a purpose to create an equitable lien, yet no charges of fraud or bad faith are made respecting either the negotiations or the contract, and, since the contract was admittedly entered into in the form pointed out, it must be construed. To say, then, that such antecedent negotiations are inconsistent with the idea of an equitable interest in the lumber, is to urge that the repeated use of the words "to put on sticks to apply on our contract" is meaningless; in a word, it is to destroy the most significant portions of the contract. And as to the effect upon creditors of an equitable lien, as distinguished from a formal and published lien, this contention at last amounts to a challenge of the soundness of the doctrine of *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and of all the decisions affirming

and settling its principles. To illustrate, as respects creditors failing to fasten a lien on the bankrupt's property, that doctrine enforces instruments which have not been published by filing or recording as required by law.

The nature of an equitable charge or lien, and the principles upon which the courts proceed in fastening such charges upon the objects intended as security, are so familiar that we are content to cite only a few of the leading decisions. In *Hurley v. Atchison, Topeka & Santa Fé Ry.*, *supra*, a mining company had contracted to mine and deliver coal sufficient to meet the current needs of the railroad company, but through financial embarrassment was unable to do so; and in order to assist the mining company to keep its agreement, the railroad company furnished the mining company with money in advance of the agreed time of payment, and it was held that this implied (213 U. S. 134, 29 Sup. Ct. 466, 53 L. Ed. 729)—

"a purpose that the coal as mined should be delivered, and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement."

This was not because of the intervention of bankruptcy or of the trustee's continued performance of the parol agreement previously made between the mining company and the railroad company, as counsel for the Clairfield Company urge. It was in consequence and in recognition of the previous parol agreement. Justice Brewer there distinctly approved language of the Court of Appeals, which is pertinent here:

"The money paid in advance entitled the railway company to an amount of coal which the money so advanced would pay for according to the terms of the original contract. We think the inevitable meaning of the new arrangement, interpreted in the light of the conditions surrounding the parties and as necessarily intended by them, was to pledge (set apart) a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge, but the method of producing it was devised for the purpose of acquiring the needed money by the coal company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it, and to treat it as creating an equitable charge or lien, however inartificially it may have been expressed."

See *Walker v. Brown*, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865; *Ingersoll v. Coram*, 211 U. S. 336, 368, 29 Sup. Ct. 92, 53 L. Ed. 208; *Fourth Street Bank v. Yardley*, 165 U. S. 634, 644, 17 Sup. Ct. 439, 41 L. Ed. 855; *Ketchum v. St. Louis*, 101 U. S. 306, 316, 25 L. Ed. 999; *Barnard v. Norwich & Worcester Railroad Co.*, 4 Cliff. 351, 365, Fed. Cas. No. 1,007 (per Justice Clifford). See, also, *Howard v. Delgado & Co.*, 121 Fed. 26, 57 C. C. A. 270 (C. C. A. 5th Cir.), and citations.

We do not see that these decisions are met by those relied on by appellee's counsel. It is enough to say that we do not regard his citations as relevant.

Nor do we think the proceeding in the Claiborne chancery court operated to vest in the general creditors of the Clairfield Company any better right than that company itself had against the Gage Company;

for, while the petition in bankruptcy is not included in the record, Judge Cochran said in his opinion below (194 Fed. 182):

"On the same day that the petition in bankruptcy was filed, insolvency proceedings against the bankrupt were begun in the proper state court of Tennessee, and one J. H. Bartlett was appointed receiver therein. September 9th he took possession of the assets of the bankrupt, including all its lumber stacked in its yard at Clairfield. * * * Upon the appointment of McEldowney as trustee in bankruptcy, the receiver surrendered possession of the lumber taken possession of by him, including that claimed by the Gage Company in its action of replevin, and the other assets of the bankrupt to him, and by consent the assertion of its claim thereto was transferred to this court."

[3] As regards the time of the commencement of the proceeding in the state court and of the bankruptcy proceeding, counsel for the Clairfield Company agrees with Judge Cochran, although counsel for the Gage Company says that the bankruptcy proceeding was begun two days later. We think we should accept the statement of the court. It is settled (*Acme Harvester Co. v. Beekman Lum. Co.*, 222 U. S. 300, 307, 32 Sup. Ct. 96, 99 [56 L. Ed. 208]) that:

"The filing of the petition [in bankruptcy] is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition."

Moreover, the transfer of the controversy between the two lumber companies to the bankruptcy court seems to have been for the purpose of testing the rights of those companies as they stood before either of the proceedings mentioned were commenced. These facts distinguish the present case from that of *Cincinnati Equipment Co. v. Degnan*, 184 Fed. 834, 107 C. C. A. 158 (C. C. A. 6th Cir.).

[4] It scarcely need be said any more that a trustee in bankruptcy, before the amendment of 1910, stood no better than the bankrupt. The same rule prevails in Tennessee as respects the rights of an assignee for the benefit of creditors (*Stainback v. Junk Bros.*, 98 Tenn. 307, 319, 39 S. W. 530); also of a receiver as to prior equities (*Johnson v. Tucker*, 2 Tenn. Ch. 398, 401). It follows that the rule of *York Manufacturing Co. v. Cassell*, supra, which originated in Ohio, is applicable here; so of *In re Huxoll*, 193 Fed. 851, 856, 113 C. C. A. 637 (C. C. A. 6th Cir.), which arose in Michigan; so, also, of *Toof v. City Nat. Bank of Paducah*, 206 Fed. 250, coming here from Kentucky, decided June 3, 1913. And as Justice Brewer said in *Hurley v. Atchison, Topeka & Santa Fé Ry.*, supra, 213 U. S. 134, 29 Sup. Ct. 469, 53 L. Ed. 729:

"The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature remained undisturbed thereby. If there had been no bankruptcy proceedings, the coal as mined was, according to the understanding of the parties, to be delivered as already paid for by the advancement."

[5] As to the claim and the holding below that the seven car loads represented by the second sum of money in dispute amounted to a preference within the meaning of section 60 of the Bankruptcy Act of July

1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), it is to be said that, although this portion of the lumber was shipped as late as September 9, 1907, the rights of the Gage Company had their origin in the contract of September 6, 1906, and, so far as we can discover, became effective as early as those respecting the other lumber; and it is to be borne in mind that no issue of bad faith is involved. The theory of the decisions, before cited, is that the trustee receives the property of the bankrupt subject to the liens equitably chargeable against it, and, as respects their enforcement, stands in the shoes of the bankrupt. Furthermore, besides its general application to the instant case, the decision in *Sexton v. Kessler*, *supra*, we think, rules this case so far as the alleged preference is concerned. See, also, *Belding-Hall Manufacturing Co. v. Mercer & Ferndon Lumber Co.*, 175 Fed. 335, 339, 99 C. C. A. 123 (C. C. A. 6th Cir.); *Union Trust Co. v. Bulkeley*, 150 Fed. 510, 516, 517, 80 C. C. A. 328 (C. C. A. 6th Cir.); 1 *Love-land on Bankruptcy* (4th Ed.) § 478.

The decision below must be reversed, with costs, and the case remanded for further proceedings in accordance with this opinion.

WOLFE v. INTERNATIONAL FIRE INS. CO. OF FT. WORTH, TEX.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1913.)

No. 1,148.

1. INSURANCE (§ 85*)—CONTRACT WITH GENERAL AGENT—CONSTRUCTION.

Where a contract by which plaintiff was employed by defendant, a fire insurance company, as its general agent in two states, to receive for his services a stated per cent. of the premiums on all policies written in such states, was silent as to classes of risks to be insured, the right was reserved to defendant to determine such classes from time to time as in the judgment of its officers and directors seemed for its best interests, and a direction to defendant to accept for the time only certain classes of risks was not a breach of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 115; Dec. Dig. § 85.*]

2. INSURANCE (§ 79*)—CONTRACT WITH AGENT—RESCISSION—CONSTRUCTION OF CORRESPONDENCE.

Where the attorneys for plaintiff, who was a general agent for defendant insurance company, because of certain action of defendant which they deemed a breach of plaintiff's contract of agency, with his assent or ratification wrote defendant that he rescinded such contract, to which defendant assented by letter sent to both plaintiff and his attorneys, the effect was a rescission of the contract by mutual consent, and plaintiff could not thereafter maintain an action for its breach.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 104; Dec. Dig. § 79.*]

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action at law by Francis E. S. Wolfe, to the use of T. Rowland Slingluff, assignee, against the International Fire Insurance Company of Ft. Worth, Tex. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action at law originally instituted in the superior court of Baltimore City on the 11th day of October, 1911. There was a motion to quash the writ of summons in that court. This motion was overruled with leave to plead. The case was then removed to the District Court for the District of Maryland.

The statement of facts by the learned judge who heard the case below is as follows:

"The plaintiff sues the defendant for an alleged breach of contract by which the plaintiff became general agent for the defendant. The plaintiff will be called the 'agent,' the defendant the 'company.'

"The declaration sets forth the agreement in full. By it the agent became general agent of the company, for the states of Maryland and Pennsylvania. In that territory he was to appoint all agents or subagents. His compensation was to be 32½ per cent. on all premiums, less return premiums and re-insurances, collected for all business written within the territory for account of the company. Many of the expenses of the agency were to be paid by the agent, others by the company. The agent was to give bond for \$20,000.

"The contract provided: 'It is understood and agreed that this contract shall continue in force after approval of said bond for ten years from the date hereof. * * * It is further agreed that said company reserves the right to cancel this contract if at any time after the first year, or any year thereafter, the losses and expenses exceed the receipts for two consecutive years.'

"The agent agreed to make certain daily and monthly reports and to remit at the times and in the manner prescribed in the agreement. This agreement was dated May 31, 1910. The agent gave the bond and entered on the discharge of his duties under the agreement.

"The declaration alleges that on the 4th of August, 1911, the company wrote him that the board of directors, after thoroughly analyzing his account and business sent to the company, found that the same had produced a very heavy fire loss and for that reason the board had determined to ask him not to send any new business or renewals from the date of the receipt of the letter, excepting risks of the preferred class. He was directed to decline all special hazards and outside unprotected risks. The letter said: 'You are familiar with the excess losses which your territory has produced, and as a matter for our own protection we are forced to demand a more limited classification. You are also aware that the company cannot be reasonably expected to maintain an agency plant at a state that is producing such excessive losses. We desire as far as within our power to minimize the losses and ask your hearty co-operation and trust you will agree with us and work to attain the end desired.'

"The declaration says that the company thereafter declined to accept policies of insurance, whether the class known as new business or renewal, written by the agent and forwarded to the company, and from the time of such letter the company wrongfully refused to permit the agent to perform said contract. It alleges the readiness and willingness of the agent to have performed it. It says that the action of the company in refusing to accept from the agent the insurance policies, other than risks of the preferred class, amounted to a breach of the contract to the damage of the agent.

"The company for a first plea said that the contract was by mutual agreement rescinded, and set forth in the plea certain correspondence which had passed between the agent and the company. From this correspondence it appears that the agent, through his attorneys, on the 10th of August, declined to admit the right of the company to limit in the manner attempted the business he might do. He notified the company that until further informed he should continue to write business as theretofore. On the 23d day of August he again wrote through his attorneys. These gentlemen said that they had advised the agent that the demand to restrict his future business to the preferred class and the company's subsequent refusal to retain insurance written by the agent for risks other than the preferred class was practically a nullification of his contract of agency and entitled him to rescind the contract and to demand the return of the consideration therefor as well as compensation for the losses he has sustained. They add: 'By reason of this breach of contract by our company in manner indicated, Mr. Wolfe has concluded to

rescind the same and we hereby notify you of his rescission thereof and demand on his behalf a return of the consideration therefor as well as full compensation for his expenditures and losses.'

"They further say that they had instructed the agent that owing to the breach of contract by the company he was not to make his monthly remittances as agent until the matter was adjusted. They added that in order to minimize the company's loss as much as possible he would, until further notice, without waiving any of his rights, continue to forward such business as may be forthcoming until the company could make such other arrangements as it saw fit to care for the same.

"On the 26th of August the company replied through its attorneys. In that letter they said, 'We accept your notice of such rescission.' The agent was notified not to write any further business. They said that if the agent did not make his monthly remittances as agent in accordance with the terms of the contract now rescinded by him suit would be brought upon his bond. In another letter addressed to the agent and written on the same day as the last, viz., August 26, 1911, he was told that the company accepted notice of his rescission of the contract 'which, in accordance with your election, we now treat as terminated.'

"The company's second plea alleged full performance by it and breach by the agent. On the second plea the agent joined issue, and to the first plea he replied that from the correspondence contained in the company's first plea and from the additional letters reproduced in the agent's replication it did not appear that there was any joint concurrence by the parties to the said contract under which the same was by mutual agreement rescinded. These additional letters consist of a letter from the agent's attorneys to the company under date of September 8, 1911, in which they demanded \$25,000 damages and loss sustained by the agent by reason of breach by the company of its contract with him. \$5,000 of this is the amount required of the agent for the purchase of stock in the company in order to obtain the general agency. \$20,000 was the estimated loss of profits on business written and to be written during the life of the contract if it had not been broken. In reply to this letter the company's attorneys under date of September 11, 1911, explained that 'the losses of the company had become so great and were increasing so rapidly that the officers of the company called together the directors from the different parts of the state * * * to consider what could be done to reduce these losses and protect the interests of the company, both of the policyholders and the stockholders.'

"The directors 'decided that the interest of the company imperatively demanded that steps be taken at once to curtail the losses, and with this end in view, and this only, they decided that in those states where the business had been unprofitable and where the losses had been so great, they would, at least for the time being, instruct their agents to eliminate the unprofitable business and take only such risks as the company might safely carry.' They stated that the agent 'seemed to take the view that this was an assault upon his contract, and through you, as we understand the communication, he threw up the contract, and the company, through us, accepted the resignation and has since then been proceeding on the basis of his being no longer a general agent of this company.'

"In reply under date of September 19, 1911, the attorneys for the agent write, among other things, that the business 'he handed in to your company was such business as was done by all insurance companies in the ordinary course of insurance business, and that when you cut him down and limited him to the character of insurance which you required him to take, his business was practically gone and that he would not realize enough from it to pay his office rent, much less the many other expenses of the same. From this viewpoint we have advised Mr. Wolfe that the action on the part of your company was a rescission of the contract and he accepted the same as a rescission and a violation of the terms of the contract which would entitle him to substantial damages for such violation.' 'If we are correct in this view, Mr. Wolfe will be entitled to repayment of the \$5,000 consideration and also to such damages as he may have sustained measured by the profits which he might have made during the continuance of the agreement.'

"On September 27th the attorneys for the company answered. They said, among other things: 'If we understand your position, it is that Mr. Wolfe is entitled to a repayment of the consideration which he paid for stock in the "company"; but you do not say whether he still owns the stock, nor do you offer to return it to the company. We would like, therefore, to know definitely whether Mr. Wolfe still owns this stock, or whether he has disposed of it, and what he considers the stock worth. We do not understand that, in any event, he would be entitled to receive back the consideration, even if he should return, or offer to return, the stock. It was a reasonable requirement on the part of the company, in appointing its general agents, that they should have a substantial interest in the company by owning stock, and Mr. Wolfe certainly could not claim that he could throw up his agency because of a real or fancied grievance, and then cancel his stockholding and recover back the money he had paid for it.'

"On October 7th the agent's attorneys answered that they had taken it for granted that the proposition made by them that the \$5,000 should be returned to the agent included a return by him of the stock. This letter stated that the suit would be brought in a few days.

"The company demurred to this replication. It says that at the time suit was brought the contract had been rescinded by mutual consent. The agreement had so far ceased to exist that no action could be maintained upon it. The agent denies that what passed between the parties amounted to a rescission. He does not question that he in so many words told the company that he had elected to rescind the contract and the company expressly said that it accepted such rescission. He does claim, however, that all that in fact happened was that he offered to rescind upon terms that the company could not accept the offer otherwise than upon such terms, and that it never did assent to the latter. If so the rescission never became effective. The contract still remained in force. The correspondence does not suggest that the agent thought that in telling the company that he had elected to rescind he supposed he was making it an offer. Quite clearly he conceived himself to be exercising a legal right which under the circumstances as he saw them was absolute. Having so elected, he made demand upon the company for those things to which in consequence of his choice he felt he had become entitled. The company in effect replied: 'We assent to your rescission of the contract. We do not think that your view of what follows from such action is in all respects correct.' If he had chosen, the agent might thereupon have safely acted upon the assumption that the contract was at an end. The company would not have been heard to say, 'We did not assent to your rescission of the contract because we expressed our nonconcurrence in your understanding of the legal consequences which it entailed.'"

The court below sustained the defendant's first plea and also the demurrer to the declaration upon which final judgment was entered in favor of the defendant, and the case comes here on writ of error.

T. Rowland Slingluff, of Baltimore, Md. (Slingluff & Slingluff, of Baltimore, Md., on the brief), for plaintiff in error.

Albert C. Ritchie, of Baltimore, Md. (Ritchie & Janney, of Baltimore, Md., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). [1] In order that we may discuss the questions involved herein in their logical order, we will first inquire as to whether there was a breach by the plaintiff of any covenant in the agreement made in 1910; that being the contract upon which this proceeding is based.

The plaintiff in error will be referred to as "plaintiff," and defendant in error will be referred to as "defendant"; such being the relative positions the parties occupied in the court below.

The covenants on behalf of the defendant company may be epitomized as follows: First, that the agent shall receive a commission of 32½ per cent. for all premiums, less return premiums and reinsurances, collected for all business written in said territory; second, that the company will furnish blank policies and daily reports and pay all losses and charges for taxes, legal service, adjustments, etc.; third, that the contract shall continue in force for ten years with the privilege of canceling after two years if it should prove unprofitable.

After a careful consideration of the provisions of the contract, we are of the opinion that it does not contain an undertaking by the company to accept, and no authority to the agent to write, any particular class of risks. There is no reference in the agreement to this subject, and therefore we must assume that it was the purpose of the defendant company to reserve the right unto itself to determine from time to time as to the class of risks that the agent was to write, and it is but natural that the contract should have been written as it was, when we consider the nature of the business in which the defendant company was engaged, and the obligation that it owed to its stockholders and others interested in its financial welfare.

As we have stated, there is no covenant to the effect that plaintiff was to be permitted to write insurance of any particular class; in other words, the contract is silent as respects this point, thereby indicating a purpose on the part of the parties thereto to leave that question in the discretion of the defendant company.

Owing to the character of business in which the defendant company is engaged, it necessarily follows that its success depends in a large measure upon its ability from time to time to increase or diminish the number and character of policies it may issue, so as to properly meet existing conditions. Therefore, in the absence of an express agreement on the part of the company to the contrary, it would be unreasonable to hold that it was the intention of the defendant company in this instance to issue policies of every class whatsoever and not reserve unto itself the right to restrict those to be issued to a particular class in the event it should in the future appear that the issuance of policies of a certain class would result disastrously, and thereby impair the financial ability of the company.

We are therefore of the opinion that the ruling of the court below as respects this phase of the question was eminently proper.

[2] However, it is also insisted by counsel for defendant that the contract in this case has been rescinded, and that therefore in no event would an action lie for an alleged breach thereof, and, even if the contract was broken by the defendant, still the plaintiff would not have a cause of action for the breach thereof, because the plaintiff in the first instance elected not to sue for the breach, but to rescind the contract.

The court below in referring to this phase of the question said:

"At the time the correspondence began the agent thought that the company had broken its contract. If that were so, he had a right, if he would, to treat the contract as still alive and to sue for the damages he had suffered by its breach. He was not required to do so. He might, if he preferred, rescind it. If he did the latter, he could demand back the consideration he had

paid, repayment of money laid out by him and compensation upon a quantum meruit for the services he had rendered. If he elected to treat the contract in force, by suing for damages for its breach, he could not ask for the return of the consideration he had paid. The measure of damages for the breach of a contract is the amount which would put the injured party in the same position as he would have been had the contract been performed. He who recovers such damages is in theory of law placed in the same situation he would have been had no breach occurred. To give him back in addition the consideration he had paid to induce the other party to enter into the contract would be to give him all the benefits of the contract while relieving him from all its burdens."

The court below held that the plaintiff had offered to rescind the contract, and that the defendant acquiesced therein. It appears that on the 4th day of August, 1911, the defendant company after carefully considering the situation, "on account of the heavy fire loss," instructed plaintiff "not to send us any new business or renewals from the date of the receipt of this letter, except risks of the preferred class, declining for us all special hazards and outside unprotected risks." Thus the plaintiff was fully informed as to the course that the defendant company had decided to pursue, and the reason therefor, and after making further inquiry by letter dated August 10, 1911, demanded the exact cause which prompted the finance committee of the defendant company to make the recommendation it did, and on August 23, 1911, plaintiff's attorneys wrote another letter, in which it was asserted that the defendant company did not have the right to fix any limitation as to the character of risks to be written, and, among other things, said:

"We have, therefore, advised him that the demand from your company to restrict his future business to the preferred class, as stated in your letter of August 4th, and its subsequent refusal to retain insurance written by him for risks other than the preferred class, as enumerated in your letter to him of August 18, 1911, is practically a nullification of his contract of agent, amounting to a breach thereof, and entitles him to rescind the contract and demand the return of the consideration therefor as well as compensation for the losses he has sustained.

"By reason of this breach of contract by your company in manner indicated, Mr. Wolfe has concluded to rescind same, and we hereby notify you of his rescission thereof and demand, on his behalf, a return of the consideration therefor as well as full compensation for his expenditures and losses."

After the receipt of this letter, to wit, on the 26th day of August, 1911, the defendant company addressed a letter to the plaintiff, in which, among other things, the following language was used:

"Assuming that you, as attorneys and agents for Mr. F. E. S. Wolfe, of your city, have the right to give notice to the International Fire Insurance Company, of Mr. Wolfe's rescission of his contract with that company, we accept your notice of such rescission."

A similar letter was addressed to the plaintiff, and the language employed therein is such as to leave no doubt as to its true meaning. In the first place, the attorneys for the plaintiff clearly and concisely stated the reasons why they thought the contract should be rescinded, and then notified the defendant company that the same had been rescinded, and, in reply thereto, counsel for defendant advised the attorneys for the plaintiff that the notice of rescission had been ac-

cepted, and a copy of this letter was also sent to the plaintiff. Here the correspondence as respects this matter ends.

If the plaintiff, when notified as to the action of his attorneys, had felt that they had exceeded their authority in rescinding the contract, he could have notified the defendant company that his attorneys had exceeded the scope of their authority in proposing to rescind the contract, but, instead of so doing, the plaintiff remained silent, and thereby assented to what had been done in the premises.

An inspection of the letters and other documentary evidence in this case forces us to the conclusion that the refusal of the defendant company to permit plaintiff to write only the preferred class of policies was considered by plaintiff as a breach of his contract, and that he then and there deliberately elected to rescind the contract and to demand the return of the consideration which he had paid in the first instance.

It was for the court below, and not the jury, to decide as to whether upon the established facts there had been a rescission of the contract.

In the case of *Sea Insurance Co. v. Johnston*, 105 Fed. 286, 44 C. C. A. 477, the correspondence between the agent and the company was very much like that of the case at bar, and there the court held that the court below acted properly in deciding that the correspondence between the parties constituted a rescission of the agreement. In that case the court, among other things, said:

"On the question under discussion—the question of rescission—there is no conflict in the legal evidence. It depends upon the correspondence, with nothing needed to supplement it, unless, perhaps, the conceded fact of the acceptance and collection and failure to return the check inclosed in the letter of February 21st. The Circuit Court should have granted the request of the Sea Insurance Company, and directed the jury to find a verdict for the defendant."

When we consider the correspondence between the parties in this instance, we are clearly of the opinion that the same constitutes a rescission of the agreement, and, such being the case, it follows that an action of this character cannot be based thereon.

For the reasons stated, the judgment of the lower court is affirmed.
Affirmed.

GRAHAM, County Judge, v. QUINLAN.

SAME v. MURPHY et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913.)

Nos. 2,488, 2,489.

1. MANDAMUS (§ 3*)—EXISTENCE OF OTHER REMEDY—ENFORCEMENT OF RAILROAD AID BONDS.

Where railroad aid bonds were issued by a county April 1, 1871, nine years before the remedy to enforce payment prescribed by Acts Ky. 1869, c. 1578, was made exclusive, a holder of such bonds was not limited to such remedy, but might enforce payment by mandamus against the county's taxing officers.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 8, 10, 11, 16-34; Dec. Dig. § 3.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COUNTIES (§ 188*)—RAILROAD AID BONDS—ENFORCEMENT—REMEDY.

Where railroad aid bonds were issued prior to the adoption of Acts Ky. 1869, c. 1578, making the remedy prescribed thereby for the enforcement of such bonds exclusive, and the bonds so issued contained no reference to the act, or to the remedy given under it, the county could not successfully claim that the bonds were parted with, or that they had been purchased, on the faith of any contractual remedy.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 296-299; Dec. Dig. § 188.*]

3. COUNTIES (§ 190*)—COUNTY BONDS—PAYMENT—TAX LEVY—STATUTES—STATE STATUTES—CONSTRUCTION.

Though Acts Ky. 1869, c. 1578, § 15, vests power to levy taxes to pay railroad aid bonds in the "county court," and later vests the same power in the presiding judge alone, "if preferred," both powers survive, if either survive; there being nothing in the act to indicate that the exercise of the power of the county judge to issue the bonds was intended to supplant that of the county court to levy taxes to pay them.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. § 190.*]

4. EVIDENCE (§ 83*)—PRESUMPTIONS—OFFICIAL ACTS.

Where the county judge convened the fiscal court and presided over it at the time levies were made to pay railroad aid bonds, he was entitled to vote on the question; and, mandamus having been granted to compel the making of the levies, it would be presumed that he concurred therein, though the record did not specifically show that he voted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

5. COUNTIES (§ 192*)—LEVY OF TAXES.

Where a county judge and certain magistrates composed a county court, with jurisdiction to levy taxes, and the court made a levy to pay railroad aid bonds of the county, the levy was valid, though the county judge withheld his assent therefrom.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300-302; Dec. Dig. § 192.*]

6. MANDAMUS (§ 176*)—SCOPE OF RELIEF—TAX LEVIES—RAILROAD AID BONDS—PAYMENT—INSTALLMENTS.

Where a tax levy required to pay judgments on railroad aid bonds issued by a county would amount to about 16 per cent. of the value of the taxable property therein, orders in mandamus to require payment of the bonds should provide for installment levies, not exceeding one-tenth of the amount required to pay the judgments in any one year.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 392-394; Dec. Dig. § 176.*]

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Mandamus by Mary Amis Quinlan, executrix, etc., and by Sherley D. Murphy and others, against Elliott Graham, County Judge of Green County, Ky. Decree for complainants, and defendant brings error. Modified and affirmed.

Ernest Macpherson, of Louisville, Ky., for plaintiff in error.

George Du Relle, J. B. Baskin, Alex P. Humphrey, James S. Pirtle, and Edmund F. Trabue, all of Louisville, Ky., for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARRINGTON, Circuit Judge. These were mandamus suits brought in the court below to enforce payment of two of its judgments. Peremptory writs were granted, and the defendants prosecute error.

The cases present similar facts, were heard together here, and will be disposed of in this opinion. The judgment in the Quinlan Case was for \$89,195.63, with interest, and \$289.12 accrued costs, and that in the Murphy Case was for \$108,718.20, with interest, and \$789 accrued costs. These judgments were based upon bonds and past-due coupons of Green county, Ky., issued under an act of 1869 entitled "An act to incorporate the Cumberland & Ohio Railroad Company." 1 Acts 1869, p. 463. The bonds were held valid, and the judgments below were respectively affirmed, in *Green County v. Quinlan*, 211 U. S. 582, 29 Sup. Ct. 162, 53 L. Ed. 335, and *Green County v. Thomas, Ex'r*, 211 U. S. 598, 29 Sup. Ct. 168, 53 L. Ed. 343. See, also, *Quinlan v. Green County*, 205 U. S. 410, 27 Sup. Ct. 505, 51 L. Ed. 860, where one of two questions certified by this court to the Supreme Court concerning the bonds was answered. The Quinlan Case, as decided by this court, is reported in 157 Fed. 33, 84 C. C. A. 537, 19 L. R. A. (N. S.) 849, and the Thomas Case, as decided here, appears in 159 Fed. 339, 89 C. C. A. 405. The judgment recovered in the latter case is the one involved in the present Murphy Case. Nothing could be added to accentuate the obligation of the county to pay these judgments.

It could serve no useful purpose to recite even the substance of the various proceedings which resulted in the levies of the taxes and the orders made for their collection under the writs issued by the court below. Those proceedings were, we think, well within the liberal provisions made for amendments by both the Kentucky and federal statutes. Carroll's Ky. Codes (5th Ed.) §§ 134, 135; section 954, Rev. St. (U. S. Comp. St. 1901, p. 696); *Mitchell v. Toledo, St. L. & W. R. Co.*, 197 Fed. 528, 534, 117 C. C. A. 24 (C. C. A. 6th Cir.). It needs only to be said that on June 13, 1910, a writ of mandamus was ordered to be issued in each case against the defendants therein named, who composed the fiscal court of the county, requiring them to assemble as such court within a specified time and to levy a tax upon all the taxable property of the county at a rate sufficient to pay each judgment, interest, and costs, and the costs of collecting the taxes, and to certify the levy of the tax for collection "to such officer as is or may be authorized by law and the orders of said fiscal court to collect the taxes imposed by law for regular county purposes upon the property subject to taxation in said Green county." The fiscal court assembled and levied the necessary taxes; and, there being no sheriff, the court certified the levy to certain collectors, successively, who for one reason or another failed to collect. November 6, 1912, a further writ was ordered to be issued in each case against Elliott Graham, county judge of Green county, one of the defendants below, commanding him:

"Whenever a sheriff or collector of county taxes, or other officer authorized by law to collect the taxes imposed for regular county purposes upon the property subject to taxation in said Green county, shall be elected or appointed, and shall qualify as such officer, to embrace in the order of appoint-

ment or qualification a direction to the officer elected or appointed and qualified to collect both the tax heretofore levied to pay plaintiff's said judgment and the tax levied or to be levied for regular county purposes, and to require of such sheriff, collector, or other officer the execution of one bond to secure the collection of each and all of said taxes."

This enlargement of the order for collection over that of the first order, before quoted, seems from the record to have become necessary to the execution of the original purpose to require both the ordinary county levy and these judgment levies to be collected by the same officer under a single order of appointment and bond.

The cases thus presented are ruled by the decision of this court in *Tucker v. Hubbert*, 196 Fed. 849, 117 C. C. A. 365. We shall as far as necessary state the reasons for this conclusion, with the objections urged against the application of the decision:

(1) The judgment as affirmed in that case was based on bonds issued under a special act, entitled "An act for the benefit of Taylor county, empowering it to compromise its debts, issue bonds, and levy and collect taxes to pay the same" (1 Acts 1877-78, p. 554); but those bonds were issued and in part used by way of compromise to take up bonds previously issued under the special act that is involved here—that is, "An act to incorporate the Cumberland & Ohio Railroad Company," section 12 of that act having authorized the construction of a railroad through several counties, including Taylor and Green (1 Acts 1869, pp. 463, 468).

(2) These acts of 1869 and 1878 differ as respects the levy and collection of taxes to pay the bonded indebtedness they respectively authorized. Under the former, the levy in terms is to be made by the county court (composed of the county judge and the county justices of the peace), or, "if preferred," by the county judge alone; while under the latter act such levy and collection were authorized through action of the circuit court. However, for reasons stated later, it is not perceived that the two remedies sanctioned in *Tucker v. Hubbert* (the one given by the act of 1878, and the other through the fiscal court) differ in principle from the two remedies open here.

[1, 2] (3) True, by Act Feb. 27, 1880 (1 Acts 1879-80, p. 248), the remedy given for the collection of the bonds and coupons authorized by the act of 1869, was in terms made "exclusive of all other remedies"; but it is averred in each of the petitions in the instant cases, and nowhere denied in the records, that the bonds merged in the present judgments were issued on the 1st day of April, 1871, some nine years before the remedy given by the act of 1869 was so made "exclusive." Attention was called in the argument, for a purpose to which we shall allude later, to the findings of fact reported in the *Quinlan Case*, 211 U. S. at pages 584-591, 29 Sup. Ct. 162, 53 L. Ed. 335. It there appears (211 U. S. 588, 29 Sup. Ct. 165, 53 L. Ed. 335) that the bonds were issued August 15, 1872; still, if this were accepted, the bonds were issued as much as seven years before such remedy was made "exclusive." If those findings are to be referred to at all, the more important fact to be observed is that the bonds contained no reference to the act or to the remedy given under it (211 U. S. 589, 29 Sup. Ct. 162, 53 L. Ed. 335); and consequently they cannot rightfully

be said to have been either parted with or purchased upon the faith of any contractual remedy whatever (*Hubbert v. Campbellsville Lumber Co.*, 191 U. S. at pages 75, 76, 24 Sup. Ct. 28, 48 L. Ed. 101).

[3] (4) The purpose of counsel in so referring to the special findings in the *Quinlan Case*, as stated, was to show that the county judge alone issued the bonds, and so to insist in substance that the county had "preferred" to exercise the powers of the act in that way, rather than through the county court, which would have included both the judge and the justices of the peace. This was made the basis of a claim that the levies in question are invalid, because they were not made by the county judge, but by the fiscal court. One answer to this is found in what has already been said touching the absence of contractual remedy. Another is that the act of 1869 (section 15) first vests the power to levy the taxes in the "county court"; and, while it is true that it later vests such power, "if preferred," in the presiding judge alone, it is plain that both powers survive, if either survive. There is nothing in the act to indicate that the exercise of the one in issuing the bonds was intended to supplant the other in their payment.

[4] It follows that the objection urged against the validity of the levies upon the theory that the county judge did not concur in them, is not tenable. He convened the fiscal court and presided over it. He had "the same right to vote on questions coming before that body that may be exercised by the magistrates sitting as members thereof." *Hollis v. Weissenger*, County Judge, 143 Ky. 72, 135 S. W. 410. We think the records fairly show that he acquiesced in the levies, although they do not show that he voted for them; but, since the peremptory writs were each aimed against him as distinctly as they were against the justices of the peace, it cannot be presumed that the presiding judge disobeyed the writs or refused to concur in the levies.

[5] Besides, the fiscal court had jurisdiction to make these levies, and, even if the presiding judge in truth withheld his assent, the action admittedly taken by that court operated to impose a valid levy in each instance. For reasons stated in *Tucker v. Hubbert*, we think this conclusion is not opposed to that reached upon the issue actually presented for decision in *Guthrie v. Sparks*, 131 Fed. 443, 65 C. C. A. 427; but in so far as the reasoning in that case may not be in harmony with our present conclusion, in view of the later decision in *Bonta v. Fiscal Court of Mercer County*, 144 Ky. 241, 137 S. W. 1084, the *Guthrie Case* should not be followed.

(5) We are not convinced that the case of *Commonwealth v. Wade's Adm'r*, 126 Ky. 791, 104 S. W. 965, which held that only one collector could be appointed, etc., was intended to be modified by the decision in *Commonwealth v. Moody*, 150 Ky. 571, 150 S. W. 680. The amendment of section 4131 passed upon in the *Moody Case* does not purport to change the portion of that section which provides for the appointment of collectors. The change simply provides that:

"Such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the county court appointing him."

This could hardly have been intended, although so remarked in the opinion in the *Moody Case*, to change the statute as it was construed in

the Wade Case; for the change was made March 15, 1906 (Acts 1906, pp. 153, 248), and the Wade Case was decided October 23, 1907. Moreover, the order made by the Taylor county court and involved in the Moody case was that Moody was appointed only to collect particular taxes, that is, such as were levied by the fiscal court on the 24th day of January, 1911; but this did not involve the question of what taxes, nor does the amendment of section 4131 prescribe what taxes, may be included in the order of the court appointing him.

(6) As regards *Bonta v. Fiscal Court of Mercer County*, *supra*, it is not important under what statute the old railroad tax there sanctioned was originally authorized. It is enough that the transaction, which was the occasion of that tax, was admittedly had in virtue of a statute passed prior to the new Constitution and prior to the establishment of the fiscal court.

[6] (7) However, we feel that the rule laid down in *City of Cleveland, Tenn., v. United States*, 166 Fed. 678, 683, 684, 93 C. C. A. 274 (C. C. A. 6th Cir.), should be applied here. The tax required to pay the present judgments is about 16 per cent. of the taxable value of the entire property of Green county. The orders entered in the cases November 6, 1912, should be so modified as to require the collection of the tax in each case in installments, to be fixed by the court below, until each of the entire sums due and to accrue is paid, but not so as to require more than one-tenth of the total taxes levied to pay the judgments to be collected in any one year; and the bond required of each collecting officer should cover the portions of the taxes maturing and collectible during his term.

Subject to such modifications, the judgments below are affirmed, with costs.

GROUT v. RUSKIN.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913.)

No. 2,332.

LANDLORD AND TENANT (§ 167*)—FIRE ESCAPES—DUTY TO FURNISH—GUEST OF SUBTENANT—DEATH—LANDLORD'S LIABILITY—STATE STATUTES—CONSTRUCTION—SHOPS AND FACTORIES.

Rev. St. Ohio 1880, § 2573, makes it the duty of every owner of a tenement house more than two stories high to provide a convenient exit from the different upper stories, which shall be easily accessible in case of fire. By Act April 4, 1884 (81 Ohio Laws, p. 106), and Act April 18, 1893 (90 Ohio Laws, p. 190), other sections were added, providing that the term "shops and factories," as used in sections 2573b and 2573c, providing for factory inspection, etc., shall include tenement and apartment houses, and if it is found on inspection, under section 2573c, that the means of egress in case of fire are not sufficient, or any other improvement is necessary for the safety of employes or persons occupying such shops and factories, such changes or additions being of a permanent and fixed character, the owner of the building shall be required by the state inspector on notice and under penalties to provide them and construct necessary fire escapes. Section 2573b confers on the inspector the right of entry in the shops and factories at any reasonable time, and proof of the failure

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
207 F.—18

of the proprietor to make the alteration ordered by the inspector shall be deemed prima facie evidence of negligence, and shall render such proprietor liable for any injury sustained by reason of such failure to make alterations. Section 2573c declares that the inspectors, if they find the means of egress in case of fire insufficient, shall notify the owners to make the alterations and additions necessary without delay, and, if they do not, they shall be guilty of a misdemeanor. *Held*, that such amendment was only applicable to a tenement house more than two stories high, within section 2573, in case of the owner's failure to comply with an order of the inspector, and section 2573 having been held by the state court not to apply to an owner of a tenement house who was not in possession and control thereof, defendant having rented the upper floors of a building more than two stories high to a lessee without restriction, and the latter having contracted to make alterations, defendant, not having been notified by the factory inspector to construct fire escapes, was not liable for the death of a guest of a subtenant, who died as the result of injuries sustained by the burning of the building, because defendant had failed to construct proper fire escapes.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.*]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action by Carrie Grout, administratrix of the estate of William Grout, deceased, against Moses Ruskin. Judgment for defendant, and plaintiff brings error. Affirmed.

Littleford, James & Ballard and Frost & Foster, all of Cincinnati, Ohio, and Hubbard Schwartz, of Newport, Ky., for plaintiff in error.

J. L. Kohl and Scott Bonham, both of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was an action for the death of plaintiff's intestate, alleged to have been caused by the failure of the owner of a building to provide suitable fire escapes. The building, which is four stories in height and located on Third street, Cincinnati, was partially burned. At the time of the fire the first floor was vacant and in possession of the owner, Ruskin; but the upper three floors were under lease to one Wilson, and were with the knowledge of the lessor occupied as a tenement house. The deceased, an invited guest of one of the subtenants, was so badly burned that he died December 14, 1909. A demurrer to the second defense of the answer was sustained below, and final judgment entered for defendant. It was in substance averred in that defense that Ruskin, by written lease, had demised the upper three stories to Wilson for three years, commencing July 1, 1908, and ending July 1, 1911; that Wilson was at his own expense to make the necessary inside repairs; that the lease contained no covenant prohibiting Wilson from assigning the lease or underletting the premises, or requiring him to use them for any particular purpose; that at the date of the fire Wilson was in possession and control of the floors so leased.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The question is whether under the laws of Ohio a duty was imposed upon the lessor to provide, as respects dangers from fire, reasonably safe means of egress for tenants of his lessee or their guests. The Supreme Court of Ohio long ago decided that no such duty existed. *Lee v. Smith*, 42 Ohio St. 458, 51 Am. Rep. 839, held:

"Section 2573 * * * does not impose upon any owner in fee of a building more than two stories high the duty to provide a convenient exit from the different upper stories of said buildings when such owner is not in possession or control thereof, although his tenant in possession and control of the building may use the same as a factory or workshop."

That case involved the construction of section 2573 of the Revised Statutes of Ohio (1880), as amended April 19, 1883 (80 Ohio Laws, p. 188); and the decision must rule the instant case, unless through subsequent legislation it has become inapplicable. In April, 1884, section 2573 was supplemented by three sections, 2573a, 2573b, and 2573c (81 Ohio Laws, p. 106); In March, 1891, section 2573 was further supplemented by section 2573d (88 O. L. 64); and this latter section, as amended in March, 1892, and again in April, 1893 (90 O. L. 190), was in force at the time of this fire, and in material part is given in the margin.¹ Sections 2573b and 2573c, referred to in section 2573d, also in necessary parts appear in the margin.² Our attention has not been called to any decision of the Supreme Court of Ohio, and we have not discovered any, construing section 2573 in connection with these supplemental sections. Presumably the Legislature enacted the supplemental statutes with knowledge of the construction that had been placed upon section 2573 by the decision in *Lee v. Smith*, and it

¹ Section 2573d: "The terms 'shops and factories,' as used in sections 2573b and 2573c of the Revised Statutes, shall be held to include the following: * * * Tenement and apartment houses; and in case it is found on inspection under 2573c that the means of egress in case of fire * * * is not sufficient in any shop or factory, as defined herein, * * * or any other improvements necessary for * * * the safety of employ  s or persons occupying such shops and factories, such changes or additions being of a permanent and fixed character, and which, after provided, become a permanent fixture and the property of the owner * * * of the building, * * * the owner of such building shall be required by the state inspector, upon the notice and under the penalties of said section 2573c, to provide the necessary fire escapes or other changes and additions." 2 Bates' R. S. O. [6th Ed.], where it is numbered section 4238k; also 1 Ohio General Code,    1000 and 1002.

² Section 2573b enacts that the "inspector shall have entry into all shops and factories * * * at any reasonable time * * * and proof of the failure of the proprietor * * * to make the alteration * * * ordered by the inspector * * * shall be deemed prima facie evidence of negligence and shall render such proprietor liable for any injury sustained by reason of such failure to make such alterations. * * *" 2 Bates' R. S. O., appearing as section 4238e.

Section 2573c: "That said inspectors, if they find upon such inspection * * * that the means of egress in case of fire * * * is not sufficient, * * * shall notify the owners * * * of such shops or factories * * * to make the alterations or additions necessary without delay * * * and if such alterations are not made within the limit of time granted, such owners * * * so notified, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined. * * *" 2 Bates' R. S. O., appearing as section 4238f.

is significant that no change was made in the language of that section. It is still more important to observe that as late as April, 1908, section 2573 was amended without referring to such supplemental legislation or otherwise changing the section in any respect that is material here (99 O. L. 83). While it is plain that supplemental legislation might operate to change the effect of the act supplemented (*Tiger v. Western Investment Co.*, 221 U. S. 286, 309, 31 Sup. Ct. 578, 55 L. Ed. 738), yet after much examination and reflection we are constrained to believe that in this instance no such change has been wrought as will aid the plaintiff. The construction placed upon section 2573 in *Lee v. Smith*, made "possession and control" of the building the test of liability. Wilson alone, not Ruskin, can, under the demurrer in the present case, be treated as having been in possession and control of the upper stories of the building at the time of the fire.

When we turn to the supplemental legislation, before set out, we find that a lessor owner can be reached only through a system of inspection, requiring notice and an order to make the necessary alteration or addition, and then only in case it shall be "of a permanent and fixed character," and when completed "the property" of the owner of the building. Failure to comply with such order of the inspector is "deemed prima facie evidence of negligence" of the owner, rendering him liable for consequent injuries. The apparent purpose of such inspection, notice, and order was to have the character of the alteration or addition inquired into and determined in advance; that is, if it be of a temporary character, it might well be entirely reasonable to impose the expense upon the lessee, depending, of course, upon the length of his term of lease, while if it be of a permanent character it would be equally just to impose it upon the lessor owner. Thus, at least as respects means of escape from fire, the distinction between the duty as imposed by section 2573 and as imposed by the supplemental legislation is that under the former the duty operates by force of the statute, directly upon the person who is in possession and control of the premises, or portions thereof, which constitute the "factory, workshop, tenement house," etc., mentioned in the section, no matter whether he be the fee-simple owner or the tenant owner; while under the latter no duty exists, either as against such owner or tenant, unless and until an inspector's notice is given and order made, and then it arises against such owner or tenant according to the nature of the improvement required. This distinction is made clear, so far as it rests on section 2573, by the opinion of Judge McIlvaine in *Lee v. Smith*, *supra*, and of Judge Spear, in *Rose v. King*, 49 Ohio St. 213, 30 N. E. 267, 15 L. R. A. 160.

In view of the argument made in behalf of the plaintiff in the instant case, it is important to note that in the latter case the duty so enjoined by section 2573 was regarded as binding upon the owner, *Rose*, even though the mayor failed to give the notice provided for in section 2574; but this was because the owner was also in possession and control. This marks the distinction between that case and the one at the bar. The existence or not of an owner's duty under the supplemental legislation is, as we have seen, dependent upon an

inspector's notice and order; and this method of indirectly imposing duty is the reason why this supplemental legislation cannot operate to change the plain and established meaning of section 2573. The absence of allegation, as here, that such notice and order were given, is fatal to the right of recovery in an action like this. *Borck v. Michigan Bolt & Nut Works*, 111 Mich. 129, 133, 69 N. W. 254; *Monforton v. Pressed Brick Co.*, 113 Mich. 39, 43, 71 N. W. 586. See, also, *Henderson's Adm'r v. Ruskin*, recently decided by the Court of Appeals, First Ohio Circuit, and not yet reported.

The judgment below is affirmed, with costs.

SOUTHERN RY. CO. v. GADD.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1913.)

No. 2,295.

1. PLEADING (§ 236*)—AMENDMENT TO CONFORM TO PROOFS—DISCRETION OF COURT.

It is within the discretion of a federal court to permit an amendment of a declaration on the trial to conform to the proofs, including the testimony of plaintiff himself.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

2. MASTER AND SERVANT (§ 286*)—INJURY TO RAILROAD FIREMAN—NEGLIGENCE.

In an action against a railroad company for injury to a fireman on a switch engine at night, there was direct testimony that the engineer sent plaintiff down to examine a part of the engine, and that as plaintiff was coming up the steps with his torch burning, in full view of the engineer, the latter suddenly started the engine, throwing plaintiff under the wheels. *Held* that, if the engineer saw plaintiff in such position of danger, his starting the engine was negligence, and that, under the evidence, whether he did so see him was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 216*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

The negligence of the engineer in such case, under Employer's Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), was the negligence of defendant, and even under the common law plaintiff did not assume the risk of injury from such negligence in operating the engine in an unusual and unexpected manner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. § 216.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

4. TRIAL (§ 178*)—MOTION FOR DIRECTED VERDICT—CONSIDERATION OF EVIDENCE.

On a motion for directed verdict, the court must take the view of the evidence most favorable to the adverse party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

5. APPEAL AND ERROR (§ 263*)—INSTRUCTIONS—EFFECT OF FAILURE TO EXCEPT.

An objection to an instruction, not taken by exception in the trial court, cannot be considered by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.*]

6. MASTER AND SERVANT (§ 270*)—ACTION FOR INJURY TO SERVANT—EVIDENCE.

Where there was evidence that plaintiff, who was fireman on a switch engine in defendant's yards, was injured by reason of the sudden and unexpected starting of the engine while plaintiff was mounting the steps, evidence that there was a friend of the engineer, not an employé, in the cab at the time, in violation of the company's rules, was admissible as bearing on the question whether or not the engineer was giving proper attention to his train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by W. O. Gadd against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Caruthers Ewing, of Memphis, Tenn., for plaintiff in error.

John L. Stout, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff, while in the employ of defendant as a fireman on a switch engine belonging to defendant, in its yards at Memphis, Tenn., lost his leg by being run over by the switch engine referred to, through the alleged negligence of defendant's engineer operating the same. He brought this action under the Employer's Liability Act of April 22, 1908 (35 Stat. 65, c. 149), as amended by the Act of April 5, 1910 (36 Stat. 291, c. 143 [U. S. Comp. St. Supp. 1911, p. 1324]). The injury occurred April 25, 1911. There was trial to a jury, and verdict and judgment for plaintiff.

It is conceded that at the time of the injury the switch engine was engaged in making up a train in interstate commerce. The evidence tended to show that in the course of the switching operations something seemed wrong with the engine; that the night was dark; that the engineer told plaintiff to take his torch and see what the trouble was; that plaintiff accordingly took his torch and "started down the fireman's side"; that before he reached the ground the engineer started again; that plaintiff got back on the engine and told the engineer he could not examine it unless the engine stood still a minute; that the engineer told him to "wait until we stop again"; that when the engine next stopped plaintiff told the engineer to give him a chance and he would get down and see what the trouble was; that the engineer told him to "hurry up"; that plaintiff again took his torch and got down on the engineer's side and stepped to the driver, where he could see; that while in that position the engineer started

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the engine backing; that plaintiff got on the footboard as it passed, and when the engine came to a stop plaintiff walked to the steps, on the engineer's side, to get in the cab; that just as he was making an effort to get on and reaching to seize the handholds, and while in plain view of the engineer, and with his torch in his hand, the engine was suddenly started forward without signal or warning of any kind, and plaintiff thereby jerked and thrown under the tank, the wheels of which ran over his leg. The engineer testified that the "kick" was made in obedience to a signal from the switchman.

[1] 1. The declaration is at least susceptible of a construction, and apparently was intended to allege, that plaintiff mounted one of the steps leading to the cab while the engine was moving slowly forward, and that the "kicking" occurred after plaintiff was so upon the step. During the closing argument for plaintiff, after motion for directed verdict (later referred to) had been made, the declaration was allowed to be amended so as to allege that the engine was standing still when plaintiff attempted to mount the step, and was started while plaintiff was in the act of taking such step. This action is criticised as an abuse of discretion. The amendment was, however, made to meet the proofs actually introduced, without objection on the ground of variance. Plaintiff had been fully cross-examined upon his statement that the engine was standing still when he attempted to mount the steps, and had been confronted, not only with the declaration, but with a written statement made soon after the accident; both the declaration and statement being claimed to be inconsistent with the testimony that the engine was standing still. In connection with the application for leave to amend, plaintiff's counsel remarked that "the court knows that the statements of a declaration are the lawyer's statements." The only objection to the amendment specifically stated was "to any statement that would indicate or convey to the jury at all that the statement, which was by leave of the court altered, is not plaintiff's, or that he is not bound by it." The amendment was clearly within the discretion of the trial court. *Mexican Central Ry. Co. v. Pinckney*, 149 U. S. 194, 201, 13 Sup. Ct. 859, 37 L. Ed. 699; *Pennsylvania Co. v. Whitney* (C. C. A. 6th Circuit) 169 Fed. 572, 578, 95 C. C. A. 70.

[2] 2. In support of the motion for a peremptory instruction (made at the close of the testimony, and, after the argument, overruled), defendant invokes the well-settled rule¹ that an employer is not an insurer of the safety of its employes, but is bound only to exercise ordinary care to that end, and that the employe assumes the risks of the employment, so far as they are incident to the usual method of work. It is contended that the "kicking" in question was the usual and ordinary movement in the handling of a switch engine engaged in the making or breaking up of trains, and thus that defendant is not liable for plaintiff's injuries. But while the kicking of cars, and

¹ *Mason & O. R. R. Co. v. Yockey* (C. C. A. 6th Circuit) 103 Fed. 265, 43 C. C. A. 228; *Washington, etc., R. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Union Pacific R. R. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766.

thus the sudden starting of a switch engine, was a usual movement in the making and breaking up of trains, yet there is no evidence of any rule or practice permitting the sudden starting of an engine under the circumstances claimed by plaintiff to exist here, including the alleged facts that plaintiff was in plain view of the engineer (and in a position liable to be injured by the sudden starting of the engine), and that the start was made without notice or warning of any kind. Indeed, defendant does not urge, as we understand the argument, that defendant would not be liable if the engineer had actually seen that plaintiff was in the act of boarding the engine and made the sudden start complained of without signal or warning. The record falls but little short of an admission that such an act would be negligence. But it is enough to say that there can be no doubt of its negligent character in law. The contention that the engineer is not shown to have seen plaintiff is answered by the fact that there was express testimony, not only that plaintiff was in plain view of the engineer, and with a torch in his hand, but that no reason existed why the engineer should not have seen him. A question of fact for the jury was thus presented.

The jury was instructed that if they believed the evidence introduced by plaintiff, as to the manner of the injury, and that the conduct of the engineer in charge, as disclosed by that evidence, was negligent, the defendant would be liable. This instruction was excepted to as leaving out of question the doctrine of assumed risk. In that connection the court expressed the opinion that that doctrine is abolished by the Employer's Liability Act, in so far as it relates to cases wherein the employé is injured because of the negligence of any of the officers, agents, or employés of the carrier.

[3, 4] Defendant insists that the doctrine of assumption of risk at common law is not abrogated by the Employer's Liability Act. In our opinion, this question (as limited by the statement of the trial court) does not exist here, for there is no room for argument that even at common law the employé assumed the risk of the employer's negligence from an unusual and unexpected method of operation, that is to say, not incidental to the ordinary method; and by the terms of the Employer's Liability Act the negligence of the engineer was the negligence of defendant. *Central R. of New Jersey v. Young* (C. C. A. 3d Circuit) 200 Fed. 359, 366, 118 C. C. A. 465. Under the rule that, on motion for directed verdict, that view of the evidence most favorable to the plaintiff must be taken (*Erie R. R. Co. v. Rooney* [C. C. A. 6th Circuit] 186 Fed. 16, 19, 108 C. C. A. 118), there was no error in submitting the case to the jury.

[5] 3. Complaint is made of an instruction that, while the plaintiff was obeying the engineer's direction, it was the latter's "duty to look out for plaintiff, and not move the engine until the plaintiff was in a position of safety." This instruction is here criticised as requiring actual knowledge on the part of the engineer that plaintiff was in a position of safety, instead of merely the exercise of ordinary care to that end. But the exception to this instruction did not raise the criticism in question, and we therefore cannot consider it. It is to

be assumed that, had the court's attention been called to the criticism now urged, due correction would have been made.

[6] 4. It was not error to permit evidence that a friend of the engineer, not an employé of the railway company, was, at the time of the accident, riding in the cab by permission of the engineer, in violation of the company's rule. Evidence was also permitted of a conversation between the engineer and a car inspector (also riding in the cab) shortly before the accident. The court held the conversation itself immaterial, but allowed evidence of the fact, and that the engineer's friend was still on the engine when the inspector left, "so far as it might or might not throw light upon the attention or want of attention the engineer was giving his train, by reason of this individual being on the engine." We cannot say this evidence was immaterial, in view of the engineer's testimony that the next time he remembered seeing plaintiff after the return to the engine (following the examination on the fireman's side) was when plaintiff "was down on the ground and hollering to come there quick."

We have not referred to all the alleged errors discussed in defendant's brief. We have, however, considered them all, and are of opinion that no prejudicial error has been committed.

The judgment of the District Court is accordingly affirmed.

YAZOO & M. V. R. CO. v. WRIGHT.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1913.)

No. 2,302.

1. MASTER AND SERVANT (§ 286*) — RAILROADS — NEGLIGENCE — QUESTION FOR JURY.

Where a railroad engineer was killed in a collision between his engine and a car, which in violation of the rules of the company had been left on a side track so near the passing track as not to allow clearance, the company cannot be held free from negligence as matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 217*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—"ASSUMPTION OF RISK."

To render the doctrine of "assumption of risk" applicable, the servant must have known, or have been chargeable with knowledge, of the danger which caused his injury, and voluntarily exposed himself to it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

For other definitions, see Words and Phrases, vol. 1, pp. 589-591; vol. 8, pp. 7584, 7585.]

3. MASTER AND SERVANT (§ 217*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

An engineer was taking his train slowly along a lead track into railroad yards, with cars standing alongside on the left on a switch track leading into his own a short distance ahead. Being unable to determine from his side of the cab, he asked the fireman, whose duty it was under the rules of the company to keep a lookout on the left side, if the stand-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing cars would clear, and was told they would. Later the fireman said they would not, but it was then too late to avoid collision, in which the engineer was killed. The fireman testified, without contradiction, that the car lacked but a few inches of clearing, and he thought it would clear until they were close to it. The rules of the company required all cars left on side tracks to stand clear of all other tracks. *Held*, that there was no evidence which rendered the doctrine of assumption of risk applicable to the engineer, and that on the trial of an action to recover for his death the court properly refused, not only to direct a verdict for defendant on that ground, but to submit the question to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR.

Where an error in instructions, if any, was so slight that it was not excepted to, nor noticed in the motion for new trial, and does not appear to have affected the verdict, it is not sufficient ground for reversal of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

5. APPEAL AND ERROR (§ 263*)—REVIEW—INSTRUCTIONS—EXCEPTIONS.

An error in instructions will not be considered by the appellate court, unless specifically excepted to or otherwise called to the attention of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by Ada R. Wright, administratrix of D. C. Wright, deceased, against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 197 Fed. 94.

Fitzhugh & Biggs, of Memphis, Tenn. (H. D. Minor and Chas. N. Burch, both of Memphis, Tenn., of counsel), for plaintiff in error.

Barton & Barton, of Memphis, Tenn. (Holmes & Holmes, of Yazoo City, Miss., of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This action was brought in the court below under the Employer's Liability Act of Congress. Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322). The plaintiff below is the widow and administratrix of D. C. Wright, who died on May 9, 1912, from injuries received while in the employ of the railroad company as an engineer and operating one of its interstate freight trains. The suit was brought for the benefit of the widow and three surviving children. The deceased received his injuries while entering the railroad yards at Gwin, Miss., when his engine collided with a coal car protruding so far over a side track on which it was standing as not to allow clearance for the engine, then passing along a lead track. The declaration as amended con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

tains eight counts, charging negligence in various forms on the part of the railroad, its officers, agents, and employes. The defenses set up were, in addition to the plea of not guilty, pleas of contributory negligence and assumption of risk. The verdict was for \$19,000, which was reduced by the court to \$10,000, and the company prosecutes error.

[1] At the close of all the evidence the railroad moved for a directed verdict upon the ground, among others, that no negligence of the defendant had been shown. This motion was overruled, and we think rightly. One of the rules of the company provided that:

"Cars on side tracks, whether in yards or at stations, must stand clear of all other tracks."

One of the evident purposes of this rule was to prevent just such collisions as the one in question. The rule was admittedly violated, and, since this resulted in the death of plaintiff's decedent, the inference of defendant's negligence clearly required submission of the question to the jury; and the question was foreclosed by the verdict and the action of the court below in denying a new trial.

The only other ground of the motion was that the deceased engineer assumed the risk of injury from the obstruction of the coal car. Defendants' counsel pressed this claim throughout the trial of the case; and it has been given paramount attention in this court, both upon brief and in oral argument. The learned trial judge held that assumption of risk was entirely abrogated as to persons operating under the Employer's Liability Act. The contention is that this is so only as respects safety appliances, and that the protruding coal car was not a safety appliance. It is urged for the plaintiff that upon the evidence the question of assumed risk does not arise. If this is sound, it will not be necessary to pass upon any of the rulings of the trial court concerning the limitations placed upon the doctrine by the Employer's Liability Act; for in that event the rulings occasioned no prejudice.

It is important to inquire more closely into the conditions attending the accident. The train in question left the main track some 1,600 feet north of the point of collision and was moved southwardly along the main lead track of the yards until it reached a point something like 200 feet north of the coal car, when, it is claimed, the engineer had the coal car in full view and could determine whether his engine would or would not clear it. The evidence tends to show that the engineer had his train under control. Indeed, the steam was shut off and the train slowed up at or near the point last mentioned. The coal car was standing on the scale track which intersected the main lead track on its south side; that is, on the side opposite to that occupied by the engineer. The car lacked but little (the fireman testified four to ten inches) of clearing the space required for the engine to pass. As the engine approached the coal car, it is reasonably plain from the evidence that the engineer's view of the car gradually diminished until it was cut off by the engine, but that the fireman's view was not obstructed. It was one of the fireman's duties, *under the rules*, to "keep a careful watch upon the track and instantly

warn the enginemans of any obstructions," and the fireman here appears to have performed this duty to the best of his ability. He testified that the engineer asked him—

"how everything was around there, if it was in the clear, and I looked out to see if it was, and I said 'All right,' and he opened the engine up and went a short ways, and shut off again, and he asked me if some cars was clear over there, * * * and I couldn't tell whether they were clear or not, and we got right on them before I thought they wouldn't clear—lacked only four to eight or ten inches of clearing—"

The witness seeming to hesitate, the court directed him to proceed, when he said, evidently in answer to the second inquiry of the engineer:

"When he asked me if they would clear, I couldn't tell whether they would or not. I thought all the time they would, and was still looking at them all the time. I hollered then that they wouldn't clear, and I said, 'Get off,' and I jumped off of the engine, and the next I saw of him he was caught between the tank and engine—and the cab. The corner of the car slashed the cab on my side. * * *"

The head brakeman testified that he was standing in the gangway of the engine, but the fireman testified that this brakeman was not on the engine at all. However, the brakeman stated that he told the engineer that "it didn't look like them cars was in the clear." The engineer then—

"asked the fireman was they clear, and the fireman was putting in the fire at the time, and when he got through he looks ahead, and he told him they wouldn't clear, and he didn't understand the fireman, and he asked me what he said, and I said he said they wouldn't clear, and the fireman had done jumped off, and he leaves his side to go to the fireman's side to see if they would clear, and I jumped off after he left his side."

Now, however this testimony may be viewed (and these were the only witnesses who appear to have seen the accident), one important feature of it stands out clearly. It is that the engineer and fireman were alert, and that the clearance seemed to these experienced men sufficient (and this is not contradicted by the brakeman) until at or about the time the fireman jumped. Further, the brakeman claims to have jumped almost immediately after the fireman, and no material lapse of time seems to have intervened between their leaving the engine and the engineer receiving his injuries; yet the fireman had previously told the engineer that the clearance was "all right." It is to be remembered, moreover, that the protrusion of the coal car into the space required for the passage of the engine was in a comparative sense not only slight in fact, but, when the fireman was exercising and communicating to the engineer his judgment that the engine would clear, both presumably felt assured that the rule requiring cars on side tracks in the yards to "stand clear of all other tracks" had been complied with; for the requirement necessarily means that such cars shall "stand clear" with respect to the passage of engines and other cars along the adjacent track. It is strenuously urged, however, that this engineer saw the danger and assumed the risk of passing. As it seems to us, this overlooks the obvious force and effect of the evidence. The engineer seems to have been solicitous as

to danger. He sought and employed the fireman, the company's designated agency, to assist him in ascertaining whether or not there was danger. He was assured that there was none until too late to avoid it.

[2, 3] We are convinced that there is no evidence really tending to show that the deceased assumed the risk of the danger that lurked in this protruding coal car. The essential quality of consent on his part is lacking. The vital question is whether he knew or was chargeable with knowledge of the danger and voluntarily exposed himself to it. The fact that the means prescribed for finding out the danger were adopted and failed to reveal it in time to avoid it negatives the whole idea of conscious assumption; and this must not be confused with acts of negligence.¹ *Schlemmer v. Buffalo, Rochester, etc., Ry.*, 205 U. S. 1, 12, 27 Sup. Ct. 407, 51 L. Ed. 681; *Smith v. Baker & Sons*, App. Cas. (1891) 325, 336, 355; *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 298, 301, 37 C. C. A. 499, 48 L. R. A. 68 (C. C. A. 6th Cir.); *Mundle v. Manufacturing Co.*, 86 Me. 400, 405, 30 Atl. 16; *Wagner v. Boston Elevated Railway*, 188 Mass. 437, 441, 74 N. E. 919; *Railway Co. v. Bancord*, 66 Kan. 81, 90, 91, 71 Pac. 253; *Chicago & E. R. Co. v. Ponn*, 191 Fed. 688, 689, 112 C. C. A. 228 (C. C. A. 6th Cir.); *Dorsey v. Phillips & Colby Construction Co.*, 42 Wis. 583, 598, 599; *National Steel Co. v. Hore*, 155 Fed. 62, 65, 66, 83 C. C. A. 578 (C. C. A. 6th Cir.); *Williams v. Bunker Hill & Sullivan Mining & C. Co.*, 200 Fed. 211, 216 (C. C. A. 9th Cir.). These decisions afford apt illustrations of the varying conditions under which the principle of assumption of risk is or is not applicable. We do not mean to hold that where the pertinent evidence of a given case is conflicting as respects the employé's knowledge and appreciation of a danger and his consent to expose himself to it, the question can be determined as a matter of law as distinguished from its submission to the jury. What we hold is that the evidence here is not conflicting touching the essential elements of assumption of risk, and consequently that it was not prejudicial error to refuse to submit the matter to the jury, no matter whether the obstruction in the instant case would under another state of facts be open or not to the defense of assumption of risk.

It is further insisted that the evidence in substance shows that the tracks in the railroad yards in question were generally and necessarily more or less filled with cars, and that this was a condition with which the deceased was familiar, and was accompanied by dangers which entered into the risks of his employment. This may well be conceded, but it does not affect the present case. The three coal cars in question, the foremost of which protruded as stated, were not on the main lead track along which the deceased was operating his engine and train. We have seen that one of the rules of the company forbade the placing of a car as this coal car was situated; and the evidence does not tend to show that the company was in the habit of violating this rule, much less that the deceased was bound to anticipate such violation. This

¹ This case is unlike *Southern Ry. Co. v. Gadd*, 207 Fed. 277, this day decided.

rule entered into the contract of employment of the deceased, and even occasional disobedience of the rule would neither put the employé upon notice nor excuse the company. *Cent. R. R. Co. of New Jersey v. Young*, 200 Fed. 359, 367, 118 C. C. A. 465 (C. C. A. 3d Cir.), and cases cited.

The next contention is that the trial court erred in refusing to charge that the deceased was guilty of contributory negligence. The claim for the most part is that such negligence could operate only in mitigation of damages, not in bar of the action. The reason urged in support of the claim is that the engineer in the last moments left his side of the engine to go to the opposite side, where he met his injury. It will be remembered that he did this just after the fireman had left the engine, and just as the brakeman claims that he left it. Whether the engineer went to the other side for the purpose of making an examination himself of the possibility of collision, or from fear that the engine might, in case of collision, be turned over upon the side on which he regularly sat, and so injure him if he should jump on that side, is not clear. It is enough to say that the question of his contributory negligence was fully submitted to the jury under proper instructions. The natural inference would be that, if the jury believed he did not exercise a reasonable degree of care, it reduced the damages accordingly. It is true that on the motion for a new trial, upon which the court was required to weigh the evidence (*Big Brushy Coal & Coke Co. v. Williams*, 176 Fed. 529, 532, 99 C. C. A. 102 [C. C. A. 6th Cir.]), it was found that the engineer was guilty of contributory negligence, and hence the verdict was reduced in the form of a remittitur, which was accepted, in the sum of \$9,000, as before stated. It is to be observed, further, that after the close of the general charge one of defendant's special requests was given, which was to the effect that if the intestate failed to exercise ordinary care and caution, and so directly and proximately contributed to the injury, and that the defendant's negligence, if any, only remotely contributed thereto, then the verdict should be for the defendant. We see no error in any of these respects of which the railroad company can rightfully complain.

[4] Objection is made to a special request asked and given for plaintiff after the close of the general charge, which submitted the question whether the fireman was negligent in first assuring the deceased that all was right, and in afterwards failing to notify him of the danger in time to stop his engine; the court stating: "I charge you, if you find that the fireman was negligent in this respect, and his negligence was the proximate cause of the injury, then you must find for the plaintiff." It is urged that there was no allegation in the declaration and no evidence to warrant this charge, and, further, that the court failed to define "proximate cause." We think this falls fairly within the amended declaration; and while we are unable to see wherein the fireman failed in the discharge of his duty (unless possibly in delaying to reveal his doubts until too late), yet in the exception taken at the time not one of these objections was stated or called to the attention of the court. If it be admitted that there was error in any of the respects now claimed, it was slight, and is not perceived to have affected the verdict. We

are not disposed under the circumstances to disturb the judgment on any such ground. *Central Union Depot & Ry. Co. v. Mansfield*, 169 Fed. 614, 617, 95 C. C. A. 142 (C. C. A. 6th Cir.).

[5] The only remaining assignment of error that need be noticed relates to a portion of the general charge which concerned the measure of damages. In summing up the elements that the jury might consider, the court included "the pain and suffering he [deceased] endured at the time he was hurt." It was error to include such pain and suffering as part of the cause of action that accrued to the widow and children. *Mich. Cent. R. R. v. Vreeland*, 227 U. S. 59, 68, 33 Sup. Ct. 192, 57 L. Ed. 417; *Garrett v. Louisville & N. R. Co.*, 197 Fed. 715, 720, 117 C. C. A. 109 (C. C. A. 6th Cir.). However, no exception was taken to this portion of the general charge at the time it was given. As Judge Severens said, in *Coney Island Co. v. Dennon*, 149 Fed. 687, 692, 79 C. C. A. 375, 380:

"Counsel were bound to present their point at the trial, so that the court might consider it, and cannot, under a broad exception not aimed at it, upon subsequent search for error and finding it, bring it forward as a ground for reversing the judgment. It is a well-settled rule that an exception, in order to found a right to review, must be sufficiently distinct to direct the attention of the court to the particular error which is the subject of complaint."

See, also, *Block v. Darling*, 140 U. S. 234, 238, 11 Sup. Ct. 832, 35 L. Ed. 476; *Pennsylvania Co. v. Whitney*, 169 Fed. 572, 577, 95 C. C. A. 70 (C. C. A. 6th Cir.).

It is noticeable that the judgment below was for a gross sum, and that no apportionment was made by the jury among the beneficiaries (*Railway Co. v. McGinnis*, Adm'x, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, decided by the Supreme Court April 7, 1913); but this apparently did not concern the defendant, for no allusion to it is to be found in the record.

The judgment below must be affirmed, with costs.

ST. LOUIS & S. F. R. CO. V. RUTLAND.

(Circuit Court of Appeals, Sixth Circuit. May 6, 1913.)

No. 2,311.

1. RAILROADS (§ 347*)—INJURIES AT CROSSINGS—TENNESSEE STATUTE REQUIRING LOOKOUT—APPLICABILITY.

Shannon's Code Tenn. §§ 1574-1576, which require every railroad company to keep some person on its locomotives always on the lookout ahead, and to take certain other precautions to prevent an accident in case any person, animal, or other obstruction appears on the track, and make a company failing to observe such requirements absolutely liable in case of any accident or collision resulting in injury to person or property, as construed by the Supreme Court of the state, do not apply to cases where it is impossible to comply with their requirements, or wholly impracticable consistently with the operation of the road, as in cases of switching operations, or where it is necessary in or about yards to push cars with the engine moving backwards, etc. Where a plaintiff's intestate was struck and killed at a street crossing by cars so being pushed, on a track

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

extending along a cross street extending from the terminal of one railroad to that of another, to which the cars, with their loads, were being transferred, it was a question of fact whether the situation was such as to make the statute applicable, and evidence as to the length of the transfer track, the extent of its use, the character of the country traversed, and the means or practicability of transferring the engine around, so as to return on the track if it preceded the cars, was relevant and admissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124–1137; Dec. Dig. § 347.*]

2. RAILROADS (§ 350*)—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

A person struck and killed at night, while walking along a street crossed by several railroad tracks near together, by cars which were being pushed backward, cannot be charged with contributory negligence as matter of law, where it did not appear that he could see the lights on the approaching cars, or how well the place was lighted, and there was a train passing on another track, which might have prevented him from hearing the one which struck him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.*]

3. RAILROADS (§ 350*)—INJURIES AT CROSSINGS—ACTION—DIRECTION OF VERDICT.

Evidence that the negligence of a railroad company was the proximate cause of the killing of a person at a crossing in the night *held* not such as to warrant the direction of a verdict against it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.*]

4. NEGLIGENCE (§ 136*)—CAUSAL RELATION.

Proof of defendant's negligence does not justify instructing a verdict for plaintiff unless the causal relation between negligence and injury is indisputable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by Elizabeth Rutland against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant below, commonly known as the "Frisco" Railroad, reaches Memphis from the east and there connects with the Rock Island. This connection is by a track running through the city of Memphis from the point where incoming Frisco trains are broken up, and extending to the Rock Island yards. This connecting track, belonging to the Frisco, at one point enters upon, and follows along, Tennessee street, and while thereon crosses Huling street. At and near this point, Tennessee street is practically given over to railroads, carrying also two main tracks and two or more side tracks of the Illinois Central. December 13, 1910, shortly before 6 p. m. (after dark), a Frisco engine was transferring, along this connecting track, three cars which had come in on the Frisco and were to go out on the Rock Island; the engine being behind, pushing the cars to the west, and itself running backward. Mr. Rutland, desiring to cross Tennessee street from the south, and accordingly walking along Huling street to the north, was struck by the first one of these freight cars, and was killed. His widow brought this action in the court below, alleging the diversity of citizenship requisite to jurisdiction, and recovered a verdict and judgment.

The railroad company's assignments of error present only three questions which seem to us to require consideration. They are: (1) Did the so-called

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

"statutory precautions" of Tennessee apply to the facts of this case, whereby the defendant's primary liability became indisputable, and contributory negligence ceased to be a bar, and could operate only in mitigation; or did the defendant's primary liability and the effect of contributory negligence depend upon common-law rules? (2) If the latter, then was defendant's negligence so clear as to justify an instruction to find for plaintiff? (3) Was Rutland's contributory negligence clear enough to require an instructed verdict for defendant? The sections of the Tennessee statute prescribing the nature and effect of the "statutory precautions" are given in the margin; also, a list of decisions of the Tennessee Supreme Court and of this court construing and applying these statutory provisions, and which we have reviewed.¹

Fitzhugh & Biggs, of Memphis, Tenn. (W. F. Evans, of St. Louis, Mo., of counsel), for plaintiff in error.

Caruthers Ewing, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] The first question arises because the trial judge, believing that the statutory precautions did apply, charged the jury that defendant was liable, and left to the jury only the subjects of contributory negligence and of damages. The Tennessee statute is, in its terms, broad and general. It makes no exception whatever, and from its terms it would

¹ Shannon's Code:

"§ 1574. Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

"§ 1575. Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur.

"§ 1576. No railroad company that observes, or causes to be observed these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed said precautions shall be upon the company."

Cases of Louisville & N. R. Co. v. Robertson, 9 Heisk. (Tenn.) 276 (1872); Haley v. Mobile & O. R. Co., 7 Baxt. (Tenn.) 239 (1874); Cox v. Louisville & N. R. Co., 1 Tenn. Cas. 475 (1875); East Tennessee V. & G. R. Co. v. Scales, 2 Lea (Tenn.) 688 (1879); East Tennessee & V. R. Co. v. Swaney, 5 Lea (Tenn.) 119 (1880); East Tennessee V. & G. R. Co. v. Selcer, 7 Lea (Tenn.) 558 (1881); East Tennessee V. & G. R. Co. v. Rush, 15 Lea (Tenn.) 145 (1885); Railway Co. v. Foster, 88 Tenn. 671, 680, 13 S. W. 694, 14 S. W. 428 (1890); Railway Co. v. Hicks, 89 Tenn. 301, 17 S. W. 1036 (1890); Patton v. Railroad, 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184 (1890); Little Rock & M. Ry. Co. v. Wilson, 90 Tenn. 271, 16 S. W. 613, 13 L. R. A. 364, 25 Am. St. Rep. 693 (1891); Railroad v. Pugh, 95 Tenn. 419, 32 S. W. 311 (1895); Railroad v. House, 96 Tenn. 552, 35 S. W. 561 (1896); Railroad v. Dies, 98 Tenn. 655, 41 S. W. 860 (1897); Illinois Cent. R. Co. v. Clarkson, 28 A. & E. Ry. Cases, 459 (1899); Chattanooga Rapid Transit Co. v. Walton, 105 Tenn. 415, 58 S. W. 737 (1900); Louisville & N. R. Co. v. Martin, 113 Tenn. 266, 87 S. W. 418 (1904); Cincinnati, N. O. & T. P. R. Co. v. Holland, 117 Tenn. 257, 96 S. W. 78 (1906); Southern Ry. Co. v. Brooks, 125 Tenn. 260, 143 S. W. 62 (1911); Towles v. Southern R. Co. (C. C.) 103 Fed. 405 (Hammond, District Judge); Southern Ry. Co. v. Simpson (C. C. A. 6) 131 Fed. 705, 65 C. C. A. 563, and cases cited; Southern Ry. Co. v. Sutton (C. C. A. 6) 179 Fed. 471, 103 C. C. A. 51, and cases cited.

seem that, in every case where the cars strike anything on the track and where less than all the prescribed precautions are observed, the railroad company would be liable for the resulting damage; but the Tennessee Supreme Court, construing the statute according to what it has thought the reasonable spirit and meaning, rather than according to the letter, has established a series of so-called exceptions—though, doubtless, these are not to be considered as real exceptions to the operation of the statute, but as instances beyond that operation. The general purport of these decisions seems to be that the statute must be applied to actual conditions in such a way as to save it from being a wholly unreasonable regulation; and it need not be said that in this matter of the construction and application of the Tennessee statute we are bound to follow that court.

One class of such exceptions comprises cases where the person injured has stepped upon the track too suddenly to permit the precautions to be operative, or, what is the same thing, has appeared upon the track under conditions indicating that he would not remain there long enough to become "an obstruction"; and this classification would seem to include the case of railroad employes whose duty takes them normally among and across tracks on which cars may be approaching. Another class (including, probably, all the adjudged cases not assignable to the first class) is made up of instances where the engine is not preceding the car or cars which are being moved, but where the engine is actually attached to and pushing one or more cars, or where cars are making a flying switch free from any engine, or where they have accidentally broken loose and are running alone. In discussing cases of this second class, the Supreme Court of Tennessee has sometimes described the case before it as involving operations "in and about yards" and sometimes as involving "switching operations"; but we cannot see that either of these things is the criterion. The rule of exclusion must be broad enough to cover both the first class and the second class. There cannot be one general reason for excluding sudden appearances on the track and another general reason for excluding switching operations; and it must follow that switching operations and movements in and about the yards are excluded, not because they are switching operations, or because they are in and about the yards, but because the switching operation or movement in the yards is within the general rule of exclusion; and whenever a case arises, novel on its particular facts, the inquiry must be whether it is within or without this general rule of exclusion.

That this is so not only seems to us clear enough as a matter of necessary reasoning, but we think it has been established, and the general rule fairly well formulated, by the Supreme Court of Tennessee. Detailed review of the cases in the margin is unnecessary. The most important were carefully considered by Judge Hammond in the Towles Case, *supra*, and by Judge (now Mr. Justice) Lurton in Simpson's Case, *supra*. We find nothing later invalidating these analyses. The criterion of exclusion is necessity—not absolute, but qualified. The precautions are not required, if their observance, though theoretically possible, is "utterly impracticable" consistently with operating

the railroad; but the railroad cannot predicate exclusion on "impracticability" which it unnecessarily causes or tolerates.

Accepting this as the broad criterion, how is it to be applied? If we try to apply the specific test, whether "in and about the yards," we find difficulties. This location was within the established "yard limits" of the railroad; but such limits, established by railroads as a matter of their own convenience in the application of their rules, often extend far beyond the actual yards, where tracks are numerous, and where switching and transferring are normal, and it is in this latter, or practical, sense that the Tennessee courts have used the phrase "in and about the yards." Case of *Towles*, supra. While this vicinity may be a yard in the latter sense from the standpoint of the Illinois Central, yet the Frisco has here only this single track, and the exemption appurtenant to yards has never been applied to such a situation. There are difficulties, also, if we try to apply the specific test, whether "a switching operation." This transfer was a step intermediate to the breaking up of the train on which the cars had come to Memphis, and the making up of a train on which they were to go out; but it was not the mere switching usual in such cases. It partook of the character of the through transportation to which it was incidental. It resembled delivery to an industrial siding; but, in that the delivery was to be to a co-operating railroad, it was not wholly equivalent to the decided case of industrial delivery. *Railroad Co. v. Jones*, 1 Tenn. C. C. A. 305.

So we are driven to abandon the specific tests and to the application of the broader rule. We conclude that the question whether, in this case, it was within the limits of practicable operation to have this engine precede these cars, was a question of fact, and it follows that all the conditions affecting that question of fact were pertinent. One of these conditions (as to which the record is silent) involves the distance from the beginning to the end of this transfer, and the character of the territory traversed, as indicating whether the distance and the incidental public dangers require those practices which attend through transportation on a through track, involving precautions, delays, expenses, and equipment which would be quite impracticable in handling traffic a short distance, where there was little public danger. Another condition (as to which the record is silent) involves the amount of traffic habitually moved over this track; as, e. g., it might be feasible for a Frisco engine, after it had delivered its cars, to be transferred around on the various Rock Island tracks, so that it could get back to its own track, if this was only occasional, but impracticable, if the requirement was very frequent.

Another condition is the state of things at both ends of this transfer track, as to turntables, Y tracks, or any other means that would permit an engine, leading in a string of cars, to get out again. As to this latter condition, defendant offered proof tending to show the lack, at the Rock Island end, of any means whereby the Frisco engine could get back on its own track, if it preceded the cars which it was delivering to the Rock Island, and so tending to show that if the freight cars preceded the engine, as they did and must, the statutory precau-

tions were impossible. The court refused to admit this evidence. It is true, the railroad could not create such a necessity (and so escape the statute) by failing to provide, at the Rock Island end of the transfer, either by itself or in association with the Rock Island, suitable and feasible means for the return of its engine, if such means were practicable; but whether the absence of such means was within the control of the Frisco Company, or was, judged by the standard of practicable operation, inherently necessary, could not be known until all the facts appeared. We think that the offered evidence should have been received, and complete inquiry made into all the facts attending this question of what was practicable. At the end of such inquiry, the conclusion may be one of fact for the jury, or the facts may permit only one inference. The present incomplete record does not justify a conclusion of law that it was practicable to have the engine precede the cars, or that an existing impracticability was avoidable by the railroad company.

[2] 2. The evidence did not justify instructing the jury that Rutland was guilty of contributory negligence. It does tend to show that, moving rapidly, he stepped upon this track when the approaching freight car was almost upon him, and that, if he had exercised any care, he could not have failed to see it coming. It may well be that, if the thing had happened in the daytime, there would have been no escape from this inference. However, it happened in the night. If the car was close upon him, as seems probable, one of the lanterns on the car, the one which was hanging over the further eaves, would not have been visible, and the one on the top of the car, back more or less from the approaching end, might not have been visible. If the car was a mere shape in the dim light, the matter of its distance and the matter of its motion might easily be uncertain. The bell, and the noise of this engine and these cars, which ordinarily would challenge attention to their approach, may have been entirely drowned by the noise of the passing train on the Illinois Central track. Just how much the immediate area was lighted by the street light, and how much the headlight of the standing engine may have been blinding or confusing, are matters of doubt. Under the rule, too familiar to justify citing authorities, that a verdict cannot be instructed if there is any room for fair-minded men to doubt plaintiff's contributory negligence, the court below was justified in submitting this question to the jury.

[3] 3. If the evidence demonstrated with certainty that defendant's common-law negligence caused the injury, then the error in holding that the statutory precautions applied, and defendant was therefore liable, would be error without prejudice; but the evidence did not justify this conclusion. The defendant's evidence tended to show that the cars approached the crossing slowly, under control, with the bell of the engine ringing, with two lookouts with lanterns upon the car in advance, and taking every precaution which the circumstances permitted, and that Rutland must have walked or run in front of the car just the instant before it hit him. If this testimony, and all the inferences which might reasonably be drawn from it, can be accepted at their full value, the defendant would not be liable. There is no incon-

sistency between this conclusion and that reached in the preceding paragraph on the subject of contributory negligence, since the two conclusions are necessarily drawn from opposite points of view; one gives to the plaintiff the benefit of all reasonable inferences from the testimony in the case, and the other gives the same benefit to the defendant.

[4] Plaintiff also claims that the evidence established the absence of any flagman at this crossing at this time, and that the consequent violation of an existing city ordinance intended to operate for the protection of those using the streets constituted negligence, justifying the peremptory instruction for plaintiff which was given. It is not clear that this violation of the city ordinance was more than evidence of negligence (*Railroad v. Ives*, 144 U. S. 408, 418, 12 Sup. Ct. 679, 36 L. Ed. 485); but, even if it was negligence per se, it would not conclusively make out plaintiff's case. The causal relation, the inference that the negligence was the proximate cause of the injury, would be disputable. The ordinance did not require two flagmen. If one had been present at this time on the north side of Tennessee street, north of the track which was occupied by the Illinois Central passing train, he would have been at his post of duty, and the ordinance would have been fully satisfied; and yet he could not have been of any possible benefit or protection to Rutland, who first appeared coming from the south, after this passing train had blocked the crossing and cut off the view of any flagman who might have been on the north side.

4. Other errors alleged do not call for consideration.

The judgment is reversed, with costs, and the record remanded for new trial.

ERIE R. CO. v. WEBER.

SAME v. KRAFT.

(Circuit Court of Appeals, Sixth Circuit. June 3, 1913.)

Nos. 2,339, 2,400.

1. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Two persons, who, with a third, were walking along a street after dark in the evening, where it was crossed by seven railroad tracks, were struck and killed by an engine on the fifth track. There were gates at the crossing, which had been lowered on the approach of an engine and cars on the first track. There was testimony, the engine having stopped before reaching the crossing, the gates were raised. There was evidence that the parties looked in both directions and listened before going upon the track, but did not see nor hear the approaching engine; that their view in the direction from which it came was obstructed by steam and smoke from the standing engine, which was blowing in the direction they were walking; and also that the engine was running at a high rate of speed and did not sound either bell or whistle. *Held*, that the question of contributory negligence, as well as the negligence of the railroad company, was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. TRIAL (§ 178*)—MOTION FOR DIRECTED VERDICT—REVIEW OF EVIDENCE.

On request for directed verdict, the court is bound to take that view of the evidence most favorable to the adverse party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

3. EVIDENCE (§ 588*)—TRIAL (§ 140*)—CREDIBILITY OF TESTIMONY—QUESTION FOR JURY.

The credibility of witnesses is peculiarly a question for the jury, and in the absence of established facts and circumstances with which the testimony cannot be reconciled it cannot be disregarded as incredible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588;* Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

Credibility of witnesses or parties testifying as question for jury, see note to Missouri, K. & T. Ry. Co. v. Collier, 88 C. C. A. 143.]

4. RAILROADS (§ 347*)—ACCIDENTS AT CROSSINGS—EVIDENCE OF NEGLIGENCE—VIOLATION OF SPEED ORDINANCE.

A violation of a city ordinance limiting the speed of trains is ordinarily evidence of negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124-1137; Dec. Dig. § 347.*]

Effect of violation of statutes and ordinances regulating speed of trains, see note to Shatto v. Erie R. Co., 59 C. C. A. 5.]

5. EVIDENCE (§ 492*)—OPINION—SPEED OF TRAIN.

The admission of the testimony of a witness, giving his opinion as to the speed of a train when it passed a crossing, *held* not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2270; Dec. Dig. § 492.*]

In Error to the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Actions at law by Edmund Weber, administrator of the estate of Anna Weber, deceased, and by Henrietta Kraft, administratrix of the estate of John Kraft, deceased, against the Erie Railroad Company. Judgment for plaintiff in each case, and defendant brings error. Affirmed.

Hine, Kennedy & Manchester, of Youngstown, Ohio, for plaintiff in error.

Charles Koonce, Jr., and Thomas McNamara, Jr., both of Youngstown, Ohio, for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. The decedents, Anna Weber and John Kraft, were struck and killed at the same time by defendant's locomotive engine. The respective suits therefor were separately tried, each resulting in verdict and judgment for the plaintiff. The cases are here on writs of error, and have been argued together. But four alleged errors have been discussed. The first two relate to both cases; the remaining two are limited to the Kraft case.

[1] 1. A request for directed verdict in defendant's favor was asked and denied. The accident occurred at a grade crossing in Youngs-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

town, Ohio, about 5:30 p. m., on December 18th. The two decedents, in company with Mrs. Kraft, the wife of decedent John Kraft, approached the railroad tracks on Valley avenue from the west, on their walk home from church. It was already dark, and the switch lights were burning. At this crossing were seven tracks extending north and south; the most westerly being the Lake Shore lead track. Next east were three other Lake Shore tracks, next the Erie track, where the collision occurred, and two tracks still easterly. The plaintiffs' evidence tended to show that as the three pedestrians approached the Lake Shore lead track a switch engine thereon, running tender foremost and drawing a cut of cars from the north, approached the crossing; as it approached the gates were lowered; that the switch engine came to a full stop a short distance north of the crossing; that thereupon the gates were raised, and the three persons started to cross the tracks, looking up and down to avoid danger; that the crossing was not brightly lighted, the most prominent light being the headlight on the tender of the Lake Shore switch engine; that this engine was constantly discharging smoke and steam, which was carried by the wind in the direction the pedestrians were traveling, and at such a height as to obscure the view to the north; that there was also light snow in the air; that the parties crossed the tracks one after another, looking and listening for approaching cars or engines, but seeing and hearing nothing; that on approaching the Erie track they again looked and listened, both up and down the track, and seeing and hearing nothing stepped upon the track, when they were struck by the engine, running at a high rate of speed, variously estimated at from 20 to 40 miles an hour, with steam shut off and "drifting," and without ringing of bell or blowing of whistle. But for the smoke and steam from the switch engine, the view was unobstructed to the north for nearly half a mile. There was testimony on defendant's part tending to show the ringing of bell and blowing of whistle, and that the smoke and steam were not so dense or continuous as to prevent a view of the approaching train, and that its approach was not so quiet as to have prevented its being heard in time to avoid collision.

Defendant contends that the conduct of the three parties in crossing the tracks under those circumstances was so clearly imprudent as to justify a direction of verdict in its favor. We are unable to agree with this contention. It is conceded there was sufficient evidence of defendant's negligence to justify its submission to the jury.

[2] On a request for directed verdict, the court is bound to take that view of the evidence most favorable to the adverse party. *Erie R. R. Co. v. Rooney* (C. C. A. 6th Cir.) 186 Fed. 16, 19, 108 C. C. A. 118, and cases there cited. The testimony of Mrs. Kraft as to the inability of the parties to see or hear the approaching train was corroborated by two of their friends, who crossed the tracks but a short distance in front of the three who were thus overtaken by the engine, and who both testified that while crossing the tracks they looked and listened, neither saw nor heard the train (until what seems to have been the instant of collision), and heard no warning of its approach by bell or whistle.

[3] The credibility of the witnesses was peculiarly a question for the jury; and, in the absence of established facts and circumstances with which the plaintiff's evidence cannot be reconciled, it cannot be regarded as incredible. *Erie Railroad v. Rooney*, supra. It would seem that after getting part way across the tracks Mrs. Kraft, at least, realized the danger on account of the obscuring of the view to the north through smoke and steam, which she says was not apparent until after the Lake Shore lead track was crossed. She testified that she thought "there was no use for us to stop there, for we were in the middle of the tracks, and it was dangerous everywhere." It was only 27 feet from the center of the lead track to the center of the Erie track on which the collision occurred. The decedents may not unreasonably have felt that to turn back entailed as much danger as to go forward. Moreover, they had the right to take into account, in determining the question of safety, the practical invitation to cross and the qualified assurance of safety given by the raising of the gates; and under those circumstances they discharged their legal duty, if they used their senses of sight and hearing for their protection as soon as, and as far as, people of ordinary prudence would do under similar circumstances. *Erie R. R. Co. v. Schultz* (C. C. A. 6th Cir.) 183 Fed. 673, 676, 106 C. C. A. 23. Under all the testimony, we cannot say that decedents did not exercise such measure of care. The motion for directed verdict was properly overruled.

[4] 2. The court admitted as evidence of negligence an ordinance of the city of Youngstown, limiting the speed of trains within the corporate limits to 6 miles an hour, and unless accompanied by certain prescribed precautions to 4 miles. A violation of an ordinance of this character is ordinarily evidence of negligence. *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Rothe v. Pennsylvania Co.* (C. C. A. 6th Cir.) 195 Fed. 21, 25, 114 C. C. A. 627; *St. Louis & S. F. R. R. Co. v. Rutland*, 207 Fed. 287 (decided by this court May 6, 1913).

Defendant assails the ordinance in question as unreasonable and void. Plaintiffs relied upon the provision limiting speed to 6 miles. In *Railroad Co. v. Ives*, supra, the ordinance which was received as evidence of negligence limited the speed to 6 miles in the city of Detroit. It is not necessary, however, to pass upon the reasonableness of this ordinance, for we think its admission nonprejudicial, in view of the concession by the engineer driving the engine, that the train was running at a speed of 20 to 22 miles an hour.

[5] 3. It was not error to allow the witness Koch to testify to the speed of the train. See *Rothe v. Pennsylvania Co.*, supra, 195 Fed. at page 27, 114 C. C. A. 627, and cases there cited.

4. The court excluded the testimony of the Erie train conductor that the bell was ringing when the train approached the Youngstown depot, which was about a mile from the place of the accident. It was offered to corroborate the testimony of the engineer that the bell was operated automatically by air, that when once started it continued to ring until shut off, that it was so started at Meadville, and was not shut

off until Youngstown was reached, thus supporting (as claimed) an inference that it was ringing at the time of the accident.

Upon the whole case, we think the effect of the proffered testimony (depending, as it did, upon inference from inference) too remote, and its weight too slight, to predicate prejudicial and reversible error upon its exclusion, even if technically erroneous.

The judgments of the District Court are affirmed, with costs.

TENNESSEE COPPER CO. v. GADDY.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1913.)

No. 2,343.

1. MASTER AND SERVANT (§§ 288, 289*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—"ASSUMED RISK"—"CONTRIBUTORY NEGLIGENCE."

To establish the defense of "assumed risk" or of "contributory negligence" as a matter of law, in an action to recover for the death of an employé of defendant, it must be shown without substantial conflict either that deceased knew or was chargeable with knowledge of the danger and voluntarily exposed himself to it, or that his acts were such that fair-minded men could not draw different conclusions therefrom touching the existence of neglect on his part directly contributing to his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1089, 1090, 1092-1132; Dec. Dig. §§ 288, 289.*]

For other definitions, see Words and Phrases, vol. 1, pp. 589-591; vol. 2, pp. 1540-1547; vol. 8, pp. 7584, 7585, 7617.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. TRIAL (§ 178*)—MOTION FOR DIRECTED VERDICT—REVIEW OF EVIDENCE.

On a motion for directed verdict, the court must take that view of the evidence most favorable to the adverse party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

3. MASTER AND SERVANT (§§ 288, 289*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Plaintiff's husband, with three others, was loading and removing ore after a blast in defendant's copper mine, when he was killed by a large rock, which fell from a higher stope, which had not been worked for years. He was comparatively new at the work, but his companions were experienced miners. Ten minutes before the rock fell some fine pieces of rock, called "fines," had fallen, and, fearing a larger fall, which frequently followed, the men took shelter for a time, and then resumed work. *Held* that, in view of the opinion of the experienced miners that the danger was over for the time, it could not be said as a matter of law that deceased consciously assumed the risk, or that he was chargeable with contributory negligence, and that both such questions were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1089, 1090, 1092-1132; Dec. Dig. §§ 288, 289.*]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action at law by Nevada Gaddy against the Tennessee Copper Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Howard Cornick and Cornick, Frantz, McConnell & Seymour, all of Knoxville, Tenn., for plaintiff in error.

James B. Cox, of Knoxville, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This proceeding is to reverse a judgment recovered against the Copper Company by Nevada Gaddy as the widow of Thomas Gaddy. The suit was for alleged negligent injuries received by the husband which resulted in his death. Gaddy received his injuries while in the employ of the company and working in one of its copper mines. The acts of negligence alleged are, in substance: (1) That without the knowledge or fault of the deceased the company knowingly left a stope in an unsafe and dangerous condition, from which a rock of several tons in weight fell and rolled to another portion of the mine, where deceased was working, striking and fatally injuring him; (2) that the company neglected to prop and make secure the dangerous portions of such stope, by reason of which the injuries and death ensued without fault of the deceased. The case went to trial upon the general issue, and resulted in a verdict of \$6,000. The company moved for a directed verdict at the close of plaintiff's evidence, and again at the close of all the evidence, and both motions were overruled. The charge of the court below is not included in the record, nor was any exception taken to it.

[1] Two questions only are presented to this court: One of assumed risk, and the other of contributory negligence. In the absence of the charge, it will be presumed, not only that the company was negligent, but particularly that the jury was properly instructed upon the two questions brought here; and, indeed, the verdict and judgment must be regarded as conclusive of those questions, unless the pertinent evidence was not in conflict and simply tended to show either (1) that deceased knew or was chargeable with knowledge of the danger and voluntarily exposed himself to it (*Tex. & Pac. Ry. Co. v. Harvey*, 228 U. S. 319, 324, 33 Sup. Ct. 518, 57 L. Ed. 852; *Yazoo & Mississippi Valley Railroad Co. v. Wright*, 207 Fed. 281, decided by this court May 6, 1913); or (2) that the acts of deceased were such that fair-minded men could not draw different conclusions therefrom touching the existence of neglect on his part directly contributing to his injury (*Tex. & Pac. Ry. Co. v. Harvey*, *supra*, 228 U. S. at page 324, 33 Sup. Ct. at page 520, 57 L. Ed. 852).

[2] The inquiry thus comes to be whether, under the evidence adduced, it was open to the court below to determine these questions as mere matters of law. This is to be tested by the rules applicable to the motion to direct a verdict in favor of defendant made at the close of its evidence. On such a motion the plaintiff was entitled to have taken in her behalf the most favorable view of the evidence. *Hales v. Michigan Cent. R. Co.*, 200 Fed. 533, 537, 118 C. C. A. 627 (C. C. A. 6th Cir.); *Erie R. R. Co. v. Weber*, 207 Fed. 293, decided by this court June 3, 1913.

[3] There was evidence tending to show the following state of facts: Gaddy, a comparatively inexperienced miner, was at the time of receiving his injuries working in the mine at a depth of between 300 and 400 feet underground, and more than 100 feet below, though not directly under, the place from which the rock fell; and no mining had been done at that place for as much as two years. Gaddy was assisting to break up material previously blasted, containing copper ore, and loading and removing it upon a tram car to the shaft. He was working with three other persons in a place dimly lighted by four small lamps, one of which was hooked on each of their caps. They were under no duty to inspect either roof or walls of the mine. Besides, the angle of the stope was such as would under any circumstances have prevented them from seeing the place upon which the rock had rested. The blasting of ore was done at a level above that of the place where these men worked, and while they were at dinner. Upon their return on this day one or more of them, according to the custom, called to a foreman, who was then near the place of blasting, to know whether it had been finished. The foreman answered, "It is all over," which meant in this mine that it was safe to resume work. The men thereupon began their work, and in something over an hour later the rock fell. Their attention having shortly before the accident been aroused by the falling of some fine pieces of rock and dirt, called "fines," the men ran under a ledge some distance away, and remained there four or five minutes before returning. It seems that they all understood that the falling of fines generally, though not always, preceded a falling of heavier material, and consequently signified danger. The man in immediate charge of the tram car said, "Boys, let's get the car out." The men returned, and remained at the place something like five minutes before the rock fell. Thus about ten minutes elapsed between the falling of the fines and the falling of the rock.

It is insisted that the act of so returning was sufficient to charge the deceased both with the assumption of risk and contributory negligence. Some evidence was offered to the effect that there was a rule which required operatives upon the falling of fines not to resume work unless and until they notified the balkground foreman and received from him assurance that all was safe; but it is not at all clear that Gaddy had notice of this rule. True, the fact that the men placed themselves under a ledge immediately upon the falling of the fines implies that the deceased as well as the other men knew that this signified danger; and yet the three men other than Gaddy, who were much more experienced than he, demonstrated by their actions that in their judgment the falling of the fines in this instance was a false alarm. The falling of fines was not an invariable token of the falling of heavier material. The fact that as much time elapsed after the men returned as had passed during their stay under the ledge tends to vindicate the judgment of these miners that in this instance at least no other fall of material would occur. It is hard to see how a reviewing court can say as a matter of law that the opinions of these miners, especially of the three experienced men, signify that Gaddy consciously or impru-

dently assumed the risk, or that fair-minded men might not reach different conclusions touching the question of his alleged contributory negligence.

These questions were carefully considered by the learned trial judge in his opinion denying the motion for a new trial. Having had the advantage of seeing and hearing the witnesses at the trial and of estimating the value of their testimony, he said:

"I am furthermore of the opinion, especially in the light of Gaddy's own short experience in work of this kind, the temporary purpose for which they returned to work, and the conduct of the other men with him, that the verdict of the jury under the charge, which was unexcepted to, involving, in effect, a finding that neither assumption of risk nor contributory negligence had been established, is not so clearly and manifestly against the evidence or the weight of the evidence as to require it to be set aside under the rule stated by the Circuit Court of Appeals for this circuit in *Mt. Adams Ry. Co. v. Lowery*, 74 Fed. 463, 472 [20 C. C. A. 596], and *Felton v. Spiro*, 78 Fed. 576 [24 C. C. A. 321], especially as the court is always more reluctant to set aside a verdict when it is against the party having the burden of proof. *Cunningham v. Magoun*, 18 Pick. (Mass.) 13."

Upon the whole, we conclude that the case was rightly submitted to the jury. *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 65, 69, 3 C. C. A. 433 (C. C. A. 8th Cir.); *National Steel Co. v. Hore*, 155 Fed. 62, 65, 83 C. C. A. 578 (C. C. A. 6th Cir.); *Williams v. Bunker Hill & Sullivan Mining & C. Co.*, 200 Fed. 211, 215, 216, 118 C. C. A. 397 (C. C. A. 9th Cir.); *Yazoo & Mississippi Valley R. Co. v. Wright*, *supra*; *Texas & Pacific Ry. Co. v. Harvey*, *supra*.

The judgment below is affirmed, with costs.

STERLING PAPER CO. v. HAMEL.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913.)

No. 2,330.

1. MASTER AND SERVANT (§ 121*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DANGEROUS MACHINERY—VIOLATION OF STATUTORY REQUIREMENTS—"TAKE ORDINARY CARE AND MAKE SUCH SUITABLE PROVISIONS."

Act Ohio March 20, 1900 (94 Ohio Laws, p. 42; *Bates' Ann. St.* § 4364—89c), which requires factory owners to "take ordinary care and make such suitable provisions" as to prevent injury to persons who may come in contact with any such machinery or any part thereof," and in terms provides that such ordinary care and such suitable provisions shall include the boxing of all shafting when operating horizontally near floors, and the covering, cutting off, or countersinking of set-screws, imposes a nondelegable duty, and its violation constitutes negligence per se.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 121*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DANGEROUS MACHINERY—NEGLIGENT FAILURE TO PROTECT.

The failure of a paper company to cover a projecting set-screw on a revolving shaft near the floor in its mill, in the most direct way between the place where an employé worked and a steam valve necessary to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

operated in regulating the supply of steam to his machine, *held* a violation of such statute, which constituted negligence as matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

3. MASTER AND SERVANT (§ 297*)—ACTION FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

Where the question whether an employé knew of the existence of a set-screw by which he was injured was submitted to the jury, a verdict in his favor is conclusive that he did not have such knowledge and voluntarily assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. MASTER AND SERVANT (§ 282*)—ACTION FOR INJURY TO SERVANT—STATUTORY LIMITATION OF RECOVERY.

Act Ohio May 3, 1904 (97 Ohio Laws, p. 547; Bates' Ann. St. § 4238o—1), which limits the recovery by an employé injured by dangerous machinery to \$3,000, where he remained in the service with knowledge of the employer's omission to protect such machinery as required by statute, is applicable only to cases where the employé had such knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 997-999; Dec. Dig. § 282.*]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action at law by Louis Hamel against the Sterling Paper Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gottschall & Turner, of Dayton, Ohio, Kittredge, Wilby & Stimson and Joseph Wilby, all of Cincinnati, Ohio, and O. M. Gottschall, of Dayton, Ohio, for plaintiff in error.

Allen Andrews, Woodruff & Shelhorn, and Andrews, Harlan & Andrews, all of Hamilton, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was a suit for personal injuries, brought in the common pleas of Butler county, Ohio, and on the ground of diversity of citizenship removed to the court below. Hamel was severely injured while in the employ of the Paper Company as "back tender" of one of the machines in its factory. He received his injuries on the night of November 26, 1909. For the purpose of turning off the steam, Hamel attempted to reach a steam valve by stepping over a calender shaft revolving at a rate of 60 or 70 revolutions a minute, when the right leg of his trousers was caught by an exposed set-screw, which drew him astride the shaft. The company admitted by its answer that a set-screw was maintained in a coupling between the shaft and the calenders of the machine at which Hamel was working, that the set-screw was uncovered, and that it projected beyond the surface of the shafting and coupling. The defenses chiefly relied on in the answer—indeed, the only ones

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of importance as to nonliability—were of assumed risk and contributory negligence. The case was tried twice below, the first trial resulting in a verdict for plaintiff of \$5,000, which was set aside and a new trial awarded, and the second in a verdict of \$6,000; and from the judgment entered thereon the company prosecutes error.

By statute of Ohio (Act March 20, 1900; 94 O. L. 42; 2 Bates' Ann. Stat. [6th Ed.] § 4364—89c) such companies as defendant were required to—

“take ordinary care, and make such suitable provisions as to prevent injury to persons who may come in contact with any such machinery, or any part thereof; and such ordinary care and such suitable provisions shall include the casing or boxing of all shafting when operating horizontally near floors, * * * the covering, cutting off, or countersinking of * * * set-screws, and all parts of * * * shafting, or other revolving machinery, projecting unevenly from and beyond the surface of such revolving parts of such machinery. * * *”

Violation of any of the foregoing provisions is, by the next section of the act, made a fineable offense.

[1] It is not disputed that the set-screw, the exposure of which is admitted by the answer, was the one that caught Hamel's trousers. The court below ruled as matter of law that the company was guilty of negligence. Apart from a question presented by two requests of the company, which will be considered later, it is clear that the statutory duty so imposed upon the owner of a factory is not only specific, but is also of a nondelegable character (*National Fireproofing Co. v. Andrews*, 158 Fed. 294, 297, 85 C. C. A. 526 [C. C. A. 6th Cir.]); and it is settled in this court that the owner's violation of such a statute constitutes negligence per se (*Cincinnati, H. & D. R. Co. v. Van Horne*, 69 Fed. 139, 140, 16 C. C. A. 182; *Lake Erie & W. Ry. Co. v. Craig*, 73 Fed. 642, 643, 19 C. C. A. 631; *Naramore v. Cleveland, C., C. & St. L. Ry. Co.* [C. C.] 96 Fed. 298, 300; *Toledo, St. L. & W. R. Co. v. Kountz*, 168 Fed. 832, 838, 94 C. C. A. 244). See, also, *Krause v. Morgan*, 53 Ohio St. 26, 43, 40 N. E. 886.

[2] However, contention is made, under the two requests before alluded to, that the company did not violate the statute, because, in substance, the set-screw was not so located as to expose an employé to its danger while engaged in the usual and ordinary discharge of his duties, and, consequently, that the master was not bound in the exercise of ordinary care to anticipate such a danger as the one to which Hamel is said to have subjected himself.

It is important here to note the place within which Hamel was working at the time he discovered the necessity to turn off the steam. Accepting for this purpose the distances stated by the company's chief witness in that behalf, Hamel was within a space running east and west about 47 inches in length by about 22 inches in width, this space being bounded as follows: On the west by the calender shaft and coupling in question; on the east by the reel shaft; on the north by the calenders and reels, the outside surfaces of which were 36 inches apart, and between which paper was passing from the calenders to the reels; on the south by the calender and reel pulleys, between which were maintained a belt and an idler, the belt traveling

both ways between the pulleys. The steam valve was about 4 feet west of the calendar shaft. Thus the shortest and only direct way from the place within which Hamel was working to the steam valve was over the calendar shaft. It is further to be observed that, while there was conflict in the testimony as to the distance between the top of the calendar shaft and the floor at the time of the accident (due in part to an alleged change in its height between that time and the trial), yet the difference is between a claim of 18 to 20 inches on the one side and 26 inches on the other. The question of law thus presented is whether the admitted environment justified the company in maintaining the exposed set-screw in the coupling before pointed out. The exact place of the set-screw was in the collar or hub of the coupling; and this, as stated, was in the only direct line between the space where Hamel was at work and the steam valve.

Concededly the regulation of the flow of steam through this steam valve is an important feature in the manufacture of paper, and the consequent necessity of furnishing a safe way between the space mentioned and the valve is obvious. We have seen that "ordinary care," as defined by the statute, requires the master to "make such suitable provisions as to prevent injury to persons who may come in contact with any such machinery, or any part thereof." The statute does more; it in terms requires the master to cover, cut off, or counter-sink set-screws. Considering the employe's environment and the necessity to operate the valve, we feel bound to hold that the company was as a matter of law chargeable with knowledge that its employes would be likely to "come in contact" with this set-screw. It follows that this was such a violation of the statute as at once to warrant the instruction that the company was guilty of negligence and a denial of the two requests mentioned.

[3] It is next insisted that Hamel assumed the risk of the danger attending the exposure of the set-screw. This subject has been repeatedly considered by this court, and also quite recently; and we are satisfied that this defense rightly failed. Hamel began work at this place as a "back tender" on the evening of the very night on which he received his injuries. True, he had worked at this place in that capacity some two years before. He testified that he had no knowledge of the existence of the set-screw, either on the night of the injury or during his earlier employment. While there is conflict as to whether he was chargeable with knowledge of its presence, the jury, as stated, found in his favor; and the question of knowledge is concluded by such a verdict. *National Fireproofing Co. v. Andrews*, 158 Fed. 294, 296, 85 C. C. A. 526 (C. C. A. 6th Cir.). We are asked to reconsider the decision of this court in *Naramore v. Cleveland, C. & St. L. Ry. Co.*, supra; but neither the decision nor the well-known controversy that grew out of it has any relevancy to this feature of the present case. The court declared in that case that upon common-law principles the plaintiff would have been held to have assumed the risk of the danger there involved. This was upon the theory that, despite his denial, he was, under the evidence, chargeable with knowledge of the danger. The verdict of the jury was

against him, and the situation therefore was the exact reverse to the one in the instant case. It is not important here whether assumption of risk is a term, express or implied, of the contract of employment, or is based solely upon the maxim "*Volenti non fit injuria*." Upon either theory of the doctrine it is enough to say of the present case that the essential quality of consent on the part of Hamel was lacking. *Smith v. Baker & Sons* [1891] A. C. 325, 336, 337. It would be to deny the force of the verdict, to hold that Hamel either knew or was chargeable with knowledge of the danger and voluntarily exposed himself to it; indeed, the absence of conscious assumption is complete, and these features of the doctrine of assumption of risk are, of course, distinct from the principles governing the rule of contributory negligence. *Thomas v. Quartermaine*, 18 Q. B. D. (Court of Appeal) 685, 696, 697; *Wheeler v. Oak Harbor Head-Lining & Hoop Co.*, 126 Fed. 348, 351, 61 C. C. A. 250 (C. C. A. 6th Cir.); also decisions as to assumption of risk cited in *Yazoo & Miss. Val. Ry. Co. v. Wright*, 207 Fed. 281, decided by this court May 6, 1913; *Southern Ry. Co. v. Gadd*, 207 Fed. 277, decided by this court on the same day.

The assignments of error touching the subject of contributory negligence, as also those concerning Hamel's choice of an unsafe way in the presence of one or more safe ways to reach the steam cock, are answered by the general charge and the verdict; for the charge fairly included the company's requests in these respects and was as favorable as could justly be claimed. All of these requests were necessarily dependent upon Hamel's knowledge, actual or constructive, of the exposed set-screw; and, in view of the charge, prejudicial error cannot be ascribed to the denial of any of them.

[4] It is strongly urged that a recovery in excess of \$3,000 in a case like this is forbidden by a statute of Ohio; and several assignments of error are presented on this point. By an act approved May 3, 1904 (97 O. L. 547; section 42380—1, vol. 2 *Bates' Statutes* [6th Ed.]), it is provided:

"In any action brought by an employé, * * * against his employer, * * * to recover for personal injuries, when it shall appear that the injury was caused in whole or in part by the negligent omission of such employer to guard or protect his machinery or appliances, * * * in the manner required by any penal statute of the state, * * * the fact that such employé continued in said employment with knowledge of such omission, shall not operate as a defense, and in such action, if the jury find for the plaintiff, it may award such damages not exceeding (where death does not result) * * * the sum of three thousand dollars, as it may find proportioned to the pecuniary damages resulting from said injuries. * * *

It is to be observed that the limitation upon amount of recovery as fixed by this statute depends upon whether the employé "continued in said employment with knowledge" of his employer's "omission." Further, the court charged the jury:

"That if you find that the plaintiff had knowledge of the existence of the set-screw and continued in the employment of the defendant with that knowledge, the laws of Ohio limit the amount of recovery to such sum as the jury may award as pecuniary damages; * * * and in any event under the

laws of Ohio, if the plaintiff knew of the existence of the set-screw and continued in the employment, he cannot recover more than \$3,000."

This court, speaking through the present Mr. Justice Lurton, in *National Fireproofing Co. v. Andrews*, supra, 158 Fed. 296, 85 C. C. A. 526, touching a refusal of the court below to instruct the jury that it could not return a verdict for more than \$3,000 under this statute if it found that the plaintiff knew of the projecting set-screw, said:

"First. There was not the slightest evidence that the plaintiff had continued in service after knowledge that this set-screw did project contrary to the statute. Second. The court told the jury that, if they found that Andrews knew there was a projecting set-screw there, he would have no right to recover at all. This was more than defendant asked for, and of this it cannot complain. The verdict of the jury, under such a charge, conclusively establishes, for the purpose of this assignment of error, that Andrews did not continue in the service of defendant with knowledge that the statute had, in this particular, been disregarded."

We do not discover any decision of the Supreme Court of Ohio construing this portion of the statute. The cases of *Wagon Co. v. Gawronski*, 14 Ohio Cir. Ct. R. (N. S.) 449, and *Lee v. Standard Tool Co.*, Id. 540, which were affirmed by the Supreme Court without opinions and are now relied on by the company, do not sustain its contention. In the first case the employé remained at his work with knowledge that the machine was not guarded as required by law, and the recovery was only \$2,000; in the second, the Circuit Court said (page 542):

"The amount of recovery in such cases is indeed limited to \$3,000 for one having knowledge of the absence of statutory safeguards."

For these reasons we must hold that the decision of our own court in the *Andrews Case*, supra, where a judgment upon a verdict of \$5,000 was affirmed, rules this branch of the present case.

The motions in effect to require plaintiff to state and elect whether recovery was sought under the statute or under the common law, as well as the motions to direct a verdict for the defendant, were without merit; and the assignments must be overruled which complain of certain hypotheses under which the case was submitted to the jury—that is, instructing the jury as to the applicable law according as the jury might find certain specified facts to exist or not, because that course was seemingly necessary, and in principle not unusual. It is not necessary to pass upon the remaining assignments of error. We have attentively considered all of them, and have found no error.

The judgment must therefore be affirmed, with costs.

WORTHINGTON v. ELMER.

(Circuit Court of Appeals, Sixth Circuit. July 22, 1913.)

No. 2,335.

1. TRIAL (§ 178*)—MOTION FOR DIRECTION OF VERDICT—REVIEW OF EVIDENCE.

On a defendant's motion to direct a verdict, it is the duty of the court to take the most favorable view of the plaintiff's evidence and from that evidence and the inferences reasonably and justifiably to be drawn therefrom determine whether or not under the law a verdict might be found for the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

2. MASTER AND SERVANT (§ 276*)—ACTION FOR DEATH OF SERVANT—INFERENCE FROM EVIDENCE.

Where a brakeman, who was killed in a collision between cars which were being switched in the yards, was last seen on one of the two moving cars, upon which it was his duty to set the brakes, and the nearest brake on the next car was found to be defective, it is a fair inference, in the absence of any evidence to the contrary, that he continued in the performance of his duty and attempted to set the defective brake.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

3. MASTER AND SERVANT (§ 205*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

Aside from any statutory requirement, it is the duty of a railroad company to furnish cars with brakes free from defects discoverable by the exercise of ordinary care, and an employé using the same has a right to rely on this duty being performed and does not assume the risk arising from such a discoverable defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. APPEAL AND ERROR (§ 977*)—REVIEW—MOTION FOR NEW TRIAL.

A showing made on a motion for new trial that the widow, for the death of whose husband the action was brought, had remarried, and the fact was concealed, was addressed to the discretion of the court, and its decision is not reviewable by an appellate court, especially as the remarriage could not have been shown in mitigation of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

In Error to the District Court of the United States for the Western Division of the Northern District of Ohio; William L. Day, Judge.

Action at law by D. Theodore Elmer, administrator of the estate of Clarence W. Rice, deceased, against B. A. Worthington, as receiver of the Wheeling & Lake Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The railroad company, through its receiver, prosecutes error to a judgment entered upon a verdict recovered below by Elmer, as administrator of the estate of the decedent Rice. The action was brought under the Employer's Liability Act for the benefit of decedent's surviving widow and child. Rice met his death on the night of September 19, 1910, while in the employ of the company as a brakeman, called "fieldman," in the railroad yard at Toledo. He was one of a crew then engaged in making up a train by switching cars

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

over a lead track to and from one or more of its intersecting tracks, which were numbered from 1 to 8. The particular operation which resulted in Rice's death involved the "kicking," as it is called, of two cars over the lead track from a point near track No. 2 to track No. 8; the intervening switches having been lined up for that purpose. It is admitted that Rice's employment was upon cars, including the two in question, which were used at the time in carrying interstate commerce.

The grounds of recovery alleged in the petition were, in substance, that the kicking movement of the two cars was made at an excessive speed and so as to bring them into contact with other cars standing on the lead track near track No. 8; that these two cars were not "provided with good and sufficient brakes" to control their movement; and that the brake on one of the cars was defective (that is, the ratchet wheel and dog were loose, and so revolved upon the brake staff as to prevent Rice from setting the brake). It was further in effect alleged that a custom prevailed in the yards which required the fieldman to board one of a cut of cars, such as these, while in motion, for the purpose of preventing them from coming into contact with cars standing near the place designed for the moving cars. Issue was joined by answer and reply. The answer admitted the allegations of the petition, except those of negligence, and alleged that: " * * * If it is shown that the defendant was guilty of any of the negligence charged against him (the receiver), then defendant says that said decedent at the time of said accident so carelessly and negligently performed his duties in connection with the stopping of said cars as to directly contribute to the said accident and his death."

Rice's death was brought about in this way: When the two cars were thrust forward by the engine they were unattended, and as they approached track No. 3 Rice ran to meet them, passed the first one, a box car, and boarded the second one, an oil tank car. He was seen working the brake of the oil car, but was not seen thereafter until his body was discovered between the rails of the lead track at No. 7. His lantern was seen on the platform of the oil car while he was operating the brake, and the disappearance of the light of the lantern, together with the sound caused by the impact of this cut of cars with cars standing further along on the lead track, led to the discovery of the body at the point stated. The standing cars were four gondolas; and they were driven to and along track No. 8 about 100 feet, when they were stopped by cars standing on that track. The distances between the switches connecting tracks Nos. 1 to 8 with the lead track are each 100 feet; the distance between the place where Rice boarded the oil car and the place of collision was about 400 feet; and the effect of the impact was to carry all the cars some 200 feet further. However, the grade ascended as far as track No. 6 and descended thence to the place where the cars were stopped, though neither the percentage of ascent or descent is given.

On the morning following the injury, two inspectors of the company found the set screw which fastens the ratchet wheel to the brake staff of the box car loose, so that the brake could not be set to stay. This was at the end of the box car which adjoined the brake staff end of the oil car. It was also found that the knuckle of the lock of the coupler at the opposite end of the box car was bent. The remaining necessary facts appear in the opinion.

C. A. Seiders, of Toledo, Ohio, for plaintiff in error.

C. A. Thatcher, of Toledo, Ohio (G. B. Keppel, of Toledo, Ohio, of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The first assignment of error is based upon the denial of a motion made at the close of all the evidence, without specifying any distinct ground, to direct a verdict for the company.

1. Any consideration of the facts contained in the statement will show that the decedent, the fieldman, was confronted at night, in the yard of the company, with the duty of boarding one of two moving cars for the purpose of preventing them from colliding with cars standing some 400 feet beyond. This duty grew out of a custom so to operate cars in making up trains. The evidence tends to show that the cars were moving at an unusually rapid rate of speed; that, if the brakes of both cars had been in good condition, two such cars moving at a rate of eight to ten miles an hour (and the evidence as a whole does not tend to show they were going that fast) could be stopped in about five car lengths; and that the brake of one of the cars was in such disrepair that it could not be effectively operated. Whatever may be said of the opportunity of decedent, either before or at the time he boarded the oil car, to estimate the speed of the cars and the feasibility of stopping them (despite their unusual speed) within the distance available, his efficiency and good judgment were attested: (1) By his success in mounting the oil car; and (2) by the proof that the cars could have been controlled if the brake of each had been in order. There is not the slightest evidence that he had any reason to suspect that the brake of either of the cars was out of repair.

However, it is urged that "there is no evidence that Rice was using the defective brake." He was seen operating the brake of the oil car but was not seen alive thereafter. The defective brake of the box car was immediately in front of him when he was setting the brake of the oil car, and his lantern stood close to him on the platform. The record is silent as to his movements between the time of setting the oil car brake and the collision. It is hard to conceive, in view of the distance between the point at which he boarded the car and the location of the standing cars, in connection with the close proximity of the brake on the box car, that there was not time for an experienced brakeman both to set the oil car brake and try to set the other brake. Everything that he was seen to do was in the prompt performance of acknowledged duty. Is it to be said, then, that he failed in so important a matter as at least to try to use the brake of the box car? That was the very next and the last step to be taken in the discharge of his duty; and his own safety as well as that of both the moving and standing cars depended upon his performance of that duty.

[1] It is settled in this court that on the defendant's motion to direct it was the duty of the court to take the most favorable view of the plaintiff's evidence (*Erie R. R. v. Weber & Kraft*, 207 Fed. 293, decided June 3, 1913; *Tennessee Copper Co. v. Nevada Gaddy*, 207 Fed. 297, decided on the same day), "and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found" for the plaintiff (*Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, 74 Fed. at page 477, 20 C. C. A. 596, by the present Mr. Justice Lurton; see, also, *L. & N. R. R. Co. v. Bell*, 206 Fed. 395, decided by this court June 30, 1913).

[2] From the facts just pointed out and the most natural and reasonable inference deducible therefrom, it was entirely justifiable to

conclude that Rice continued in the performance of his duty respecting the brake on the box car between the time he was seen setting the opposite brake and the collision. As was said in *Maguire v. Fitchburg Railroad*, 146 Mass. 379, 15 N. E. 904, respecting the evidential effect of finding a deceased employé's body at a place where his duty had called him:

"The jury might well have believed that he was on the track in the performance of his duty and in the exercise of all the care to be expected of a prudent man."

See, also, *Caron v. Boston & Albany Railroad*, 164 Mass. 523, 525, 526, 42 N. E. 112.

This is in principle like the presumption of performance of duty which, in the absence of evidence to the contrary, is indulged in favor of one who is injured at a railroad crossing; that is, that he stopped, looked, and listened before attempting to cross. *Baltimore & Potomac R. R. v. Landrigan*, 191 U. S. 461, 472, 474, 24 Sup. Ct. 137, 48 L. Ed. 262; *P., C., C. & St. L. Ry. Co. v. Scherer*, 205 Fed. 356, decided by this court May 6, 1913; *Gates v. Beebe*, 170 Mich. 107, 112, 135 N. W. 934. The principle so alluded to is applicable under other and varying circumstances, where there is an absence, as here, of direct testimony on the subject in dispute. *Prince v. Lowell Electric Light Corp.*, 201 Mass. 276, 281, 87 N. E. 558; *Brown v. Coal Co.*, 143 Iowa, 662, 673, 120 N. W. 732, 28 L. R. A. (N. S.) 1260; *Gilbert v. Ann Arbor R. Co.*, 161 Mich. 73, 79, 125 N. W. 745. It follows that the motion to direct was rightly overruled.

[3] 2. Although the defense of assumption of risk is not set up in the answer, it appears to have been considered in the trial court, and it has been strenuously pressed upon our attention. We infer that counsel was permitted to present this defense at the trial, under two requests which were refused and upon which error is assigned. In one of these requests the court was asked to instruct the jury that a verdict could not be rendered on account of a defective brake, because there was "no evidence that Rice was using the defective brake"; and in the other that the verdict must be for the defendant "if the evidence shows that it was customary to kick cars at that place at a speed as great or greater than was used at the time of this accident." Thus it was sought to have the cars treated as having been in all respects in good repair and as running at a speed not unusual; and so it was claimed that, under the custom of the yard, Rice assumed the risk attending the movement and stoppage of these particular cars. The general charge upon this subject was as favorable to the company as its receiver could reasonably ask; and the verdict of the jury forbids any claim, indeed none is made, that Rice had any knowledge, either actual or constructive, of the defective brake. The duty to furnish suitable appliances, like brakes, is the duty of the master (*Texas & Pacific Railway v. Archibald*, 170 U. S. 665, 669, 670, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Kreigh v. Westinghouse Co.*, 214 U. S. 249, 255, 257, 29 Sup. Ct. 619, 53 L. Ed. 984); and since no effort was made by defendant to show that it had used any diligence in the matter of keeping this brake in order, and since, indeed, defendant

seems nowhere to have claimed or presented the theory that there was insufficient proof of its negligence as to this defect it was not improper for the jury to conclude that the condition of the brake was due to some act or omission of one or more of the agents or employes of the carrier, for which the Employer's Liability Act distinctly renders the carrier liable. Act April 22, 1908, c. 149, 35 Stat. L. pt. 1, p. 65 (U. S. Comp. St. Supp. 1911, p. 1322); *Southern Railway Co. v. Gadd*, 207 Fed. 277, decided by this court May 6, 1913; *Central R. Co. of New Jersey v. Young*, 200 Fed. 359, 366, 118 C. C. A. 465 (C. C. A. 3d Cir.). Rice was therefore entitled to assume that the brake on each car was in good condition (*Kreigh v. Westinghouse Co.*, supra, 214 U. S. at pages 255, 256, 29 Sup. Ct. 619, 53 L. Ed. 984; *Texas & Pacific Railway v. Archibald*, supra, 170 U. S. at page 673, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Yazoo & M. V. R. Co. v. Long*, 201 Fed. 881, 884 [C. C. A. 6th Cir.]; *Alaska Pacific S. S. Co. v. Egan*, 202 Fed. 867, 869 [C. C. A. 9th Cir.]); and, considering only familiar principles of the common law (apart from the mooted question as to what extent the doctrine of assumed risk is annulled by the Employer's Liability Act), the danger attendant upon Rice's efforts to control and stop the cars was not one of the risks he assumed under his employment. As the present Chief Justice White said in *Texas & Pacific Railway v. Archibald*, supra, 170 U. S. at pages 671, 672, 18 Sup. Ct. 779, 42 L. Ed. 1188, respecting a rule of general application and not, we think, dependent upon any statutory requirement:

"The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employe has a right to rely upon this duty being performed, and that, whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employe with respect to appliances furnished."

See, also, *Sterling Paper Co. v. Hamel*, 207 Fed. 300, and decisions there cited, decided by this court June 30, 1913.

There is to be added the unusual force employed in kicking the cars and so causing excessive speed in their movement. The effect of such initial force and speed was disclosed by the proved results of the impact of the collision with standing cars, pointed out in the statement; and this is not in any wise affected by the defense of contributory negligence, for, aside from the negative effect of the verdict as respects such negligence, no assignment was made to the court's charge in that behalf. We cannot but conclude, from this and the other matters stated, that the jury was warranted in finding, as its verdict imports, both that the company was negligent and that there was causal relation between its negligence and Rice's death.

[4] 3. The last assignment concerns a discovery made after trial that, between the commencement of the suit and the trial, Rice's widow was married. However, this fact was subsequently called to the attention of the trial judge and also considered on an affidavit upon the motion for new trial; and we think that the question of concealment of marriage addressed itself to the discretion of the court below and so is not reviewable here. *Big Brushy Coal & Coke Co.*

v. Williams, 176 Fed. 529, at page 533, 99 C. C. A. 102, and cases cited (C. C. A. 6th Cir.). The controlling feature of such a question is that the marriage would not have been admissible in mitigation of damages. Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Georgia Railroad & Banking Co. v. Garr, 57 Ga. 277, 280, 24 Am. Rep. 492; Consolidated Stone Co. v. Morgan, Adm'r, 160 Ind. 241, 247, 66 N. E. 696; Philpott v. Pennsylvania Ry. Co., 175 Pa. 570, 573, 34 Atl. 856

It may be noted that while the cause of action arose after the amendment of April 5, 1910, adding section 9 to the Employer's Liability Act (Act April 5, 1910, c. 143, 36 Stat. L. 291 [U. S. Comp. St. Supp. 1911, p. 1325]), and while the court told the jury that the matter of distribution of any recovery belonged to the county probate court, which was contrary to the rule laid down in Gulf, Colorado, etc., Ry. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, yet no allusion to the effect of the amendment or to that decision appears to have been made below, and of course no assignment of error in respect of either is presented here.

The assignments must be overruled, and the judgment of the court below affirmed, with costs.

ILLINOIS CENT. R. CO. et al. v. PORTER.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913.)

No. 2,337.

1. DEATH (§ 52*)—EMPLOYER'S LIABILITY ACT—DEATH—DECLARATION.

Under Act April 5, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325), amending Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65, by adding section 9, providing that a right of action given an injured employé should survive to his personal representative for the benefit of the same relatives for whose pecuniary loss recovery is provided by section 2, a declaration under such act for the alleged wrongful death of an employé, for the benefit of his parents or next of kin, should allege that they suffered pecuniary loss by reason of his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 69; Dec. Dig. § 52.*]

2. APPEAL AND ERROR (§ 193*)—REVIEW—QUESTIONS NOT RAISED AT TRIAL—EMPLOYER'S LIABILITY ACT—DECLARATION—ALLEGATION OF PECUNIARY LOSS.

Where, in an action for death of an employé, under Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325), by adding section 9, for the benefit of his parents or next of kin, the declaration failed to contain an averment of pecuniary loss, but no objection was taken on that ground by demurrer or at the trial, and no motion was made in arrest of judgment for that reason, and the evidence in fact showed pecuniary loss to decedent's father, the defect was not fatal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MASTER AND SERVANT (§ 288*)—DEATH OF SERVANT—FELLOW SERVANTS—
NEGLIGENCE—ASSUMED RISK.

Decedent, with fellow truckmen, was engaged in loading interstate freight from a warehouse into one of defendant's cars. As decedent was about to enter the car with his truck, he encountered a truck inside the car about to come out, and in order to avoid collision swung his truck to one side off the apron extending from the warehouse platform to the car, and stood in the warehouse, behind the doorway of the car, practically against its side. While in this position a fellow truckman, wheeling a heavy hogshead coming at full speed, pushed him against the side of the car, causing injuries from which decedent subsequently died. *Held*, that evidence that the work was being done at the time and in the usual and ordinary way, was not proof that the negligent conduct of decedent's fellow truckman was the usual and ordinary method of doing the business, and hence decedent did not assume the risk thereof as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. COMMERCE (§ 27*)—RAILROADS—EMPLOYER'S LIABILITY ACT.

A truckman, employed by a railroad company to wheel interstate freight from a warehouse into a car, to be transported in interstate commerce, injured by being crushed against the side of the car by the negligence of another truckman, *held* engaged in interstate commerce, within Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), imposing liability on interstate railroads for injuries to employes so engaged, etc.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

5. NEGLIGENCE (§ 101*)—CONTRIBUTORY NEGLIGENCE—REDUCTION OF DAMAGES.

In an action for death of an employé, engaged in interstate commerce, under Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), the court properly charged that only such contributory negligence of decedent could be considered by the jury in reduction of the damages as proximately contributed to the injury, since under the act the negligence of the employé, in order to reduce the recovery, must be "causal."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101;* Master and Servant, Cent. Dig. §§ 665, 672.]

6. MASTER AND SERVANT (§ 291*)—INSTRUCTIONS—BURDEN OF PROOF.

Where, in an action for death of an employé from alleged injuries sustained through the negligence of a fellow servant, there was evidence that he had also sustained an injury the day before, but the court explicitly charged that there could be no recovery for any injury occurring on the previous day, and that he could not recover unless the preponderance of the evidence supported an allegation that he was injured through the negligence of a fellow truckman on the day in question, it was not error to refuse to charge that, if the evidence left the case in doubt as to which accident caused decedent's death, no recovery could be had; nor was the giving of an instruction placing on defendants the burden of proving the causal relation of the accident of the preceding day and decedent's death misleading.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. WITNESSES (§ 258*)—REFRESHING RECOLLECTION—DECLARATIONS OF DECEDENT.

Where, in an action for death, a physician, who had taken decedent's statement relating to the accident, and who was permitted to read what he had written at the time of the interview, including decedent's statement that the cause of the injury was the "truck fell on me," the court properly excluded testimony of further conversations between the physician and decedent as to the manner of the injury, where the physician had no recollection, independent of the writing, of the exact words that decedent said about the accident, and was able only to rely on his custom of writing down all that was said, and of the absence from the written statement of any mention of another injury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 887, 893, 895, 896; Dec. Dig. § 258.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by James W. Porter, as administrator of the estate of Griff Barton, deceased, against the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Fitzhugh & Biggs, of Memphis, Tenn. (Chas. N. Burch, of Memphis, Tenn., of counsel), for plaintiffs in error.

Anderson & Crabtree, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This suit was brought to recover damages for negligent injuries resulting in the death of decedent, Griff Barton, while engaged as a trucker in loading freight into a car for transportation in interstate commerce. The negligence alleged is that of a fellow servant of deceased, also a trucker, engaged in loading the same car, and consisted in carelessly running a heavily loaded truck against decedent and crushing him against the side of the car. The declaration was demurred to as showing on its face that decedent's injuries were due to the negligence of his fellow servant. The demurrer was overruled, and pleas of not guilty and contributory negligence were filed. There was trial to a jury, and verdict and judgment for plaintiff.

[1] 1. There was no error in overruling the demurrer. The declaration stated a case under the Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), unless in failing to allege pecuniary injury to the next of kin. Under that act the negligence of decedent's fellow servant was the negligence of defendant. The declaration alleged that deceased left a father, two sisters, and a brother, all of whom were named. The natural inference would be that suit was brought for their benefit. The cause of action arose since the 1910 amendment (adding section 9) to the Employer's Liability Act (Act April 5, 1910, c. 143, § 2, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1325]), by which amendment the right of action given the injured employé was made to sur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rép'r Indexes

vive to his personal representative for the benefit of the same relatives for whose pecuniary loss recovery is provided by section 2 of the act. It is true that previous to that amendment recovery was limited to compensating such relatives as are shown to have sustained pecuniary loss by the death (*Mich. Central R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417; *American R. Co. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456), and that the apportionment of damages should be made by the jury (*Gulf, Colorado, etc., R. Co. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785); and we have held in such case that where parents or next of kin are beneficiaries it is necessary that the declaration contain an averment of pecuniary loss (*Garrett v. Louisville & Nashville R. Co.*, 197 Fed. 715, 722, 117 C. C. A. 109). Yet, whatever may be the effect of the amendment of 1910 (a question we are not called upon to consider, in view of the theory on which the case was tried below and the fact that no error is assigned upon the instructions as to the measure of damages), and assuming, for the purposes only of this opinion, that the rules above stated would apply to the surviving right of action of deceased, we think the defect urged was not fatal.

[2] The objection that pecuniary injury to one or more of the relatives named was not alleged was not raised either by demurrer or upon the trial. Had the objection been so raised, the declaration would have been readily amendable. No motion in arrest of judgment was made; but, had it been made, the motion would not have been good. The point under consideration appears to have first occurred to counsel after the decision of the Supreme Court in the McGinnis Case. As a matter of fact, the testimony tended to show pecuniary injury to decedent's father. While the measure of damages was not confined to such pecuniary injury, no error is assigned in this respect. The suit was brought by the only party plaintiff who could recover for the death of deceased, and the recovery barred further action for the same cause. We find nothing to the contrary of this conclusion in the Tennessee cases cited,¹ or in the decision of this court in *Atlanta, etc., Ry. Co. v. Hooper*, 92 Fed. 820, 35 C. C. A. 24. We have not here a case of total failure to state the existence of statutory beneficiaries.

[3] 2. In loading the car in question the trucks were run over an iron apron extending from the floor of the freight warehouse to and upon the floor of the car, thus covering whatever distance and inequality might exist between the floors of the car and warehouse. A turn had to be made by the trucker just before crossing the apron. Several truckers were employed at the time in loading the car. The testimony tended to show that, as deceased was about to enter the car with his truck, he encountered a trucker inside the car about to come out, as we assume from the testimony; that, in order to avoid

¹ *Railway Co. v. Lilly*, 90 Tenn. 563, 18 S. W. 243; *Railroad Co. v. Pitt*, 91 Tenn. 86, 90, 18 S. W. 118; *Love v. Southern Railway Co.*, 108 Tenn. 104, 108, 65 S. W. 475, 55 L. R. A. 471; *Railroad Co. v. Maxwell*, 113 Tenn. 464, 473, 82 S. W. 1137.

collision with the trucker in the car, decedent swung his truck to one side, got off the apron, and stood in the warehouse, beyond the doorway of the car, and practically against its side; that while decedent was in this position a fellow truckman, wheeling a heavy hogshead and coming at full speed, pushed his truck against decedent, crushing him against the side of the car. The evidence was sufficient to support a conclusion that the fellow truckman negligently collided with decedent. Upon cross-examination, an eyewitness to the collision gave an affirmative answer to the question:

"And what was going on at this time was just the usual and ordinary way that the business was operated there?"

Also this testimony was given on cross-examination:

"Q. When they are trucking there, carrying freight, several of them, into the cars, why, they are in the habit of taking these trucks into it, when others are in the way of the car, just like they were doing this time? I say they were going back and forth over this apron all the time? A. Yes, sir. Q. This was just exactly like it was under ordinary circumstances, usual and ordinary way of doing it? A. Yes, sir."

The denial of a motion for directed verdict is assigned as error, on the ground that the risk which resulted in decedent's injuries was the usual and ordinary risk incident to the method of employment, and that the assumption of such risk is not abrogated by the federal Employer's Liability Act. There was no error in refusing a peremptory instruction. In *Southern Ry. Co. v. Gadd*, 207 Fed. 277 (decided May 6, 1913), we held that even at common law the employé did not assume the risk of the employer's negligence from an unusual and unexpected method of operation; that is to say, not incidental to the ordinary method. Evidence that the work was being done at the time in question "in the usual and ordinary way" was not evidence that negligent conduct such as charged in this case was the usual and ordinary method of doing the business. The natural inference would be that such negligence of a fellow trucker was outside the usual and expected. The risk of such negligence was not, in our opinion, assumed by decedent, and this without reference to any construction of the Employer's Liability Act. The defendant's requests based upon the theory of such assumption of risk were, we think, properly refused, as not supported by a proper construction of the testimony in that respect.

[4] 3. It was not error to refuse to instruct the jury that deceased was not at the time of his injury engaged in interstate commerce. The recent decisions of the Supreme Court in *Pedersen v. Delaware, Lackawanna & Western R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, and *St. Louis, San Francisco & Texas R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, are decisive of this question. In the *Pedersen* Case the plaintiff was an iron worker employed by the railway company in the alteration and repair of bridges and tracks. While walking across a bridge, on his way to another bridge to be repaired, and carrying bolts and rivets to be used for such repair, he was run down and injured by an intrastate passenger train through the negligence of its engineer. Both bridges

were used in both intrastate and interstate commerce. It was held that there was evidence to sustain a finding that the railroad was negligent, and that the plaintiff was employed by it in interstate commerce. In the Seale Case a yard clerk, whose duties were to examine incoming and outgoing trains, to make a record of the numbers and initials on the cars, to inspect and make a record of the seals on the car doors and check the cars with the conductor's list, and to put cards or labels on the cars to guide the switching crews in breaking up incoming trains and making up outgoing trains, his duties relating to both intrastate and interstate traffic, was held to be engaged in interstate commerce while on his way to the performance of his duties through the yards to one of the tracks therein to meet an incoming train from another state.

In the instant case the deceased was actually loading interstate freight into a car for interstate transportation. Under the holding in the Pedersen Case, it would be immaterial whether the fellow trucker whose negligence caused the death was or was not engaged in interstate commerce.

[5] 4. The charge to the jury is criticised as limiting the reduction of damages attributable to the negligence of the deceased to such negligence as proximately contributed to the injury. It is said that under the practice in Tennessee in cases where the contributory negligence does not defeat recovery, but merely reduces damages, any negligence of the person injured which even remotely contributes to the injury is to be taken into account. We need not stop to consider the scope of the Tennessee decisions invoked. They are not binding upon our construction of this federal statute. It is the established rule in the federal courts that contributory negligence, to defeat recovery, must directly and proximately contribute to the injury. We content ourselves with calling attention to the decisions of this court in *Coney Island v. Dennon*, 149 Fed. 687, 693, 79 C. C. A. 375, and *Toledo, St. Louis & Western R. Co. v. Kountz*, 168 Fed. 832, 840, 94 C. C. A. 244. We see no logical reason for a different view under the Employer's Liability Act. Under that act the negligence of the employé must, in order to reduce recovery, be "causal." The purpose of the rule of damages provided is, as said by Mr. Justice Van Devanter, in the recent case of *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096:

"To abrogate the common-law rule completely exonerating the carrier from liability in such a case, and substitute a new rule confining the exoneration to a proportionate part of the damage corresponding to the amount of negligence attributable to the employé."

In the Earnest Case it was pointed out that a comparison of the employé's negligence should be made, not with that of the defendant, but with "the entire negligence attributable to both." In the instant case we pass by that question as not specifically presented.

[6] 5. The accident for which recovery was had occurred on May 24th. There was evidence that on the previous day deceased was injured by the falling upon him of his own loaded truck. It is now urged that recovery should not have been permitted, because the

proof did not sufficiently show to which accident the death was attributable. Complaint is also made of the refusal to give a requested instruction that, if the evidence left the case in doubt as to which accident was the cause of death, no recovery could be had, as well as of the giving of an instruction said to have put upon defendants the burden of proof as to the causal relation of the accident of the 23d; the instruction being, in effect, that if the jury believed "from the greater weight of this testimony" that the death was caused by the accident of the 23d the plaintiff could not recover, because he had not sued for negligence occurring on the 23d. The charge is also said to have held defendants responsible for the entire damage, provided the accident of the 24th proximately contributed to the death. We think these criticisms without merit. There was ample evidence to sustain a finding that the accident of the 24th caused the death. The jury was sufficiently instructed that recovery could be had only on account of the injury of that day. After exceptions had been taken to the charge, the jury was instructed that there could be no recovery for an injury occurring on the 23d, and that the only ground of negligence alleged is that of the fellow truckman in catching and crushing decedent against the car and platform, and that there could be no recovery in the case unless the preponderance of evidence supported that allegation. We think the jury could not well have been misled by anything which had previously been said regarding the burden of proof as to the injury of the 23d.

[7] On May 25th deceased gave the company's physician a statement relating to the accident, which was taken down in writing. Complaint is made of the exclusion of certain offered testimony on the part of the physician, especially to the effect that deceased did not mention the accident of the 24th. The witness was allowed to read what he had written at the time of the interview with deceased on the 25th, including the statement that the cause of the injury stated was the "truck fell on me." The court properly excluded testimony of further conversations between the physician and deceased as to the manner of the injury, for it appeared that the witness had no recollection (independent of the paper) of the "exact words that he [deceased] said about the accident," and apparently was able to rely only on his custom of writing down all that was said, and on the absence from the written statement of mention of any other injury.

We have examined all the errors presented. We find no reversible error in the record, and the judgment of the District Court is affirmed, with costs.

YOUNG v. ALLEN et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913.)

No. 2,472.

1. FRAUDULENT CONVEYANCES (§ 95*)—REAL PROPERTY—EQUITABLE INTEREST—ATTACK BY HUSBAND'S CREDITORS.

Where title to land purchased with the funds of a wife is taken in the name of the husband, the equitable interest or estate of the wife under the Kentucky law is not open to attack by the husband's creditors, who have not been misled or defrauded by any voluntary act of hers, and who have failed to assert their claim before the completion of her legal title by conveyance from the husband to her.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 243-288; Dec. Dig. § 95.*]

2. BANKRUPTCY (§ 181*)—FRAUDULENT CONVEYANCE—VACATION—CONVEYANCE TO WIFE—RESULTING TRUST.

Ky. St. § 2353, provides that, when a deed shall be made to one person and the consideration shall be paid by another, no trust shall result in favor of the latter, except where the grantee takes a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person. *Held*, that where the wives of bankrupts furnished the funds with which real estate was purchased in August, 1905, and both the wives testified that they never saw the deed which conveyed the land to the bankrupts, and until shortly before the execution of a conveyance of the land by the bankrupts to them on March 18, 1911, they did not know that the conveyance had been made to the bankrupts, instead of to themselves, and it was also shown that when the original deed was made the bankrupts promised immediately to reconvey the land to their wives, such reconveyance, though made within a month before bankruptcy intervened, was not fraudulent, nor subject to vacation by the bankrupts' trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 271, 273, 274; Dec. Dig. § 181.*]

3. HUSBAND AND WIFE (§ 25*)—KNOWLEDGE OF HUSBAND—ADVERSE INTEREST—IMPUTATION TO WIFE.

Where the bankrupts improperly took title in their own name to certain land purchased with the funds of their wives, without the wives' knowledge or consent, the bankrupts' interest to conceal the facts prevented their knowledge from being imputed to their wives.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148-151, 153, 154, 525; Dec. Dig. § 25.*]

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Action by S. M. Young, as trustee in bankruptcy of the estates of Joseph T. Allen and Daniel C. Lewis, individually and as partners under the firm name of Allen & Lewis, against Ethel M. Allen and Eunice H. Lewis. Judgment for defendants, and plaintiff appeals. Affirmed.

This was a plenary suit to set aside a conveyance (bearing date March 18, 1911, and properly recorded) from the bankrupts to the defendants, the wives of the bankrupts, of an undivided one-half interest in certain lands, and to recover the rents and profits accrued, on the grounds that the deed was without consideration and given and received in consummation of a fraudulent scheme to hinder, delay, and defraud the creditors of the bankrupts. April 16, 1911, Joseph T. Allen and Daniel C. Lewis, individually and as partners

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

composing the firm of Allen & Lewis, were adjudicated voluntary bankrupts. On May 8th complainant was appointed and qualified as trustee of both the individual and partnership estates. It was agreed that the estates are insufficient to pay in full either the individual or firm creditors. No jurisdictional question is raised, as plainly it could not be, because the bankruptcy proceeding was commenced after the amendment in 1910 of section 23 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], as amended by Act June 25, 1910, c. 412, § 7, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1499]). 1 Loveland on Bankr. (4th Ed.) 57; 2 Loveland on Bankr. (4th Ed.) § 536.

The land in dispute is comprised within 1,250 acres situated in Cumberland county, Ky., which belonged to the father of the defendants, Dr. W. I. Hutchens, who died intestate October 23, 1902. His widow and four children survive him. The dower interest of the former was set apart to her in lands other than the 1,250 acres mentioned, and the four children inherited that tract as tenants in common. August 15, 1905, two of the heirs—Mattie J. Carter (formerly Hutchens) and her husband, and W. L. Hutchens and wife—conveyed the undivided interest now in dispute to the bankrupts, and the deed was properly recorded November 3, 1905. Issue was joined by answer and replication. The defense in substance was that the deed last mentioned was given in pursuance of a purchase made by the defendants, Ethel M. Allen (formerly Hutchens) and Eunice H. Lewis (formerly Hutchens), of the undivided one-fourth interest of their sister and brother respectively in the 1,250-acre tract, but that through mistake of the draftsman of the deed, if not through fraud, the names of the husbands of the defendants were written in the deed as grantees; that the consideration paid to the grantors was money belonging to the defendants; that, although the defendants were not present at the time of the execution and delivery of the deed, this mistake was then observed by those present, and the husbands promised that it should be rectified; but that the defendants did not discover the error until shortly before the deed in dispute was executed and delivered to them by their husbands, the bankrupts. The decree below was in favor of the defendants, and the trustee appealed.

Duffin, Sapinsky & Duffin, of Louisville, Ky., and J. O. Ewing, of Burkesville, Ky., for appellant.

Gartner & Vaughan, of Louisville, Ky., and Porter & Sandidge, of Glasgow, Ky., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The controversy in the main depends upon the true nature of the transaction which culminated in the deed of August 15, 1905. As pointed out in the statement, that deed embraced an undivided one-half interest corresponding to the interest then owned in common by the defendants in the 1,250-acre tract, which the four children had inherited from their father. If the consideration for that conveyance was in truth paid with money belonging to the defendants, and with an understanding that the legal title should be placed in them, it is clear that the equitable estate in the property so conveyed has been in the defendants ever since the delivery of the deed. By statute of Kentucky it is provided:

"When a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or

where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person." Section 2353, Carroll's Stat. (Ed. 1909) p. 1018.

[1] It is settled in Kentucky that such an equitable interest or estate in a wife is not open to attack by a creditor of her husband, where such creditor "has not been misled or defrauded by any voluntary act of hers, and who fails to assert his claim before the completion of her legal title." *Campbell v. Campbell's Trustee*, 79 Ky. 395, 399, 400; *Sparks v. Colson*, 109 Ky. 711, 716, 60 S. W. 540; *Graham v. King*, 96 Ky. 339, 346, 24 S. W. 430; *Harlan v. Eilke*, 100 Ky. 642, 644, 38 S. W. 1094.

[2] The consideration for the conveyance now sought to be set aside, and mentioned in the statement, was stated therein:

"The said E. M. Allen and Eunice H. Lewis furnished their husbands with money with which they paid for said interest in said land, with the express understanding that said one-half interest in said land was to be deeded to said E. M. Allen and Eunice H. Lewis; and whereas, by an oversight and mistake said deed of conveyance was made to said J. F. Allen and D. C. Lewis, when in fact and in truth it should have been made to said E. M. Allen and Eunice H. Lewis."

Upon a careful examination of the evidence the court below summed up its opinion thus:

"In short, in respect to that defense we find (somewhat in the language of section 2353 of the Kentucky Statutes) that the bankrupts, the grantees in the deed dated August 15, 1905, took that deed in their own names without the knowledge or consent of their wives, whose money paid the entire consideration therefor; that, though five grantees in the deed expressly promised to do otherwise, they held the deed and the title it conveyed until about the 18th day of March, 1911; that the defendants were ignorant of the fact that the deed was made to their husbands, and not to themselves, until about that date; and that, when informed of it, they demanded the deed, which was made accordingly to them. The deed thus obtained is attacked in this suit, and we think the attack must fail."

Unless this finding is not sustainable under the evidence, it is clear that the recital before quoted from the conveyance now in dispute is a complete answer to the complainant's case. The inquiries touching the facts so found may be stated thus: (a) Was the consideration given for the land conveyed by the deed of August 15, 1905, paid with moneys belonging to the defendants? (b) Were these moneys furnished with an understanding that the deed should be taken in the names of the defendants as grantees? (c) Was the deed taken in the names of the husbands without the consent of their wives?

After all that can fairly be said in criticism of the evidence, the testimony of Mrs. Allen, Mrs. Lewis, and also of their mother, Mrs. Hutchens, furnishes, without substantial contradiction, an affirmative answer to each one of these questions:

1. Mrs. Hutchens is the administratrix of the estate of the deceased husband and father, Dr. Hutchens; and she, as well as her defendant daughters, was cognizant of the fact that her daughters received more in cash from the estate than was required to pay for the undivided interests in the land in dispute. They all testify that the money used to pay for such interests belonged to the daughters; and if this was

not true, the testimony might have been contradicted by an intelligent person who was present when the transaction was closed, and who now appears in the interest of complainant.

2. The grantors were not living at the place where the defendants and their mother resided; indeed, the grantor brother, with his wife, lived in South Dakota. The defendants were not present when the consideration was paid and the deed delivered; such payment and delivery having occurred at Burkesville, where the sister grantor and her husband resided. Both defendants testified in substance that it was agreed in advance that they would purchase the undivided interests of their brother and sister, and that the conveyance should be made to them, Mrs. Allen and Mrs. Lewis. Mrs. Hutchens, the administratrix, and the husbands of the defendants, were present when the deed was delivered, and it was then discovered that the deed had been executed in favor of the husbands of defendants. In answer to a question as to whether the husbands were present, Mrs. Hutchens testified that they were, and then proceeded:

"I told them that Eunice [Mrs. Lewis] said her money was not to be paid out unless the deed was to her and Ettie [Mrs. Allen], and they all agreed, Joe and Daniel [meaning the husbands] agreed, to make the deed to them [the wives] the next week, and Mell Allen [a lawyer present] advised me to let it go that way, said they surely would make the deed, and it would save a whole lot of expense and trouble if the money was not sent on. There would have to be a new deed made and sent off again to South Dakota, and they both promised they would make the deed next week, and so I let it go that way."

3. It is not clear to whom the deed was delivered, although it seems that it was received by the bankrupt, Allen. It was placed of record; but both the wives testified explicitly that they never saw the deed, and that (until within a short time of the execution and delivery of the deed sought to be set aside) they had no knowledge of the fact that the names of their husbands, instead of their own, appeared as the grantees in the deed from their brother and sister. Defendants' husbands requested them to join in the execution of a mortgage upon the property, when the wives first learned that the title stood in the names of their husbands. The wives made immediate demand that the deed in issue be executed and delivered.

[3] It is claimed that Mrs. Hutchens, the mother, was the agent of her daughters at the time of the delivery of the deed of August 15, 1905, and that her knowledge is imputable to her daughters. We are not satisfied from the evidence that any such agency existed. Assuming, although it is not claimed, that such an agency resided in the husbands, it hardly need be said, in view of their conduct and of their interest to conceal the facts, that their knowledge is not imputable to their wives. *American National Bank of Nashville v. Miller*, 229 U. S. 517, 33 Sup. Ct. 883, 57 L. Ed. 1310, decided by the Supreme Court June 9, 1913. Plainly the title was taken in the names of the husbands without the knowledge or consent of their wives.

In reaching this conclusion we do not overlook the contention that the court below erred in its finding by misplacing the burden of proof; but examination of the opinion shows this contention to be erroneous.

It is to be observed, further, that the complainant called all of the witnesses; and we think that the testimony elicited, both on the direct and cross examinations, had the effect of discharging the burden, even though it were in terms cast upon the defendants.

It might be added, although not strictly necessary, that if the fiction of imputed knowledge of the defendants, through an agency of their mother, touching the deed of August 15, 1905, should be treated as applicable, the most that could be said would be that the bankrupts acquired the legal title to the property under an agreement that they would on the following week convey it to their wives. They were upon the plainest principles of equity and good conscience bound from that time forth to carry this agreement into execution. This results alike from the statute and the decisions of the state of Kentucky, before cited; and they are controlling in a case like this. There is nothing in the Bankruptcy Act to warrant the claim that the property in issue passed to the bankrupts. *Thomas v. Taggart*, 209 U. S. 385, 389, 28 Sup. Ct. 519, 52 L. Ed. 845; *Smith v. Mottley*, 150 Fed. 266, 268, 80 C. C. A. 154 (C. C. A. 6th Cir.); 1 *Loveland on Bankr.* (4th Ed.) § 408, and citations.

The decree below must be affirmed, with costs.

HASKELL et ux. v. COLUMBUS SAVINGS & TRUST CO.

(Circuit Court of Appeals, Eighth Circuit. July 28, 1913.)

No. 3,676.

1. BILLS AND NOTES (§ 517*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a note, evidence *held* insufficient to authorize a finding that the note was delivered on and subject to a condition.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1807–1815; Dec. Dig. § 517.*]

2. BANKS AND BANKING (§ 314*)—DIRECTORS—KNOWLEDGE—IMPUTING TO BANK.

A trust company with which a stockholder in a corporation negotiated a loan for the purpose of advancing the money to the corporation to assist in paying its debts was not chargeable with knowledge of an agreement between the stockholders that no one should be bound to make such contribution unless all did, merely because the president of the corporation, who acted for the stockholder in negotiating the loan, was also a director of the trust company.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

3. TRIAL (§ 139*)—DIRECTED VERDICT—WHEN WARRANTED.

Where the evidence in favor of plaintiff is so conclusive and so preponderant that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict for defendants, the court should direct a verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. § 139.*]

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by the Columbus Savings & Trust Company against C. N. Haskell and wife. Judgment for plaintiff, and defendants bring error. Affirmed.

Richard Wm. Stoutz, of Muskogee, Okl. (M. L. Leith, of Muskogee, Okl., on the brief), for plaintiffs in error.

Preston C. West and George S. Ramsey, both of Muskogee, Okl. (Barton Griffith and Cyrus Huling, both of Columbus, Ohio, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a suit instituted by the Columbus Savings & Trust Company against the defendants below, C. N. and Lillie E. Haskell, his wife, to recover a balance due on a promissory note for \$18,970 executed by them on May 5, 1904. The note was in renewal of one executed by them in September, 1903. The original note was given in part consideration of an old indebtedness due from them to the trust company and in further consideration of a new loan for some \$14,000 made at the time by the trust company to them. The note was absolute on its face and contained a promise to pay absolutely and unconditionally at a fixed time the sum of \$18,970 to the plaintiff.

The defense was that the note was executed by defendants and accepted by the trust company on and subject to a condition that all the stockholders of a certain corporation, known as the National Construction Company, in which defendants and others held stock, should advance their pro rata share to the contracting company to enable it to discharge its then pressing indebtedness; that the condition failed in this: That some of its stockholders failed and refused to make their pro rata contribution. It is doubtful if the defense was sufficiently pleaded by the defendants in their answer; but, as the parties in their briefs and argument have so treated it, we shall do likewise.

With the answer setting up this defense, a cross-petition was filed in which defendants sought to recover from the plaintiff an amount of money alleged to have been paid to the plaintiff in excess of the amount due on the note in suit, and in which the defendants also sought to secure a return of certain collateral pledged to the trust company for the payment of the note in suit or in lieu thereof to recover money damages as for a conversion.

The case was tried to a jury, and at the close of all the evidence the Circuit Court, at the request of plaintiff's counsel, instructed the jury to find for the plaintiff. The defendants sued out this writ of error. No assignment of error is predicated upon any action of the court connected with the cross-petition. The chief and only error relied on for reversal is the action of the court in directing a verdict.

[1] We find no evidence directly tending to prove the fact put in issue by defendants that the note was executed and delivered subject to the condition mentioned. There was evidence, however, tending to show the following facts: That, in view of the then embarrassed state of finances of the contracting company, a meeting of its stockholders was called by its president and attended by most of them in

St. Louis, Mo., on the 24th day of August, 1903. At this meeting a plan was devised whereby the stockholders of the company should be invited to make a voluntary contribution of an amount of money proportionate to their respective holdings in the stock of the company and get bonds and stock of certain telephone companies in Texas, which were owned and controlled by the contracting company, for the amount contributed by them. As some of the stockholders were not present at the meeting, it was arranged that the absent ones should be interviewed by certain specified persons by correspondence or otherwise with a view of securing their consent to the plan and learn whether they would join with the others. Mr. Haskell, representing himself and his wife, was present at the meeting and joined with others present in approving of the plan for raising money. He testified, however, that it was understood that no one was to be bound to make the contribution unless the plan was universally agreed to and carried out by all the stockholders of the contracting company. Mr. Haskell then advised the president of the contracting company, Mr. Daugherty, who was also a member of the board of directors of the trust company, that neither he nor his wife had the ready money to pay their share, which amounted to about \$14,000. It was then suggested they might be able to borrow it from the trust company, using collateral which the trust company then held belonging to the Haskells as security for the payment of a balance due on an old indebtedness due from them to the trust company, and also the bonds which the Haskells were to receive from the contracting company for their contribution, as collateral for their new note which should embrace the balance of their old indebtedness and an additional sum required to make their contribution.

Mr. Daugherty lived in Columbus and, being a member of the board of directors of the trust company, was a most obvious channel for making application for the desired loan. There is some contradiction in the testimony as to who first suggested borrowing the money from the trust company and as to how or when Daugherty was requested to make application for it and as to other details, and much is made of these things by counsel for defendants in an attempt to show that Daugherty was not the agent of the Haskells in the transaction with the trust company, but these differences are trivial in the light of certain great facts which are not only uncontradicted but which are substantially admitted by counsel for defendants in their brief. These are: That Daugherty did in fact present the application for the loan for and on behalf of the Haskells to the trust company; that it was favorably considered and granted; that the Haskells afterwards executed a note for \$19,000, pledging the securities mentioned for its payment, and sent the same to Daugherty at Columbus for delivery, and a disposition of its proceeds was made by Daugherty which was entirely satisfactory to the Haskells. This is evidenced by the report of his doings made by Daugherty in a letter of date September 11, 1903, addressed to C. N. Haskell, who in all these matters acted for himself and his wife, in which, after a detailed account of what he had done with the note and its proceeds, he said:

"If there is anything about this matter that you do not understand or that is not correct, kindly advise me at once."

The record discloses no answer to this inquiry and we may well conclude that Daugherty's acts in the premises were fully approved by Mr. Haskell. In view of these facts and others of like character, we can reach no other conclusion than that Daugherty acted in the matter of negotiating the loan in question solely as the agent of the Haskell.

Conceding now that there was evidence tending to show that the stockholders of the contracting company did have an understanding or agreement, as between themselves, that no one should be bound to make the contribution unless all did it, how is the trust company, which merely loaned money to the Haskell, affected by that understanding or agreement? It was a creditor but not a stockholder of the contracting company. There is no evidence that any of its executive officers ever made any agreement with the Haskell that the note should be void unless all the stockholders of the contracting company made their proportionate contribution. Neither is there any evidence that such executive officers made any such agreement or had any such understanding with Daugherty, Haskell's agent.

[2] But the contention is that, because Daugherty was a member of the board of directors of the trust company, his knowledge of the agreement or understanding between the stockholders of the contracting company is imputable to the trust company, and that that company was in some way obligated at the peril of invalidating its note to see to it that all the stockholders of the contracting company joined in the proposed contribution. These contentions, in our opinion, carry the doctrine of imputable knowledge and its consequences to an unreasonable and unwarrantable length.

But there are other considerations of an unquestionable character and consequence which satisfactorily dispose of the case. Haskell admits in his testimony that very shortly after the St. Louis meeting he knew that all the stockholders had not agreed to make their contributions. Whether he acquired this knowledge before he executed the note of which that in suit is a renewal and before he received his agent's report of the disposition of the proceeds of the discount may be uncertain, but it is certain that he did these things at a time when he must have been uncertain whether all the stockholders had come into the proposed arrangement. He therefore, in prematurely executing the note and borrowing the money to make his own and his wife's contribution, must have assumed the consequences of that uncertainty.

But there are other facts: On November 17, 1903, the defendants authorized the trust company to exchange certain 6 per cent. bonds of the Williamson County and Bell County Telephone Companies, which had been pledged as collateral security for the payment of the \$19,000 note given in September, 1903, for a like amount of 5 per cent. bonds of a new issue by the same telephone companies; on May 5, 1904, the defendants paid the accrued interest on the note and renewed the same for \$18,970, pledging the collateral originally given with the exception of the Williamson County and Bell County Telephone Companies bonds, which had been exchanged; on November 7, 1904, the defendants authorized the trust company to sell 45 certain railroad bonds which, among other things, had been pledged as collateral security for the note sued on and to apply their proceeds to

the payment, so far as they would go, of that note. This was done and a credit for \$7,193 was given to the defendants on the note.

On March 2, 1905, the defendants tendered to the trust company the full amount then remaining unpaid on the note in suit and demanded the surrender of the note and of all the collateral held by the trust company to secure its payment, subject, however, to the condition that the trust company should surrender the 6 per cent. bonds of the Williamson County and Bell County Telephone Companies instead of the 5 per cent. bonds of those companies which, with the consent of the Haskell's, had before then been substituted for the 6 per cent. bonds and which the company then held; later, on April 8, 1905, the Haskell's, in the name of the defendant Lillie E. Haskell, instituted a suit in the court of common pleas of Franklin county, Ohio, affirming the execution and delivery of the note in question and of the tender of its payment on March 2d and demanded a surrender of the note and of the collateral held by the trust company. In their petition in that case the plaintiffs allege that they have been at all times ready and willing to pay the amount due on the note upon the surrender of the note and of the collateral security remaining in the hands of the trust company. Bearing in mind what has already been stated, that the Haskell's had on November 17, 1903, authorized the trust company to exchange the 6 per cent. bonds of the Williamson County and Bell County Telephone Companies for 5 per cent. bonds of the same companies, and that the trust company had accordingly made the exchange, the tender, in so far as it was conditioned upon the surrender of the 6 per cent. bonds instead of the 5 per cent. bonds seems not to have been made in good faith. In none of these acts or in the negotiations leading up to them do we find any pretension that the note was invalid by reason of any condition on which it was given being broken. On the contrary, there is in some of the acts mentioned, if not in all of them, a distinct, unequivocal, and necessary affirmation of the existence and validity of the note and of a willingness to pay it.

In the Ohio suit there was a formal and solemn admission of record in a court of justice of the same thing. In view of this substantial and uncontradicted testimony, even if a possible inference could have been drawn from Daugherty's relation to the trust company that the latter company knew what had been agreed upon at the stockholders' meeting of the contracting company, can it be possible that any intelligent or reasonable jury could have found for the defendants on the vital and controlling issue of the case? We think not.

[3] The unconditional promise to pay found in the body of the note itself, the want of any direct evidence substantiating the alleged conditional execution and delivery of the note, the vague and improbable inferences which alone are claimed to establish it, taken in connection with the several serious, important, and solemn admissions and acts of affirmation of the validity of the note by the defendants, make the evidence in favor of the plaintiff of such conclusive character and so preponderant that the court in the exercise of a sound judicial discretion would have been compelled to set aside a verdict, if any had been rendered for the defendants. Such being the case, it was clearly

the duty of the court to instruct a verdict in favor of the plaintiff. *Hart, Adm'r, v. Northern Pacific Ry. Co.*, 116 C. C. A. 12, 196 Fed. 180; *Improvement Company v. Munson*, 14 Wall. 442, 20 L. Ed. 867; *Southern Pacific Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485.

A strong argument is made that the judgment rendered in favor of the defendant in the Ohio suit is *res adjudicata* of the present controversy; but, in view of the satisfactory disposition of the case on the merits, it is unnecessary to consider or pass on this contention. There are some assignments of error challenging the action of the court in admitting and excluding evidence, but they were not deemed important enough to be argued by plaintiffs in error, and we fail to find anything in them of a prejudicial character.

Finding no error in the proceedings below, the judgment is affirmed.

MAXEY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1913.)

No. 3,913.

1. CRIMINAL LAW (§ 1120*)—APPEAL—RECORD—MATTERS TO BE INCLUDED.

A bill of exceptions complaining of the admission of the testimony of a witness who had been convicted of a felony and sentenced to imprisonment in the penitentiary would be considered on appeal, though the record of such witness' conviction and sentence did not appear in the record on appeal, where it showed that such record was offered and that the court made no point that the record did not show the facts to prove which it was offered but merely ruled that the facts shown did not disqualify the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

2. COURTS (§ 349*)—PROCEDURE—WITNESSES—COMPETENCY—STATE LAW.

The competency of witnesses to testify in criminal cases in the courts of the United States is determined by the common law of the state where the trial is had, as it was when such courts were established, except where Congress in special cases may provide otherwise.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 925; Dec. Dig. § 349.*]

Competency of witnesses in federal court following state practice, see notes to *O'Connell v. Reed*, 5 C. C. A. 602; *Bank of California v. Cowan*, 21 C. C. A. 278.]

3. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS.

Where counsel for defendant objected to the competency of a witness, stating that he had been convicted of a felony and sentenced to the penitentiary for 15 months, offering the record of his conviction and sentence, it would be assumed, in the absence of such record from the record on appeal, and in the absence of any objection on that ground, that the record showed that his conviction and sentence was for a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. WITNESSES (§ 48*)—COMPETENCY—"INFAMOUS PUNISHMENT."

Imprisonment in a penitentiary is an "infamous punishment" within the common-law rules as to the competency of witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 109-115; Dec. Dig. § 48.*

For other definitions, see Words and Phrases, vol. 4, pp. 3577, 3578; vol. 8, p. 7687.]

5. WITNESSES (§ 48*)—COMPETENCY—CONVICTION OF CRIME.

A person convicted of a felony and sentenced to the penitentiary for 15 months was incompetent as a witness in a criminal case in a United States court, since at common law conviction and punishment for treason, felony, and the *crimen falsi* disqualify a witness, and the common-law rule has been changed by Congress only as to civil suits.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 109-115; Dec. Dig. § 48.*]

6. WITNESSES (§ 48*)—COMPETENCY—"CRIMEN FALSI."

The "*crimen falsi*" of the common law not only involved the charge of falsehood but also is one which may injuriously affect the administration of justice by the introduction of falsehood and fraud.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 109-115; Dec. Dig. § 48.*

For other definitions, see Words and Phrases, vol. 2, p. 1741.]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Robert E. L. Maxey was convicted of conspiring to commit an offense against the United States, and he brings error. Reversed, and new trial ordered.

See, also, 200 Fed. 997.

George W. Murphy, of Little Rock, Ark. (E. L. McHaney, of Little Rock, Ark., and W. H. Martin, of Hot Springs, Ark., on the brief), for plaintiff in error.

Wm. G. Whipple, U. S. Atty., and Powell Clayton, Asst. U. S. Atty., both of Little Rock, Ark.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

CARLAND, Circuit Judge. Maxey and one Henry B. Copeland were indicted for conspiring to commit an offense against the United States; the offense being the devising of a scheme to defraud by carrying on a correspondence through the mails. Maxey, having been tried and convicted, brings error.

[1] The following appears from the bill of exceptions:

"The United States, to maintain the issues upon its part, introduced as witnesses first H. B. Copeland, but the defendant objected to his competency, stating that at the April term, 1912, of said court he had been convicted of a felony and sentenced to 15 months in the penitentiary at Atlanta, Ga., and offering the record of his conviction and sentence. The court overruled the objection, stating that that did not disqualify him, and defendant at the time excepted. Whereupon said Copeland testified as follows:"

This ruling of the court is assigned as error, and as Copeland was a co-conspirator of Maxey and a witness without whose testimony

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

no conviction could have been had, it is important that this ruling be carefully considered. The record of the conviction and sentence of Copeland does not appear in the record. The record, however, does show that such record was offered, and in view of the fact that the court made no point that the record did not show the facts to prove which it was offered, but ruled that the facts shown did not disqualify the witness, it cannot now be objected that the record of the conviction and sentence of Copeland does not appear in the record before us.

[2] The competency of witnesses to testify in criminal cases in the courts of the United States is determined by the common law, except where Congress in special cases may otherwise provide. *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. The Supreme Court in the case cited had under consideration section 858, R. S. U. S. (U. S. Comp. St. 1901, p. 659), and after full consideration determined that the provision of that section reading as follows:

"In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty"—

referred to civil cases only, and in so deciding used the following language:

"And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states. But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress.' 'The law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789 [Act Sept. 24, 1789, c. 20, 1 Stat. 73].' 'The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has thus been sanctioned by a practice of 60 years.' *United States v. Reid*, 12 How. 361, 363, 366 [13 L. Ed. 1023]. * * *

"For the reason above stated, the provision of section 858 of the Revised Statutes that 'the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty,' has no application to criminal trials; and therefore the competency of witnesses in criminal trials in the courts of the United States held within the state of Texas is not governed by a statute of the state which was first enacted in 1858 but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a state."

Section 858 was amended June 29, 1906 (Act June 29, 1906, c. 3608, 34 Stat. at L. 618 [U. S. Comp. St. Supp. 1911, p. 271]), so as to read as follows:

"Sec. 858. The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held."

It thus appears that there has been no legislation by Congress changing the rule of the common law as to the competency of witnesses in criminal cases in the courts of the United States except in special instances not material in this case. It was not until March 16, 1878 (Act March 16, 1878, c. 37, 20 Stat. at L. 30 [U. S. Comp. St. 1901, p. 660]), that persons charged with crime in the courts of the United States were made competent witnesses in their own behalf. Thus for nearly a century the common-law disqualification obtained as to persons charged with crime. In the rapid march of events we often forget that we did not always possess the liberties that we now enjoy. As another illustration of the change in the common-law rule of evidence, we may refer to the act of Congress approved February 26, 1913, which provides as follows:

"In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness."

It will be seen that this law changes the common-law rule in regard to the comparison of writings where the genuineness of the handwriting of any person may be involved. The rule of the common law would not permit a comparison of handwriting unless the writing to be compared was properly in the case for other purposes than mere comparison. *Withaup v. United States*, 127 Fed. 530, 62 C. C. A. 328.

If we are to look to the common law of Arkansas where the trial was had, we learn that the disqualification of infamy which arose from the conviction of crime at common law has not been removed by statute in that state, except partially in civil cases. *Werner v. State*, 44 Ark. 122. We do not cite this case on the assumption that the Legislature of Arkansas has any power to provide what the rules of evidence shall be in criminal cases in the courts of the United States but simply to show what the common law is in the jurisdiction where the trial was had.

[3] Counsel for Maxey, at the time he objected to the competency of Copeland as a witness, stated that the witness had been convicted of a felony and offered the record of his conviction and sentence. We think it is perfectly fair to assume that the record showed that the crime for which Copeland was convicted and sentenced was a felony, as there seems to have been no objection made upon that ground. We are not confined to this view of the matter, however, as counsel stated that Copeland had been sentenced to 15 months in the penitentiary at Atlanta, Ga. Section 335 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. at L. 1152 [U. S. Comp. St. Supp. 1911, p. 1687]) reads as follows:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

We are obliged to assume, therefore, that the crime of which Copeland was convicted and sentenced was a felony.

[4, 5] And we will now proceed to inquire whether this conviction and sentence rendered Copeland infamous and therefore disqualified him as a witness under the rule of the common law.

In *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89, Mr. Justice Gray, in delivering the opinion of the court holding that an offense punishable by confinement in the penitentiary at hard labor was an infamous offense within the meaning of the fifth amendment, said:

"Mr. William Eden (afterward Lord Auckland) in his *Principles of Penal Law*, which passed through three editions in England and at least one in Ireland within six years before the Declaration of Independence, observed: 'There are two kinds of infamy; the one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent.' Eden's *Principles of Penal Law*, c. 7, § 5.

"At that time it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime and not upon the nature of his punishment. *Pendock v. McKinder*, Willes, 665; *Gillb. Ev.* 143; 2 *Hawk. c.* 46, § 102; *The King v. Priddle*, 1 *Leach* (4th Ed.) 442. The disqualification to testify appears to have been limited to those adjudged guilty of treason, felony, forgery, and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subordination of perjury, suppression of testimony by bribery, conspiring to accuse one of crime, or to procure the absence of a witness, and not to have been extended to cases of private cheats, such as the obtaining of goods by false pretenses, or the uttering of counterfeit coin or forged securities. 1 *Greenl. Ev.* § 373; *Utey v. Merrick*, 11 *Metc.* [Mass.] 302; *Fox v. Ohio*, 5 *How.* 410, 433, 434 [12 L. Ed. 213]. * * *

"The remaining question to be considered is whether imprisonment at hard labor for a term of years is an infamous punishment. * * *

"For more than a century, imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered an infamous punishment in England and America."

In *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909, *Ex parte Wilson*, supra, was followed.

Here we have a witness shown to have been convicted and sentenced for a felony to which an infamous punishment was attached. The question now presented for decision is: Was Copeland disqualified as a witness under the rule of the common law? The crimes, a conviction and punishment for which would disqualify a witness at common law, are generally enumerated as follows: Treason, felony, and the *crimen falsi*.

[6] The *crimen falsi* of the common law not only involved the charge of falsehood but also is one which may injuriously affect the administration of justice by the introduction of falsehood and fraud. *Greenl. Ev.* § 373; *Wigmore on Evidence*, vol. 1, §§ 519, 520. In a note to section 520, *Wigmore on Evidence*, Mr. Wigmore says:

"This topic, being practically almost obsolete and destined soon to become entirely so, may be here sufficiently expounded by quoting the words of Professor Greenleaf, which have served to guide our courts in their rulings from 1842."

We are not unmindful that the trend of modern opinion, so far as the disqualifications of witnesses are concerned, is toward removing the disqualifications and permitting the jury to weigh the testimony

of the witnesses in connection with their character and antecedents; but this court has no power to remove the disqualifications of the common law, the power to do so being with Congress.

It is urged in the brief of counsel for the United States that Congress has passed no law making the conviction of crime a disqualification. This is an erroneous view to take of the matter. The common law prevails until Congress shall decide otherwise. The courts of the United States were organized and their jurisdiction defined, but the matter of the competency of witnesses has never been legislated upon by Congress except as to civil cases, and there is no rule upon the subject unless we go to the common law. Other errors have been assigned, but as they will probably not arise again we do not deem it necessary to consider them.

We think the court erred in permitting Copeland to testify, and the judgment of conviction is therefore reversed and a new trial ordered.

AMERICAN LINSEED OIL CO. v. CRUMBINE, Chief Food and Drug
Inspector of Kansas.

(Circuit Court of Appeals, Eighth Circuit. June 30, 1913.)

No. 3,727.

1. STATUTES (§ 107*)—CONSTITUTIONALITY—SUBJECT OF ACT.

Sess. Laws Kan. 1911, c. 179, entitled "An act to prevent the adulteration of turpentine, linseed oil or flaxseed oil, prevent deception in the sale thereof, and to provide for the punishment of such adulteration and deception," and the provisions of which accord with such title, is not invalid as in violation of Const. Kan. art. 2, § 16, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, in that it deals with both turpentine and linseed or flaxseed oil; the subject-matter of the act, from a legislative view, being adulteration.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

2. CONSTITUTIONAL LAW (§ 276*)—LIBERTY TO CONTRACT—POLICE POWERS OF STATE—LAWS TO PREVENT FRAUD.

Provisions in such act prohibiting the sale of any article under the name of turpentine which is not in fact turpentine and unadulterated, or any adulterated turpentine or compound of linseed or flaxseed oil unless plainly marked on the container with the word "adulterated" or "compound," with a statement of the actual proportion of its ingredients, do not render it unconstitutional as in violation of any rights guaranteed by the fourteenth constitutional amendment, but such provisions are clearly within the police powers of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 845, 846; Dec. Dig. § 276.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by the American Linseed Oil Company against Samuel J. Crumbine, as Chief Food and Drug Inspector of the State of Kansas. Decree for defendant, and complainant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hugh A. Myers, of Omaha, Neb., and W. A. S. Bird, of Topeka, Kan. (S. L. Lashbrook, of Topeka, Kan., on the brief), for appellant.

John S. Dawson, Atty. Gen., and S. N. Hawkes, Asst. Atty. Gen. (Price, Alburn & Daoust, of Cleveland, Ohio, of counsel), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

CARLAND, Circuit Judge. The American Linseed Oil Company, a corporation of the state of Ohio, filed the bill in this action against Samuel J. Crumbine for the purpose of having chapter 179, Session Laws of the state of Kansas 1911, declared unconstitutional and void upon two grounds:

First, because said act violates the provision of section 16, art. 2, of the Constitution of the state of Kansas, which provides as follows:

"No bill shall contain more than one subject, which shall be clearly expressed in its title."

Second, because said act violates the fourteenth amendment to the Constitution of the United States in that it prohibits the sale of any compound of linseed oil in the state of Kansas regardless of how it may be labeled:

By stipulation the case was heard upon demurrer to the bill and final judgment was rendered by the trial court dismissing the same. The bill alleges that Samuel J. Crumbine is the legally appointed, duly authorized, and acting chief food and drug inspector of the state of Kansas, whose duties are the enforcement of certain special enactments made by the Legislature of said state pertaining to the purchase and sale of foods, beverages, condiments, medicines, linseed oil, paints, and other products included therein; that appellant is engaged in manufacturing, buying, selling, and importing pure linseed oil, linseed oil compounds and blends, and has a large number of customers and prospective customers in the state of Kansas to whom it has for a considerable period of time offered for sale through advertisements and sold by mail orders and by traveling salesmen its aforesaid products within said state; that among said products is a certain compound or blend of linseed oil composed of less than 96 per cent. of linseed oil, which it had during the time aforesaid offered for sale and sold, by means aforesaid, to its customers within said state as a substitute for linseed oil, said compounds or blends being known and labeled as follows:

"The American Linseed Oil Company, Omaha, Nebraska. Boiled Linseed Oil, not sold or intended for Food or Medicinal Purposes."

"The American Linseed Oil Company, Omaha, Nebraska. Raw Linseed Oil, not sold or intended for Food or Medicinal Purposes."

That, beginning some time prior to the commencement of this suit, the said defendant, assuming to act in his official capacity as chief food and drug inspector of the state of Kansas, has continually therefrom wrongfully and unlawfully opposed the sale and introduction of said compounds and blends of linseed oil, described as aforesaid, within said state, and unlawfully advised appellants' customers and prospec-

tive customers to refuse to contract with appellant for the purchase and sale of said linseed oil compound or blends, and threatened to prosecute appellant in the event of the sale or offer to sell by it of the aforesaid compounds or blends to any person, firm, or corporation within said state; that appellant has sold in manner aforesaid and shipped to its said customers within the state of Kansas the compounds or blends of linseed oil above mentioned as a substitute for linseed oil, under the name "Linsol" and in containers labeled as follows:

"The American Linseed Oil Company, Omaha, Nebraska. Linsol, not sold or intended for Food or Medicinal Purposes."

That appellant has sold in manner aforesaid and shipped within the state to its aforesaid customers the aforesaid compound or blend of linseed oil as a substitute for linseed oil, under the name "Blended Linseed Oil" and in containers known and labeled as follows:

"The American Linseed Oil Company, Omaha, Nebraska. Blended Linseed Oil, not sold or intended for Food or Medicinal Purposes."

That said defendant, assuming to act in his official capacity as chief food and drug inspector of the state of Kansas, wrongfully and unlawfully opposed the sale and introduction of the aforesaid compounds or blends of linseed oil within said state, sold and labeled as "Linsol" or sold and labeled as "Blended Linseed Oil," and threatens to prosecute appellant and its customers in the event of a sale of the same, and that said defendant threatens to continue to oppose and to prevent the sale thereof, claiming that the law hereinbefore referred to wholly prohibits the manufacture, sale, or offer for sale or use within the state of Kansas said compounds of linseed oil labeled as aforesaid.

[1] The law claimed to be unconstitutional appears in the margin.¹ It is claimed that this law violates section 16, art. 2, of the Con-

¹ Chapter 179, Session Laws of the State of Kansas, 1911:

An act to prevent the adulteration of turpentine, linseed oil or flaxseed oil, prevent deception in the sale thereof, and to provide for the punishment of such adulteration and deception.

Be it enacted by the Legislature of the state of Kansas:

Section 1. Hereafter it shall be unlawful to manufacture, mix for sale, sell, offer or expose for sale in this state, under the name of raw linseed oil or flaxseed oil, any substance which is not wholly the product obtained from well cleaned flaxseed or linseed, and unless the same fulfills the latest requirements of the United States Pharmacopœia, or any so-called boiled linseed oil, or boiled flaxseed oil, unless the same shall have been prepared by incorporating dried with raw linseed oil, as defined above, at a temperature of not less than 225 degrees Fahrenheit, and unless the same contains not less than 96 per cent. of linseed oil. And for the purpose of this act it shall also be deemed a violation thereof if boiled linseed oil does not conform to the following requirements: (1) Its specific gravity at 60 degrees Fahrenheit must be not less than 0.935. (2) Its saponification value (Koettstorfer figure) must not be less than 186. (3) Its iodine number (Huebl's method) must not be less than 160. (4) Its acid value must not exceed 10. (5) The volatile matter expelled at 212 degrees Fahrenheit must not exceed one-half of one per cent. (6) No mineral oil shall be present, and the amount of unsaponifiable matter as determined by standard methods shall not exceed 2.5 per cent. (7) The film left after flowing the oil over glass and allowing it to

stitution of the state of Kansas, for the reason that it contains more than one subject, namely, adulteration of turpentine and adulteration of linseed or flaxseed oil; the contention being that no such natural relation exists between the oil extracted from the seed of flax and that substance which is by distillation extracted from the gum of the long-leaf pine and other trees, called turpentine, as will in the face of the constitutional provision quoted permit the Legislature to unite

drain in a vertical position must dry free from tackiness in not to exceed twenty hours, at a temperature of about 70 degrees Fahrenheit. It shall be unlawful to manufacture, mix for sale, sell, offer for sale or expose for sale in this state under the name of turpentine or spirits of turpentine or any compound of the word turpentine, or under any name or device illustrating or suggesting turpentine, oil of turpentine or spirits of turpentine any article which is not wholly distilled from rosin, turpentine gum, or scrape from pine trees, and unmixed and unadulterated with oil, benzine or any other foreign substance of any kind whatsoever.

Sec. 2. No person, firm, or corporation shall sell, expose or offer for sale any turpentine, flaxseed oil or linseed oil, unless it is done under its true name, and each barrel, keg or can of such oil so sold exposed or offered for sale, has distinctly and durably painted, stamped, stenciled, labeled or marked thereon the true name of such oil in ordinary bold-faced capital letters, not less than five lines pica in size, and the name and address of the manufacturer thereof, or that of the jobber or dealer therein: Provided, that if the contents of the package be less than twenty-five gallons, a label may be used printed in type not less than two-line pica in size.

Sec. 3. Any person, firm, or corporation who shall fail to comply with the requirements of section 2 of this act, or falsely paint, stencil, label or mark, as required by section 2, said barrels, kegs or cans containing turpentine, flaxseed oil or linseed oil or knowingly permit such false painting, stamping, labeling or marking, or violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction punished with a fine of not less than ten dollars nor more than one hundred dollars, or imprisonment not less than ten days nor more than ninety days or both for each offense.

Sec. 4. Nothing in this act shall be construed as prohibiting the manufacture or sale of adulterated spirits of turpentine or linseed oil compounds: Provided, if such compounds or adulterations are designed to take the place of raw or boiled linseed oil or turpentine as defined in section 1 of this act, they shall not be manufactured or mixed for sale, sold, offered or exposed for sale under any title or designation conveying the impression, either directly or indirectly, that it is flaxseed oil or linseed oil, and all compounds of linseed oil or flaxseed oil shall, when sold, offered or exposed for sale, under invented proprietary names or titles, bear conspicuously upon the containing vessel in capital letters not less than five-line pica in size, the word "compound," or "adulterated" and be labeled so as to state clearly and distinctly the actual proportions of turpentine or linseed oil and other ingredients contained therein, said label to be printed in the English language, in plain legible type in continuous list, with no intervening matter of any kind.

Sec. 5. The chief food and drug inspector, as well as his inspectors, assistants, experts, analysts, or others appointed by him, shall have full rights of ingress and egress to the premises occupied by parties who manufacture, deal in or compound turpentine, linseed oil or flaxseed oil, and also have power and authority to open any tank, barrel, can or other vessel believed to contain such oil, turpentine, or products used in its manufacture, and to inspect the contents thereof, and to take therefrom samples for analysis, and in case any of the samples so taken shall prove on analysis to be adulterated in violation of the provisions of this act, it shall be the duty of the person securing the sample to proceed against the offender as herein provided.

Sec. 6. This act shall take effect upon its publication in the statute book.

them under the same head or title in making a provision against their adulteration and sale, but that to accomplish such purpose two separate acts must be passed. The trial court was of the opinion that turpentine could be properly classified as an oil and that there was no such want of relation between turpentine oil and flaxseed or linseed oil as to forbid the Legislature from so classifying them under the Constitutional provision above quoted. The position taken by the trial court may be correct, but we are of the opinion that the subject-matter of the law complained of is adulteration, and so considered there is certainly but one subject contained in the act. The general subject of the law being adulteration, the Legislature could extend its provisions to such compositions as it wished. In regard to the proper construction of section 16, art. 2, of the Constitution of Kansas, the Supreme Court of that state in the case of *State v. Barrett*, 27 Kan. 213, used the following language:

"In order to correctly interpret that provision of section 16, art. 2, of the Constitution, * * * its object must be taken into consideration; and the provision must not be construed or enforced in any narrow or technical spirit but must be construed liberally on the one side so as to guard against the abuse intended to be prevented by it, and liberally on the other side so as not to embarrass or obstruct needed legislation.

"* * * The title of an act may be as broad and comprehensive as the Legislature may choose to make it; or it may be as narrow and restricted as the Legislature may choose to make it. It may be so broad and comprehensive as to include innumerable minor subjects, provided all these minor subjects are capable of being so combined and united as to form only one grand and comprehensive subject; or it may be so narrow and restricted as to include only the smallest and minutest subject.

"And while the title to an act may include more than one subject, provided all can be so united and combined as to form only one single, entire, but more extended subject, yet neither the title to the act nor the act itself can contain more than one subject, unless all the subjects which it contains can be so united and combined as to form only one single subject.

"In construing the title to an act, as well as the act itself, reference must be had to the object of the act, and to the evil sought to be remedied by it."

In *Rathbone v. Hopper*, 57 Kan. 245, 45 Pac. 611, 34 L. R. A. 674, the same court said:

"A technical interpretation, however, has never been applied in this state to the titles of legislative acts. On the other hand, it has been consistently held that the constitutional limitation should not be enforced in any narrow or technical spirit but should be liberally interpreted with a view of upholding the acts of the Legislature. It has been regarded to be the duty of the court to view the acts of the Legislature with great respect and so far as possible endeavor to reconcile and sustain them. Illustrations of liberal interpretations placed upon the titles of acts may be found in almost every volume of our decisions, but we need only refer to a few of them. *Woodruff v. Baldwin*, 23 Kan. 494; *Philpin v. McCarty*, 24 Kan. 393; *Com'rs of Marion Co. v. Com'rs of Harvey Co.*, 26 Kan. 181; *Com'rs of Cherokee Co. v. State ex rel.*, 36 Kan. 337 [13 Pac. 558]; *Mo. Pac. Ry. Co. v. Harrelson*, 44 Kan. 253 [24 Pac. 465]; *State v. Bush*, 45 Kan. 140 [25 Pac. 614]; *In re Pinkney*, Petitioner, 47 Kan. 89 [27 Pac. 179]; *State ex rel. v. Lewelling*, 51 Kan. 562 [33 Pac. 425]; *In re Sanders*, Petitioner, 53 Kan. 191 [36 Pac. 348, 23 L. R. A. 603]; *Lynch v. Chase*, 55 Kan. 367 [40 Pac. 666]; *Rogers v. Morrill*, 55 Kan. 737 [42 Pac. 355]."

[2] Upon the second point we are also of the opinion that the law does not offend against any provision of the fourteenth amendment to

the Constitution of the United States. The law does not prohibit appellant from selling its merchandise within the state of Kansas; it simply requires that, if appellant shall sell the compounds and blends of linseed oil described in the bill, it shall be properly marked. The object of the statute in this respect is to prevent fraud and deception. Appellant ought not to complain of a law which requires it to state upon the package, in which its compound or blend is contained, a true statement in the English language as to just what the compound or blend is. The people of the state of Kansas, or of any other state, have a right to know when they purchase an article as to just what it is. Then if they purchase it, and do so knowingly, they cannot complain. The law makes this clear in section 4 of the act. That section, speaking in general terms, provides that the law shall not be construed as prohibiting the manufacture or sale of adulterated spirits of turpentine or linseed oil compounds, provided, if such compounds or adulterations are designed to take the place of raw or boiled linseed oil or turpentine as defined in section 1 of the act, they shall not be manufactured or mixed for sale, sold, offered or exposed for sale under any title or designation conveying the impression, either directly or indirectly, that it is flaxseed oil or linseed oil, and all compounds of linseed oil or flaxseed oil shall, when sold, offered or exposed for sale, under invented proprietary names or titles, bear conspicuously upon the containing vessel, in capital letters not less than five-line pica in size, the word "compound" or "adulterated" and be labeled so as to state clearly and distinctly the actual proportions of turpentine or linseed oil and other ingredients contained therein; said label to be printed in the English language in plain legible type with no intervening matter of any kind. This law simply requires appellant and other persons or corporations subject to its provisions to be reasonably honest. We have no doubt of the power of the state of Kansas to legislate in order to prevent fraud and deception in the sale of any kind of property to her people. The power of the states to pass such laws has been uniformly and repeatedly recognized by the Supreme Court of the United States. *Powell v. Commonwealth of Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; *Schmidinger v. Chicago*, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364. Liberty of contract is not a universal right and may be abridged when required for the public good. *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315; *M. & S. L. R. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *People v. Railway Co.*, 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 139 Am. St. Rep. 828, 19 Ann. Cas. 811; *Welsh v. C., B. & O. R. Co.*, 53 Iowa, 632, 6 N. W. 13; *Jones v. Railroad Co.*, 16 Iowa, 6; *Railway Co. v. McCann*, 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093; *Smeltzer v. Railway Co. (C. C.)* 158 Fed. 649; *Brush v. Railroad Co.*, 43 Iowa, 554; *Davis v. Railway Co.*, 83 Iowa, 744, 49 N. W. 77; *Lucas v. Railroad Co.*, 112 Iowa, 594, 84 N. W. 673; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417; *McCune v. Railroad Co.*, 52 Iowa, 602, 3 N. W. 615; *Rose v. Rail-*

road Co., 39 Iowa, 246; Solan v. Railroad Co., 95 Iowa, 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. Rep. 430; C., M. & St. P. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; N., C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; N. Y., N. H. & H. R. R. Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; West. Un. Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; Gladson v. Minnesota, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064; Central Trust Co. v. Sloan et al., 65 Iowa, 656, 22 N. W. 916.

The decree of the court below must be affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. BOARD OF DIRECTORS OF
MILLER LEVEE DIST. NO. 2 et al.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1913.)

No. 3,886.

1. EMINENT DOMAIN (§ 2*)—COMPENSATION—CONSTRUCTION OF LEVEE.

A state, under its general governmental power, has the right, directly or through the agency of levee districts created for the purpose, to build levees to protect land from overflow; and such structures create no liability for consequential damages caused thereby to private property by reason of any provision of the national Constitution.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

2. LEVEES (§ 9*)—POWERS OF LEVEE DISTRICTS—REVIEW OF ACTION BY COURTS.

When the location and mode of construction of a levee is within the discretion of the board of directors of a levee district, to which it has been committed by the Legislature, their determination cannot be reviewed by the courts, unless an arbitrary and manifest abuse of the power is shown.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 18; Dec. Dig. § 9.*]

Appeal from the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Suit in equity by the St. Louis Southwestern Railway Company against the Board of Directors of Miller Levee District No. 2 and others. Decree for defendants (197 Fed. 815), and complainant appeals. Affirmed.

Edward A. Haid, of St. Louis, Mo., and T. J. Gaughan, of Camden, Ark. (S. H. West, of St. Louis, Mo., and J. T. Sifford, of Camden, Ark., on the brief), for appellant.

Henry Moore, Jr., of Texarkana, Ark., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

WILLARD, District Judge. The railway company, a citizen of Missouri, which was the plaintiff below, brought this suit for the pur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pose of enjoining the defendants, citizens of Arkansas, from constructing a levee on the Red river, in Miller county, Ark., which construction, it is alleged, would compel the plaintiff to rebuild its bridge across the river near the proposed levee, at an expense of over \$150,000. The levee district is a corporation organized by special act of the Legislature in 1911. The court below sustained a demurrer to the amended bill, and, the plaintiff declining to plead further, it dismissed the bill. The amended bill alleged:

"That the defendant board of directors of Miller Levee District No. 2, is undertaking to build a levee of solid earth along the south and west side of Red river, beginning at a point in Miller county, Arkansas, where the state line between the states of Arkansas and Texas intersects the south bank of Red river, at or near Index, in the county of Miller and state of Arkansas, down along the southern and western bank of Red river to a point near the town of Garland City on the line of the plaintiff's road, and at or near said point to connect with the roadbed and cross the right of way of the plaintiff's railroad, and thence on southerly and easterly. That the purpose in view on the part of said board of directors of Miller Levee District in the construction of said levee, to confine the flood waters which are now and which have always heretofore been accustomed to flow down the Red river and the low lands adjoining its channel into the channel of said river north and easterly of said line of levee, and to prevent any of the waters accustomed heretofore to flow down said river and the low lands adjoining it from coming upon any of the lands embraced in said levee district, being those lands lying south and west of the said levee, and between it and what is known as the foothills or high lands of Miller county adjoining said Red river bottom.

"The plaintiff alleges that said board of directors, with the purpose and intent aforesaid, has caused surveys to be made and the location of said levee to be fixed by engineers, and plans and specifications thereof to be drawn, and has or is about to arrange for the building of said levee by contract with a contractor or contractors, and is now engaged in negotiating for the sale of bonds in the sum of \$300,000, or some like amount, in order to raise funds for the purpose of constructing said levee.

"The plaintiff further alleges: That in the spring of 1908 an overflow occurred in the Red river, the height of which was duly ascertained and marked, so that it is now well known. Said overflow was regarded, and is in fact, a fair example of the floods which may reasonably be expected to occur in said river. That the levee proposed to be constructed by the defendant district will be about five feet higher than the high water of the year 1908, and therefore higher than any known high water in said river.

"The plaintiff further alleges that a levee district has heretofore been created by a special act of the Legislature of the state of Arkansas on the opposite side of Red river, on what is known as the Lafayette county side, and a levee constructed of solid earth on an average of two feet higher than the high water of said river in the year 1908, above referred to. And, further, the plaintiff alleges that it is advised, and alleges as true, that the said levee district on the Lafayette county side intends to, and will in the near future, increase the height of said levee so that it will be of at least as great, if not greater, height than the levee proposed to be constructed by said defendant board of directors.

"The plaintiff further alleges that between said two embankments or levees not more than two-fifths of the flood water of Red river has heretofore been accustomed to pass, and that the effect of confining all of said water, the same being river water and accustomed to flow down the natural channel and natural drainage tributary thereto, in Red river will be to raise the water in the channel of said river to such a height as will overflow said levee in case of a flood similar or like the one of 1908, which said floods may reasonably be expected.

"The plaintiff further alleges: That more than 20 years ago, by special act of Congress, and under the authority and approval of the Secretary of War,

it constructed a railroad bridge across said river near Garland City, and built a roadbed across the lowlands adjoining said river, leaving sufficient openings or trestle work to allow all flood water from said river which might reasonably be anticipated to pass free from obstruction through the same. * * * That the top of its pivot pier in its bridge across Red river is less than six inches above the high water of 1908, and the bottom chord of the draw of said bridge, which is the lowest part of the steel work of the bridge, is not more than high enough above that high-water mark to allow for the passage of drift. That by the construction of said levee the water of Red river will be raised during ordinary overflow more than two feet above the high-water mark of 1908; and should the Lafayette county levee be added to in height, as is now proposed by the Lafayette Levee District No. 1, then the water in Red river at said bridge will be raised at least five feet higher than the high-water mark of 1908, with the result that the water will be about five feet above the present height of the pivot pier, and will cause the logs and driftwood which always float down said river during overflows to lodge against the draw span of said bridge, and the pressure from said accumulated drift would in all probability cause said bridge to give way. * * *

"The plaintiff further states: That in the event said proposed levee should be constructed, and should the levee on the Lafayette county side be increased in height, so that the height of two said levees would be substantially the same, one or the other of said levees would necessarily in the time of high overflow give way, and that it would not be possible for the plaintiff to know which of said levees would give way, so that it would be necessary for it to provide, by additional openings on both the Miller county side and the Lafayette county side of the main channel of said river, to take care of the immense volume of water which would be discharged over and through the openings in the levee which should break and give way. That the expense necessary to provide for the additional openings required would be in excess of \$100,000. * * *

"The plaintiff further alleges: That the act creating said levee district does not prescribe the height to which the levee should be built, nor the distance from the bank of the river where the levee should be constructed. That the defendant board of directors have located said levee so near the bank of said river, and are intending to and will construct it of such height, that it will be of no benefit to the lands which were intended to be protected."

The amended bill also alleged that if the levee is constructed the company will be compelled to rebuild its bridge at a cost of over \$150,000, which the levee district cannot pay, owing to the limitation on the amount of taxes which it can raise. The amended bill further alleged that in the condemnation proceedings it was allowed \$14 for that part of its right of way taken for the levee, and that it has appealed from that award.

[1] The directors of the district are proceeding to build the levee under direct legislative authority from the state of Arkansas. They constitute one of the agencies of the state. That the state under its general governmental power has the right to build levees to protect land from overflow cannot be doubted. *Carson v. Levee District*, 59 Ark. 513, 532, 27 S. W. 590; *Cubbins v. Mississippi River Commission* (D. C.) 204 Fed. 299, and cases there cited. The principal question is whether or not, if the state does that in this case, and the damages which plaintiff says it will suffer are not paid, any provision of the national or state Constitution will be violated. That such proceedings are not in violation of the Constitution of Arkansas is settled by the case of *McCoy v. Board of Directors of Plum Bayou District*, 95 Ark. 345, 129 S. W. 1097, 29 L. R. A. (N. S.) 396. The court

said there, at page 352 of 95 Ark., at page 1100 of 129 S. W. (29 L. R. A. [N. S.] 396):

"We conclude that, upon the state of facts which the jury could have found under the instructions of the court to exist, the defendant could rightfully construct the levee in the manner described without liability to plaintiff for damages. It is insisted, however, that a distinction should be made because of the provision of our Constitution that 'private property shall not be taken, appropriated or *damaged* for public use without just compensation therefor.' Article 2, par. 22, Constitution of 1874. In reaching the conclusion above announced, we are not unmindful of the constitutional provision; but, where no right has been violated, there is no injury for which the law affords compensation. It is a case of injury without damages. *Lamb v. Reclamation District*, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775."

That the acts done in this case do not constitute a "taking," within the meaning of the word as used in the fifth amendment to the Constitution of the United States, is settled by the cases of *Jackson v. United States*, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. 1363, and *Hughes v. United States*, 230 U. S. 24, 33 Sup. Ct. 1019, 57 L. Ed. 1374, decided on June 16, 1913, and since this case was argued. It was also held in those cases that if the United States, in the lawful exercise of its power to improve the navigation of the Mississippi river, caused damages, such as the plaintiff would suffer in this case, it was not liable therefor. In *Jackson v. United States* the court said:

"The third consideration—that is, the preventing of the outflow of water by work done in the tributaries, and the consequent increase in the volume of water in the river—cannot be tested from the point of view of individual authority, as the power to do so involves necessarily the exercise of governmental power. We therefore come to consider the proposition in that aspect. In doing so, however, it is to be observed that, even if all the previous considerations which we have stated, concerning the nonliability to result from building levees, measured by the right of an individual to build a levee to prevent the water of a river from overflowing its banks and destroying his property, be put out of view, and the case, therefore, in all its aspects be tested by the scope of the governmental authority possessed by the United States, the absence of merit in all the claims is too clear to require anything but statement. We say this because the plenary power of the United States to legislate for the benefit of navigation, and to construct such works as are appropriate to that end, without liability for remote or consequential damages, has been so often decided as to cause the subject not to be open. It was directly ruled as to work done by the Mississippi River Commission in *Bedford v. United States*, 192 U. S. 225, 24 Sup. Ct. 238, 48 L. Ed. 414, upon the authority of which case, as we have said, the court below placed its ruling, and as the underlying principles which controlled the decision in the *Bedford Case*, and which govern the subject, were again at this term, with much elaboration, stated and applied, we think it unnecessary to do more than refer to that ruling (*United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063, decided May 26, 1913), and to direct that the judgment below be affirmed."

If the United States in the proper exercise of its governmental powers is not liable for consequential damages caused by such exercise, then a state cannot be made liable for such damages, when it is properly exercising its governmental powers, by reason of any provision of the national Constitution. That such consequential damages cannot be recovered has been frequently held. *C., B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; *C., B. & Q. Ry. Co. v. Board of Supervisors*,

Appanoose County, Iowa, 182 Fed. 291, 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117 (8th Circuit).

[2] The plaintiff claims, however, that, even if a state has the right to divert the waters of a river without liability to those damaged thereby, the construction of the levee in the manner and to the height proposed would be so unreasonable and arbitrary as to demand injunctive relief of a court of equity, and it quotes from the case of *C., B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, on page 593, 26 Sup. Ct. 341, on page 350 (50 L. Ed. 596, 4 Ann. Cas. 1175), the following:

"If the means employed have no real, substantial relation to public objects which government may legally accomplish, if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action."

The only allegation in the bill bearing upon this point is the following:

"That the defendant board of directors have located said levee so near the bank of said river and are intending to and will construct it of such height that it will be of no benefit to the lands which were intended to be protected."

This is entirely insufficient to bring the case within the principle announced. The public object which the state might legally accomplish was the prevention of the overflow. The means employed were the levee. In view of the millions of dollars spent on levees in the United States, it is idle to say that they have no real, substantial relation to the prevention of overflows. By the law here in question the height of the levee was left to the judgment of the board of directors, and so was the location thereof with reference to its proximity to the bank. There is no allegation in the bill that, in determining this height or this location, the directors acted in an arbitrary and unreasonable manner. There is no allegation that they did not employ competent engineers. If the Legislature had in the act itself located the line in the same place where the directors did locate it, and if it had in the act itself fixed the same height for the levee which the directors afterwards did (both of which things the Legislature had the undoubted right to do), it could not for a moment be contended that an allegation such as is found in the bill would require the court to enjoin the prosecution of the work thus ordered by the Legislature. Such an allegation would amount to nothing more than the opposition of the opinion of the railway company to the opinion of the Legislature. In *Moore v. Board of Directors*, 98 Ark. 113, at page 117, 135 S. W. 819, at page 821, the court said:

"It will be seen from this that the court held that only an arbitrary and manifest abuse of power by the Legislature would be reviewed, and not merely mistakes of judgment. To hold otherwise would be to take away from the lawmakers the powers committed to them and to substitute the judgment of the courts, requiring the latter to review every matter alleged to have been erroneously determined by the Legislature. It is only an arbitrary determination of the lawmakers, made without just and reasonable basis, that the courts should review. We said in *Louisiana & Ark. Ry. Co. v. State*, 85 Ark. 12, 106 S. W. 960: 'The legislative determination should be and is con-

clusive, unless it is arbitrary and without any foundation in justice and reason.' Nor can the courts review merely on general allegations that the assessments are 'arbitrary, excessive, and confiscatory.' Facts must be pleaded which show that the decision of the lawmakers was not merely erroneous, but that it was manifestly outside of the range of the facts, so as to amount to an arbitrary abuse of power; for nothing short of that will authorize a review by the courts."

In *Salmon v. Board of Directors*, 100 Ark. 366, at page 369, 140 S. W. 585, at page 586, the court said:

"Again, it is alleged in the answer, and it is now insisted, that the benefits to the land in question to be derived from the improvement will not be commensurate with the amount of assessments levied, and that the annual assessment should not have exceeded 4 per cent. of the valuation of the lands, which amount appellant tendered in court. The legislative branch of the government is, as we have said in several cases, the sole judge in the matter of creating improvement districts of this character, in establishing the boundaries thereof, and in determining, or in providing means for determining, the amount of assessments based on benefits, and the courts will not interfere unless an arbitrary and manifest abuse of the power is shown. Mere mistakes of the lawmakers, or of those empowered by the lawmakers to make assessments, in fixing the amount or rate of assessment, will not be reviewed and corrected by the courts. *Moore v. Board of Directors Long Prairie Levee District*, 98 Ark. 113, 135 S. W. 819; *Board of Improvement v. Pollard*, 98 Ark. 543, 136 S. W. 957."

The decree of the court below is affirmed.

THE CHARLTON HALL.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 253.

SHIPPING (§ 141*)—DAMAGE TO CARGO—PERILS OF THE SEA.

Damage to a cargo of nitrate from water escaping from a steel ballast tank which was being filled while the vessel was discharging, caused by the fact that the top of the tank had buckled so that the manhole cover did not fit, *held* due to perils of the sea for which the vessel was not liable under the exception in the bill of lading; there being evidence that the tank was properly constructed and was in good condition when the vessel started on her return voyage from western South American ports to Philadelphia, and that she encountered very severe weather which injured her in other respects.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497-499; Dec. Dig. § 141.*]

Loss by perils of the sea, see notes to *The Dunbritton*, 19 C. C. A. 465; *Southerland-Innes Co. v. Thynas*, 64 C. C. A. 118.]

Ward, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the E. I. Du Pont de Nemours Powder Company against the steamship *Charlton Hall*, J. Robertson Dunn, claimant. Decree for respondent, and libellant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Following is the opinion of the District Court, by Hough, District Judge:

In January, 1912, the Charlton Hall arrived at Philadelphia with a cargo of nitrate from the West Coast of South America. After discharging a part of her cargo the officers of the ship deemed it advisable to fill up the No. 1 ballast tank. The sea cock was opened and more than enough time elapsed to fill up the tank, yet soundings showed that the tank was not full, while sounding the bilges revealed no water in them. This condition of affairs apparently puzzled those in charge of the steamer, but they finally shut off the sea cock and (continuing the discharge of cargo) found that so much water had come into the hold (or remained in the hold) during the extremely cold weather then prevailing that the cargo was frozen stiff for some two or three feet above the ceiling of the hold. This ceiling is a permanent board covering extending over the top of the tank and forming the floor upon which the cargo is laid. Access to the tank is gained by hatches in the ceiling. There is no evidence that at any time this ceiling was injured or broken or in any such condition that pressure or a blow could have been given by cargo to the tank. The ceiling at all times fulfilled the function for which it was devised.

The cause of the frozen water in the cargo remained a mystery until the Charlton Hall had gone (light) from Philadelphia to New York, where she was drydocked, and it was then discovered that the cement on her port side between 14 frames was cracked and broken, much of it badly, and that one of the manhole covers, also on the port side, was displaced in a very curious manner. As constructed, this manhole cover consisted of a steel or iron plate over the manhole, packed with a gasket and tightened with a dog by means of a central screw bolt. This is a usual and proper method of construction. On survey the screw, dog, manhole cover, and gasket were all perfect, but the top of the tank had become deformed or buckled in such a manner that a good gasket and duly tightened dog no longer made a watertight joint. When the tank was filled the water spurted out in a considerable stream.

This case differs from many others of the kind in the fact that this examination, made shortly after damage discovered and before the ship was laden, revealed exactly what was the matter, for there is no contradiction of the evidence showing that the amount of water which would flow through the sea cock during the time the same was opened, and which would escape through the deformed manhole joint, was quite enough to account for all the frozen water which injured the cargo.

It may be noted here that the rapid freezing of the water is measurably accounted for not only by the severity of the weather but the fact (of which judicial notice is taken) that the sea cocks were opened at Philadelphia in fresh water, something which greatly facilitated freezing; and this accounts for the fact that the water did not show in the bilges, which were also frozen.

The leading question of fact is how and when did that deformation of the tank top occur, which (proximately if not legally) caused the injurious flow of water? Claimants contend that it arose from peril of the sea on the long and stormy passage from Antofagasta to Philadelphia. Libellant points out that no other substantial injury to the ship was discovered, that the weather, while severe, was not materially different from that encountered on the outward passage, and therefore asserts that there was a defect in the ship at the beginning of the voyage amounting to a lack of seaworthiness, concluding that, since the vessel was not seaworthy when the voyage from Antofagasta began, the saving exception in the bill of lading concerning peril of the sea does not apply, and neither does the protection of the Harter act.

The Charlton Hall had been surveyed for reclassification immediately before starting from New York for the West Coast of South America; she received the highest classification; and the evidence is direct that this particular tank was then tested and found tight. She arrived at her first port of destination with tanks empty, and she did have heavy weather going out. As cargo went out, ballast tanks were filled, and the No. 1 tank was filled

from Valparaíso to Callao, and then down to Iquique, or, in time, from October 10th to November 7, 1911.

The first cargo for the United States was taken on (as per bill of lading) at Caleta Buena on November 4th, and next at Iquique on November 8th. Down to this time the No. 1 tank was full. Waves are high on the Pacific Ocean, and at these nitrate ports the steamer lay off the coast in surf of such a character that the lighters bringing out the cargo lost, and apparently were expected to lose (judging by the provisions of the charter party), considerable parts of their loads.

When at Caleta Buena the inward cargo began to come on board the captain personally went into the hold, saw that it was all in order and the bilges dry; the tank was then full. Having taken on board upwards of 19,000 bags of nitrate, he went to Iquique with the tank still full, and there, having taken on more than 31,000 bags, pumped out the tank. Certainly no freezing rendered detection of leakage difficult at that time and place, yet the bilges remained dry. This is satisfactory evidence to me that the manhole cover was in good condition at and after leaving Caleta Buena, at which point the inward voyage began.

Libellant has introduced expert evidence to show that the buckling of the tank top could not have occurred by the tossing and twisting of the ship in heavy weather without other and more substantial injury being shown to the fabric of the vessel than is indicated by the breaking and cracking of cement between frames. These opinions are most respectable, but since the weather admittedly was very heavy and the cement was broken, they do not answer the inquiry, Why did the tank top buckle? That the metal was sufficient and of good quality is, I think, shown by the action of Lloyd's surveyor when the difficulty was discovered, for he did not require a plate to be substituted nor the metal even to be faired in place, but put on a different kind of manhole cover which could be made tight notwithstanding the inequality or buckling of the tank top.

In my opinion the evidence affirmatively shows that a proper manhole cover closing an aperture in a well-built tank did begin leaking by the overpowering action of the wind and waves on the voyage from Caleta Buena to Philadelphia; the vessel having been seaworthy in respect of this tank on leaving the port of departure. It follows that the damage complained of is within the exception of the bill of lading, and the libel is dismissed, with costs.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for appellant.

Burlingham, Montgomery & Beecher, of New York City (Robinson Leech, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decree affirmed, with costs, by a majority of the court, on opinion below.

WARD, Circuit Judge, dissents.

SAFETY-ARMORITE CONDUIT CO. v. MARK et al.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1913.)

No. 2,342.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF ENAMELING METAL SURFACES.

The Garland & Garland patent, No. 611,900, for a process of treating and enameling metal surfaces, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by the Safety-Armorite Conduit Company against Cyrus Mark, Anson Mark, and Clayton Mark, partners as the Mark Manufacturing Company. Decree for complainant, and defendants appeal. Affirmed.

The following is the opinion of Sater, District Judge:

The complainant charges the infringement of its patent No. 611,900, issued to Robert and John W. Garland, October 4, 1898, for a new and useful method of treating metal pipes. The defense is anticipation and want of invention.

The patent particularly relates to the cleaning of metal pipes, such as are installed for use in buildings as electrical conduits. The pipes vary in diameter from one-half of an inch to three inches and are ordinarily about ten feet in length. Their use has become extensive; the complainant alone selling from 18,000,000 to 24,000,000 feet per year. The National Board of Fire Underwriters imposes on manufacturers, builders, and owners rigid requirements as to the character of such pipes. To avoid the tearing and wearing of the insulation of the wires drawn through them, and the consequent loss occasioned thereby, it is exacted that their interior surface shall be not only enameled, but smooth. The patentees state in their specifications that prior to their discovery of their method pipes which were enameled or otherwise coated on their inner surface, for use in carrying electric wires, contained small projections and particles of slag or scale, and when the wires were drawn through the pipe they contacted with such obstructions, tearing away the enamel coating and destroying the insulation of the wires. They declare that their invention overcomes this difficulty by a cheap and simple method of giving a smooth, even, inner surface before the enamel or coating is applied to the pipes. The method of treating the pipes under their invention is to submerge the pipe in a weak solution of acid, preferably sulphuric acid, and then remove the pipes and subject its interior to a blast of air containing abrading material, preferably sand. The scale and slag causing the roughness and obstruction in the interior of the pipe, being loosened by the acid, is dislodged and driven out by the sand blast, and the smooth interior surface thereby produced is well adapted for receiving the enamel. The interior coating is then applied, either by dipping the pipe into a bath of the coating material, or in any other suitable way. The advantages claimed for the invention are a much better article than was theretofore possible by a method of preparing the inner surface which is cheap, rapid, and easily carried out. The patentees do not limit themselves to any particular solution for loosening the scale or of applying the acid and blast. Their process of treating the interior surface of metal pipes is thus seen to consist of (1) applying a dilute acid solution thereto, or pickling the pipes; (2) driving a blast, provided with an abrading material, through the pipes *after* the completion of the pickling operation; (3) the enameling of the treated surface; and such are the successive steps set forth in their two claims.

Although the patentees' method of treating metal pipes may be but a slight advance over the prior art, it results in the production of a highly useful

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

article, and involves novelty and patentable invention sufficient to justify the issuing and sustaining of the patent. Long prior to its grant, the cleansing of the interior and exterior surfaces of pipes, as well as of the exterior surface of other metallic articles, by pickling in a dilute acid, was extensively practiced, as appears from the British and American patents offered in evidence. Sand blasts had long been used for the same purpose, and for removing obstructions and projections from the interior of pipes. The enameling of their interior was also familiar. Some of the prior patents cover merely a method of enameling, or of enameling and glazing; others, a method of pickling, followed by washing or boiling in hot water; others, a method of pickling and a subsequent cleansing with a brush or sand and water; in still other instances, to one or more of these steps was added some sort of a coating to the metal treated. Mandrels had been used to remove scales and other deposits and obstructions from boiler and other tubes. Blasts of steam and air had been employed for the same purpose, or to cleanse the exterior surface of bodies, and sand blasts had been used in connection with pickling. But, whatever were the methods employed, it is not shown that any one had ever practiced the same or combination method devised by the patentees, or obtained the same result. None of the elements entering into the method or process is in itself claimed to be new; but it is the use of them all, and the new combination of them all, and the securing of a new and useful result thereby, that constitutes the basis on which the patent rests, and that justifies the finding of patentability. *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Kermantz v. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; *Western Electric Co. v. Millheim Electric Telephone Co. (C. C.)* 88 Fed. 505.

The increasing use of electricity for light and power purposes created an extensive and growing demand for the installation of metallic pipes imbedded in the walls and floors of large buildings, as containers of insulated electric wires. The annoyance and loss from grounded circuits, the danger of loss by fire occasioned by the destruction of the covering of the wires, and the tearing away of the enamel when wires were drawn over or against rough places, or sharp and projecting points in the pipes, called for a perfection not theretofore known in their interior finish. A new use had arisen for small pipes, demanding a nicety, a precision, a smoothness in construction, as regards their interior, not previously required. When they come from the mill, there are present on their interior surface scales and some rust. These are ordinarily removed by the acid pickling, which destroys their connection to the pipes; but in so doing it also to some degree dissolves and pits the interior surface of the pipes, and leaves in them salts of iron and a gummy or colloidal coating. Adhering particles, and the projecting parts of particles imbedded in the iron, produce roughness. If loose and partially adhering particles remain, the enamel does not affix itself to the interior surface of the pipes, nor can it have a solid bearing on such particles, nor will it always wholly cover the rough and sharp projecting edges of such particles. So long as imperfections, whether consisting of rust, blisters, burrs, slivers, sharp edges or points, or of obstructions of any kind, exist which interfere with the ready pulling of the wires through the pipes, or tend to injure their covering, the pipes or tubes are commercially objectionable, and their use is condemned if such imperfections exist to any marked extent. Resort was had to various devices to free the interior of the pipes from such faulty features—such as washing them, subjecting them to hot water to remove the acid, blowing air or steam through them, ramrodding and reaming them by machinery, tumbling them in a revolving barrel, cleansing them with brushes, drawing wire rope through them, placing them on a lathe and hammering them as they revolved, driving sand and steam through them, etc.; but none of these expedients were found effectual. As the result of much experimenting, the patentees hit upon the method set forth in the Garland patent. The practical effect of driving through the pipes a blast provided with abrading materials, after their pickling, is to remove all, or substantially all, loose particles, acid and acid effects, to wear off sharp and

projecting surfaces, smooth the interior surface, and leave the tubes, without any other needed treatment, ready for receiving the enamel. From this it necessarily follows that the sand blast dries the pipes; for, were it not so, and were the pipes left in a moist condition, they would be subject to rust, and would consequently have to be dried and probably further treated to remove such rust, before the final step of enameling is undertaken.

It is urged that the patent does not mention all of the beneficial results now claimed and found to follow from the sand blast treatment. The file wrapper shows that the removal of acid was in contemplation. It, and the patent also, disclose that the tubes were to be left in a condition for enameling at the conclusion of the sand blasting. That fact as clearly appears as if it were affirmatively stated. It must follow, therefore, that the sand blasting operates as a drier. An inventor's failure, when he perfected his apparatus or process, to foresee all of its results, does not invalidate his patent. He is entitled to its use for every purpose to which it is adapted (*New Process Fermentation Co. v. Koch* [C. C.] 21 Fed. 580), and whatever the patent fairly covers the inventor is entitled to, although its complete capacity is not recited in the specifications and was unknown to the inventor prior to the issuing of the patent (*Diamond Rubber Co. v. Consol. Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527).

The method prescribed in the Garland patent differs from that set forth in the British patent to Cowper-Cowles, No. 16,507, which was issued in 1893, and is thought by some of the expert witnesses to be more nearly anticipatory of the patent under consideration than any other. His patent relates to a method of and apparatus for pickling the exterior of metallic articles preparatory mainly to their receiving a coat of metal or of metallic compound, but which is also applicable to pickling them for any other purpose. His specifications provide that "in some cases it is advantageous to treat the articles *before* pickling, and *in intervals* of the process of pickling, with a sand blast." He contemplated the use of the sand blast merely as auxiliary to the cleansing action of the acid, and not as a step following the completion of the pickling to remove all prior obstructions, traces of acid, of cutting and projecting elements and other objectionable and rough features, but a step intermediate to a succession of tube immersions in the pickling solution. He states no method of applying the sand blast and no treatment to be given subsequent to the pickling and prior to the coating. His patent contains no suggestion of a method of treating the interior surface of pipes, or a complete unitary method such as that devised by the Garlands. The sand-blasting process under the Garland patent takes place *after* the pickling. It was manifestly this difference in the time of applying the sand blast that mainly, if not entirely, induced the Patent Office to grant the Garland patent, notwithstanding the disclosures of that of Cowper-Cowles.

Under the recognized rule as to the extent to which foreign patents are held to be anticipatory, the Cowper-Cowles patent cannot be held to defeat the one here in question. *Seymour v. Osborne*, 11 Wall. 516, 560, 20 L. Ed. 33; *Hanifen v. Godshalk Co.*, 84 Fed. 651, 28 C. C. A. 507 (C. C. A. 3); *New Process Fermentation Co. v. Koch* (C. C.) 21 Fed. 580; *Carnegie Steel Co. v. Cambria Iron Co.* (C. C.) 89 Fed. 721, and 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968; *Western Electric Tel. Co. v. Millheim*, *supra*. Even as to domestic patents, the Garland method is not invalidated by statements in an earlier publication, unless those statements are full and definite enough to inform those skilled in the art how to put in practice the patented Garland invention. Moreover, a process patent can only be anticipated by a similar process, and no such process as that set forth in the Garland patent is shown in any prior patent. It is not sufficient to show a piece of mechanism by which the process might have been performed. *Carnegie Steel Co. v. Cambria Iron Co.* It is significant that the disclosures of the many earlier patents cited by the defendant did not result in the application of the prior patentees' method to the preparation of tubes to carry electric wires.

The Roberts patent, No. 582,952, May 18, 1897, was also cited by the examiner for the rejection of the first three original claims in the Garland application and is relied on here as anticipatory. That patent relates to the

cleaning of the surface (exterior) of bodies, and is for a method of cleansing by the use of an acid and scouring by means of brushes and water. The application and claims of the Garlands as amended were deemed by the examiner—and correctly, I think—to distinguish their method from that of Roberts, else their patent would not have been granted.

After the Garland patent issued, Tilghman & Brooksbank in 1902 made application for a patent for the same method and an allowance of the same claims. They were the owners of the Tilghman patent, No. 108,408, October 18, 1870, for an improvement in cutting, grinding, boring, dressing, pulverizing, and engraving the exterior surfaces of stone, metal, glass, and other hard substances, by means of a stream of sand, or grains of quartz, or of other suitable material, propelled by a rapid jet or current of steam, air, water, or other suitable gaseous or liquid medium, or other direct force. It did not involve the pickling process. In the 32 years which have elapsed, their method, in so far as the record discloses, was never applied to the cleaning of the inner surface of tubes. The interference declared between the Tilghman & Brooksbank application and the Garland patent terminated in a decision on concession in favor of the latter. The concession made, according to the evidence of John W. Garland, was the priority of the Garland invention. The result of the interference proceeding is not binding on the defendants, who were not parties to it (*Wilson v. Consolidated Store-Service Co.*, 88 Fed. 286, 288, 31 C. C. A. 533 [C. C. A. 1]; nevertheless it has some weight favorable to the complainant in determining the validity of its patent (*Westinghouse v. Stanley*, 133 Fed. 167, 68 C. C. A. 523 [C. C. A. 1]).

The evidence of John W. Garland is that various futile experiments were made to produce an acceptable commercial tube, before the patented method suggested itself. The witness Flack, who was experienced in metal and tube manufacture, details expedients tried by the American Conduit Manufacturing Company, which finally adopted the Garland method. His company, he says, was compelled to use the sand blast as the finishing step in the preparation of pipe for enameling, or else give up the attempt to manufacture electrical conduits, and after making a pretty thorough search among users of the sand blast, to ascertain whether it had ever been used prior to the issuing of the complainant's patent for scouring the interior surface of tubes, it found that the manner of scouring employed in the manufacture of bath-tubs was the thing nearest to complainant's method, and that was not satisfying. When his company was sued for infringement, a compromise was effected whereby it received a license permitting it to proceed according to complainant's method. The witness Smith, who was in charge of the Armorite Interior Conduit Company, and who had held other important positions in manufacturing plants, recites the unsuccessful efforts of his company to produce a commercial pipe that would acceptably meet the requirements of the trade. It found itself unable to compete with complainant, and, having no satisfactory method of successful pipe production, it "stole," he said, "the [complainant's] process of sand-blasting." Garland names other manufacturers that adopted complainant's method (page 299), only to relinquish the same or wholly retire from business when their right to use the same was challenged. The defendant, in its efforts to produce a high grade of merchantable pipe, with knowledge of the existence of the Garland patent, also, after trying various methods, adopted the process therein described, purchased a machine constructed for use in connection therewith, and used it for a period of from four to six weeks immediately prior to the beginning of this suit. It thus appears that, as soon as competitors learned of the Garland method, they one after another appropriated and used it, until called upon to defend their right to do so, and this none of them were willing to do. Their conduct bespeaks the merit of the invention. That others skilled in the art sought to accomplish the results attained by the patented method, and failed in their efforts, and that there has been a very general acquiescence in its validity, may be and usually are evidence of invention, and not merely of judgment and skill on the part of the Garlands in conceiving and producing it. *American Graphophone Co. v. Universal Talking Mach. Mfg. Co.*, 151 Fed. 595, 81 C. C. A. 139 (C. C. A. 2); 30 Cyc. 861.

The mere fact that the method and its product possess great commercial advantages, went promptly into extensive use, excluded other manufacturers as competitors, and displaced other methods and pipes produced thereby, which had previously been employed for carrying electric wires, does not necessarily establish that the Garland patent involves patentable invention; but it may be considered, as may also the presumption of validity arising from the granting of the patent, in determining the question of patentability, and if the other facts in the case leave the question in doubt, is sufficient to turn the scale. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 495, 496, 23 L. Ed. 952; *Streator Cathedral Glass Co. v. Wire Glass Co.*, 97 Fed. 950, 38 C. C. A. 573 (C. C. A. 7). The production of tubes according to complainant's process has secured economy and speed in the manufacture of a useful article. Where the result produced by a method is an improvement in the trade, and is for the public good and advantage, by the manufacture either of a new, or better, or cheaper article than that produced by other methods, such result is evidence of patentable novelty and utility. *Jones v. Wetherill*, Fed. Cas. No. 7,508; 30 Cyc. 826, 827; *National Tube Co. v. Aiken*, 163 Fed. 254, 91 C. C. A. 114 (C. C. A. 6). Notwithstanding the demand for improved tubes for conduits to care for electric wires, neither the manufacturers who invested their capital, nor their employes, nor men learned in the science, who acted as their advisers, saw and did what the Garlands saw, and, after protracted effort, did. This implies novelty and patentable invention. The simplicity of the process described in the patent does not depreciate its value or establish want of patentable invention; but when a patentee gives to the world a new combination of old elements, whereby a new and useful result is obtained, his patent should be sustained, even if the changes in mechanism or method by which the result is produced are not difficult. *Stewart v. Mahoney* (C. C.) 5 Fed. 302. It is the last step that wins, in the law of patents. *Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; *Streator Cathedral Glass Co. v. Wire Glass Co.*, supra.

In the oral argument attention was directed to the evidence of complainant's expert, Smith (page 327), to the point that, previous to the granting of the patent involved, "it was customary to clean the interior of conduit pipes, previously to their enameling by pickling in acid, by scouring and abrasion, either by wet scrubbing with sand or by sand blasting, or by forcing a mandrel through the pipes, by which the rough surface was smoothed." Inasmuch as the witness did not state the order in which the sand blasting occurred, in view of his evidence as a whole and especially as given on pages 335, 336, 337, etc., it cannot be held to support the defendants' contention or to conflict with the conclusion reached.

It is urged that the defendants have developed a method of treating pipes which produces the same result and as good or even better pipes than can be had by the use of complainant's process. This constitutes no defense. Their ability to produce the same result as complainant by another and different method does not affect the complainant's right to an injunction. *Du Bois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895.

In view of the fact that the defendants are the owner of a machine designed for the manufacture of tubes according to the complainant's process, an injunction may go.

Charles Neave, of New York City, and James K. Bakewell, of Pittsburgh, Pa., for appellants.

C. P. Byrnes and Geo. H. Parmelee, both of Pittsburgh, Pa., and E. Rector, of Chicago, Ill., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was a suit based upon the two claims of the Garland & Garland patent, No. 611,900, dated Oc-

tober 4, 1898. The patent relates to the treatment and enameling of metal surfaces, and particularly the interior surfaces of metal pipes. The complainant below holds the patent through assignment of the patentees. The defenses were anticipation and lack of invention. The cause was heard below on the usual pleadings and upon proofs taken by both parties. The validity of the patent and the charges of infringement of both claims were sustained, an accounting and injunction were granted, from which this appeal was allowed and is maintained. Judge Sater's decree in the court below was the result of minute examination and a considered opinion. It is not necessary, however, to pass upon its entire reasoning. Our examination of the record leads us to a unanimous approval of the conclusion.

The decree is therefore affirmed, with costs.

GOODWIN FILM & CAMERA CO. v. EASTMAN KODAK CO.

(District Court, W. D. New York. August 14, 1913.)

1. PATENTS (§ 328*)—PHOTOGRAPHIC PELLICLE—FILM SUPPORT.

Hannibal Goodwin patent, No. 610,861, for a film support for photographic purposes especially in connection with roller cameras *held* valid, not anticipated, and infringed as to claims 1, 6, 8, 10, and 12, covering the process and product of the patent.

2. PATENTS (§ 168*)—INTERPRETATION—PROCEEDINGS IN PATENT OFFICE.

The interpretation to be placed on a patent is to be determined by the language of the grant, and the proceedings of the Patent Office are immaterial unless the patentee by his acquiescence has accepted limitations imposed by the rejection of broader claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.*]

3. PATENTS (§ 72*)—ANTICIPATING PATENTS.

Anticipating patents and publications in order to effect a patent in question must disclose the invention without patentable change or alteration.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86-91; Dec. Dig. § 72.*]

4. PATENTS (§ 30*)—PATENTABLE INVENTION—PERFECTION OF ART.

The patent law does not require that an inventor shall have succeeded in bringing his art to the highest degree of perfection, but it is enough if the skilled in the art understand the process described and the specifications point out a practical way of performing it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 34; Dec. Dig. § 30.*]

5. PATENTS (§ 283*)—PRIORITY—PROCESS PATENT—ESTOPPEL.

A patentee, during the course of proceedings to obtain a patent, practically conceded priority of a specific process for making the same article, and his successor in title is estopped thereafter to assert infringement by articles made in pursuance of the specific process patented formula.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-450, 452; Dec. Dig. § 283.*]

In Equity. Bill by the Goodwin Film & Camera Company against the Eastman Kodak Company. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edward C. Davidson, of New York City (Edmund Wetmore, of New York City, of counsel), for complainant.

M. B. Philipp and J. J. Kennedy, both of New York City, for defendant.

HAZEL, District Judge. The Hannibal Goodwin patent in suit, No. 610, 861, for photographic pellicle and process of producing same, now owned by the complainant company, was originally applied for on the 2d day of May, 1887, and was granted September 13, 1898, more than 11 years later. The bill alleging infringement by the Eastman Kodak Company of 11 out of a total of 12 claims was filed in December, 1902, and argued and submitted for decision in May, 1913. The answer of the defendant sets up various defenses, denies infringement of the patent and complainant's title thereto, and asserts the invalidity thereof in view of the state of the art and because it was granted for a different invention than that described in the application originally filed. The various questions presented and argued are of much importance and complexity; the record is voluminous and the testimony highly technical. Although the determination of the controversy is in favor of the validity of the patent and accords to the claims a liberal construction, yet such determination was reached upon a record of so contradictory a character that there remained a doubt as to the correctness of the conclusion, which doubt, however, has been resolved in favor of the patent. There was much caustic criticism of the testimony of Dr. Chandler, who testified for the complainant, and similar criticism of Prof. Main, who testified for the defendant; but the qualifications and competency of these well-known scientists to testify upon subjects relating to mechanics and the art of modern photography in its relation to films and film supports are beyond serious question or dispute. No doubt many of the wide divergences of opinion arose from the abstruseness of the subject and the almost undefinable mysteries of chemical reaction which obscure the untrained mind and which probably in a lesser degree similarly affect the minds of the skilled chemist learned in the art.

There are a number of preliminary matters, such as the denial of complainant's title, laches in the issuance of the patent, asserted laches in bringing the suit to a hearing, and an alleged champertous arrangement, which have been considered, but the assertions are believed to be insufficiently substantiated to justify the dismissal of the bill on those grounds. I therefore proceed to examine the patent upon which complainant's legal rights are based.

[1] The specification states that the object of the invention "is primarily to provide a transparent sensitive pellicle better adapted to photographic purposes, especially in connection with roller cameras." Then, after referring to the prior art and the inefficiencies of the stripping paper films, the specification says that the patentee's support for the film is nitrocellulose, and that by the simultaneous use of two classes of solvents the film support is improved and rendered insoluble in the usual fixing and intensifying solutions used in photography. The specification continues:

"In carrying out the invention I provide a suitable surface, such as that of glass, and flow over the same a solution of nitrocellulose (by which I do not mean a solution of the compound known as 'commercial celluloid' dissolved in alcohol or ether) dissolved in nitrobenzole or other nonhygroscopic and nonhygroscopic solvents, such as may be employed in producing celluloid, as distinguished from collodion and diluted in alcohol or other hygroscopic diluent. The equivalents for nitrobenzole are those nonhygroscopic, nonhygroscopic fluid solvents of nitrocellulose which are nonmiscible with water, of slow volatility, and nongreasy, including nitrobenzole, above named, acetate of amyl, etc., which effect, when the solution has been flowed over a smooth plate, a smooth, transparent, imporous, impermeable film capable of being subjected to the photographic fluids above mentioned without being affected thereby. The solution obtained by dissolving the nitrocellulose in said nonhygroscopic, nonhygroscopic solvent is diluted with alcohol or other diluent, which, like alcohol, serves to dilute or expand the volume of the dissolved nitrocellulose and increase its fluidity and which may be, and ordinarily is, hygroscopic, miscible with water, and highly volatile. This diluted solution is then applied to a smooth and hard surface, from which it may be stripped when dry."

Thus it will be noticed that in practicing his process the patentee used as a solvent nitrobenzole, which he describes as a high-boiling, nonhygroscopic, and nonhygroscopic solvent, with the basic ingredient nitrocellulose, and as a diluent alcohol "or other diluent." The resultant of the process was a thin solution of nitrocellulose flowed evenly on a glass support and was easily removable therefrom. It is shown that, because of the high volatility of certain elements contained in the solvents, they evaporated rapidly, leaving the pellicle fluidous until the high-boiling elements which evaporate more slowly were also evaporated, when it became hard, transparent, and nonporous and, being without oil or greasiness, resisted the injurious effects of the photographic emulsion. The desired result was achieved principally through the high-boiling quality of the solvents and their nonhygroscopic and nonhygroscopic character. Dr. Chandler, testifying to the effects of the two classes of solvents, says:

"The sequence of evaporation from such a mixture of liquid solvents would be the following: The low-boiling rapidly evaporating diluent would pass off first; any water present which did not pass off with the vapor of the diluent would pass off next; and finally the high-boiling, nonhygroscopic, and nonhygroscopic solvent, such as nitrobenzole or amyl acetate, would pass off, leaving upon the support (that is, the glass plate) the nitrocellulose film in its complete and finished state ready, either before or after it is detached from the glass plate, to receive its sensitive photographic coating."

It will suffice to reproduce the following claims:

"(1) An improvement in the art of making transparent, flexible, photographic-film pellicles, the same consisting in dissolving nitrocellulose in a menstrum containing a hygroscopic element and an element which is nonhygroscopic; the nonhygroscopic element being of itself a solvent of nitrocellulose and of slower volatility than the hygroscopic element, depositing and spreading such solution upon a supporting surface, and allowing it to set and dry and harden by evaporation, and spreading a photographically-sensitive solution on the hardened film, substantially as set forth."

"(6) An improvement in the art of making transparent, flexible, and elastic photographic pellicles; the same consisting in dissolving nitrocellulose in an eventual celluloidal menstrum which is anhydrous and nonhygroscopic, spreading such solution upon a supporting surface, allowing it to dry and

harden; spreading photographically-sensitive matter thereon, and again drying and stripping the pellicle from said support, substantially as set forth."

"(8) The process of making photographic pellicles, which consists in subjecting nitrocellulose to the action of a menstrum combining fast and slow evaporating solvents; the slow evaporating solvent being nonhygroscopic and nongreasy in nature and quality and acting as an eventual solvent as described, spreading the solution upon a support and setting the same by evaporation, then applying photographically-sensitive matter and stripping, all substantially as set forth."

"(10) As a new article of manufacture, a transparent film support for photographic purposes, the same consisting of a thin, nongreasy film, foil, or pellicle of a dried and hardened cellulosidal solution of nitrocellulose, combining, in addition to the following essential properties of glass-plate supports, viz., insolubility in developing fluids, insensibility to heat and moisture, impossibility of structure, and hardness, smoothness, and brilliancy of surface, the further desirable properties of exceeding thinness, lightness in weight, toughness in texture, and elasticity in flexure, as and for the purposes specified."

"(12) The process of manufacturing photographically-sensitive pellicles, consisting of flowing a nonphotographically-sensitive solution of nitrocellulose dissolved in a nonhygroscopic liquid, or a liquid which is eventually nonhygroscopic, and drying and hardening such compound into a support for the photographically-sensitive emulsion and imposing on such support the said sensitive emulsion, substantially as set forth."

There was considerable argument in the Patent Office, after Goodwin's application for patent was filed, in an effort to persuade the Primary Examiner that patent for process and product should be granted. The file wrapper and contents disclose a wealth of discursive correspondence and the institution of several interference proceedings to which reference is hereinafter made. Repeated amendments of the specification and claims were filed, while the Patent Office continuously rejected the application, citing the prior art in anticipation, and principally relying upon the English patent to Parkes and on descriptions of the coating of plates or sheets for making films contained in publications devoted to the art of photography; but after the final rejection in March, 1898, an appeal was prosecuted to the Board of Examiners in Chief, and its decision favored issuing the patent, the board substantially adopting the view that the prior art did not disclose means for successfully producing a photographic film of the kind specified in the Goodwin patent and claims.

The file wrapper and contents show that from the beginning Goodwin insisted upon the allowance of broad claims, referring in his specification to ornamental veneering and to the use of the solution in the decorative arts. He also specified a preferable fluid solution for his process; but, in view of the Patent Office citations suggesting films of celluloid and collodion, he limited the claims to the enumerated ingredients having the specified chemical properties; and he at all times maintained that the solution of nitrocellulose in nitrobenzole, flowed on a suitable surface to make a pellicle adapted for use in photography, was of the essence of his invention and was a generic discovery.

The history of the essential steps in the development of modern photography from the camera obscura is only partially narrated in the record of this case; and, though the expert witnesses have widely differed as to the effect of prior photographic processes and the char-

acter of modifications in the application of chemical principles, still I think it is fairly established by the proofs that in this field an important step forward in the art was made by Goodwin which led from past inefficiencies and failures to success. The process by which at the present time images are instantaneously reproduced by the action of light on a sensitized flexible film chemically prepared, and by which, for example, the automatic movement of forms and shapes is obtained, would be difficult to comprehend even at this date were it not for the widespread interest evinced in the art by the amateur photographer since the perfection of Archer's dry plate process and augmented since the substitution of flexible and rollable sensitized films for the glass plates of the prior art.

In so far as material, the history of the photographic art shows that by Daguerre's process images were reproduced on sheet metal, the sensitizing agent being iodine, while in the Talbotype process, consisting of photography on paper, which quickly replaced the earlier metallic sheets, the paper was coated with a solution of iodine of silver and the negative suitably waxed before printing. Following the latter process came the albumen process which was coated on glass plates, after which came the wet collodion process which consisted of coating the glass surface with ether and alcohol impregnated with iodine of potassium usable only before the sensitizing agencies became dry. Then in 1855 came the Archer patent, No. 1,914, which described the use of collodion, hardening and drying the film, and removing it from the surface of the glass, and obviated many objections and difficulties inhering in the exposure of glass in the camera. Collodion emulsion was next used, being poured over the glass plate and exposed to the light to take the picture; but there yet remained objections to the processes at that time commonly used in photography which were only removed by the adaptation of bromide of silver for the sensitizing medium and which ultimately led to the discovery, between the years 1878 and 1880, of the dry plate or gelatine emulsion process and consequent disappearance of the so-called wet process.

The record shows that roll holders for films were suggested at a comparatively early period (see *Eastman Co. v. Blair Camera Co.* [C. C.] 62 Fed. 400), but that their use was restricted, and that the art was continuing to look forward to a flexible and rollable film support which could be conveniently carried by the photographer in lieu of glass. After the dry plate process became known, a demand immediately arose for a flexible film, and in 1885 such a film was devised and made practicable by Mr. George Eastman of the defendant company. This film was of paper, coated with a gelatine bromide which became the negative and which was readily removable from the paper. But there was still a desire for more satisfactory film supports; the witnesses Eastman and Dr. Chandler testifying that the paper stripping films were objectionable on account of the not infrequent appearance of the grain of the paper in the picture and on account of the thinness of the film which made it difficult to handle in the printing operation. In spite of the success attained in the art by the paper films, they became subordinate to a transparent flexible

nitrocellulose film support, upon which the sensitive emulsion was flowed, which was put upon the market by the defendant, but which complainant claims was the discovery of Goodwin.

The patentee conceded in the Patent Office that patents for transparent flexible photographic films had previously been granted, much having been printed regarding supports from gelatine, collodion, and celluloid; yet he insisted, and the evidence supports his view, that all former attempts failed of their object and did not fulfill the requirements. In his replies to repeated rejections of his application by the Primary Examiner, he argued that his invention was essentially different in character and adaptation from the prior processes of Parkes, Davis, and others, and from the prior processes by which sheets of celluloid and shaved films were made for photographic purposes. He constantly maintained that his invention was a pellicle (originally called by him a foil) which, though peculiarly celluloidal, was nevertheless different from the ordinary celluloid and from collodion, and that his process of flowing the solution over a glass plate and then drying it was essentially different from other processes, and that by his process he was able to produce thin, tough, transparent, and flexible sheets which were rollable. None of the prior patents, he urged, were capable of producing such sheets or films either by a shaving or pressing operation, and consequently his method of flowing a solution of nitrocellulose for making film supports was new and novel.

The criticism of the defendant that the specification and claims contain unnecessary explanatory statements as to the chemical properties of the ingredients is perhaps not inapt, but the amplified amendments do not operate to enlarge the scope of the claims or introduce new subject-matter. The original invention remains. Chemists were aware of the fact that nitrobenzole and amyl acetate possessed nonhydrous and nonhygroscopic properties, that they were classed as solvents of nitrocellulose, guncotton, and pyroxyline; but, as already stated, Goodwin drew a sharp distinction between his solution and the solutions of collodion or celluloid, which was composed of nitrocellulose and camphor ordinarily dissolved in ether or alcohol, and expressly disclaimed the latter, all the while claiming an improvement in the specific combination of nitrocellulose dissolved in nitrobenzole or other nonhydrous or nonhygroscopic solvents and diluted in alcohol or its equivalent. There was also criticism by the defendant of the inclusion in the original application, in the class of high-boilers, of wood alcohol or prepared alcohol, a low-boiling, hydrous element, and of the inclusion of glacial acetic acid, but this is immaterial as those substances were omitted from the amended specification.

It is further urged that the specification is insufficient in that the proportions of the compounded ingredients are not given, nor the consistency of the menstrum to be spread or flowed upon a glass plate stated. Nevertheless I think that the process is described with sufficient clearness and fullness so that the skilled artisan would find no difficulty in producing a pellicle from such description. The terms "flowing and spreading" do not convey to the art radically different steps, and to "flow" the plastic material upon the supporting surface is thought to imply spreading or leveling whenever necessary; this to

depend upon the character of the film desired. Dr. Chandler, when asked how the process would be performed without directions as to proportions, testified:

"Well, Goodwin tells you what to use; nitrobenzole or acetate of amyl he mentions by name as the high-boiling solvents, and ethyl alcohol, methyl alcohol, ethyl acetate, methyl acetate, and acetone as diluents. All one would have to do, therefore, would be to dissolve his pyroxyline in either one of the high-boilers mentioned, using enough to accomplish the purpose, and dilute the solution thus obtained with either one of the diluents. One experiment would be sufficient to give him an idea of the proper quantity; then if he wanted to he could mix the high-boiler and the diluent together first and introduce the pyroxyline into the mixture, and if desirable he might reduce the quantity of the high-boiler or modify the proportions in any way that suited his convenience. The Goodwin patent does not undertake to teach people how to dissolve pyroxyline; that had been done for more than half a century. * * * What he teaches is the employment of certain specified solvents or their equivalents, which are of such character as to produce a solution which when evaporated will leave a film having the physical and chemical properties mentioned in the specification."

This version is challenged by the defendant, but not successfully. The patentee, in my opinion a pioneer inventor, no doubt had the legal right to embody in his amendments other solvents which he regarded as possessing substantially the same chemical properties as those specified originally.

[2] The general rule is that the interpretation to be placed on a patent is to be determined by the language of the grant, and that the proceedings of the Patent Office are immaterial unless, of course, the patentee by his acquiescence has accepted limitations imposed by the rejection of broader claims. *Westinghouse Elec. & Mfg. Co. v. Condit Elec. Mfg. Co.*, 194 Fed. 427, 114 C. C. A. 389; *Beach v. American Box-Mach. Co.* (C. C.) 63 Fed. 597. Goodwin in filing new claims, making them narrower but still within the original specification and drawings, acted within his legal rights. *General Elec. Co. v. Morgan-Gardner Elec. Co.*, 168 Fed. 52, 93 C. C. A. 474.

The Goodwin patent is not to be construed as meaning a mere solution of nitrocellulose, because in his original application the patentee stated that he dissolved nitrocellulose in nitrobenzole "or other solvent." The latter phrase, fairly interpreted, must be taken to mean, as the patentee no doubt intended that it should be taken, viz., a solution in nitrobenzole or its equivalent; and so also as to the diluent alcohol and the words "or other diluent." In the outstart Goodwin perhaps did not understand the chemical properties of his composition nor the effect of compounding high and low boiling ingredients, but his ignorance in that respect and his consequent omission to state the properties in the original application of all high or low boilers known in chemistry does not defeat the patent as long as the mode of operation achieving the result is sufficiently described in the application. *Andrews et al. v. Cross* (C. C.) 8 Fed. 269.

Was the patent in suit anticipated by the prior art? In the English patents to Parkes, No. 2,359 of 1855 and No. 1,123 of 1856, to which reference was made by the Examiner, there is contained a description of collodion sheets of sufficient thickness to support a photographic film. In the patent 1855 for elastic and adhesive compounds, Parkes

describes a solution of guncotton in wood naphtha or other solvents. He states that the preparation may be used for waterproofing and various articles requiring properties similar to india rubber or gutta percha, and, while mentioning that guncotton has been used principally as a photographic agent, says that his object is to employ compounds of collodion for manufacturing purposes generally; and in his provisional specification of 1856, which, by the way, was abandoned, he stated that his invention of sheet collodion was usable as a substitute for glass in photography, and specified a thick layer of collodion formed on plate glass with a film of collodion thereon. He states that in making pictures the back of the collodion may be coated with a black varnish, etc. But it is important to note that the method of making his sheet support is not specified by him nor the method by which its thickness is controlled. The inference may fairly be drawn that Parkes simply intended that the sheet of collodion should be used in the same manner that a glass plate is used, and that it should possess equal firmness. He makes no reference whatever to the character of the solvents or their properties, nor to the application of the solution to make a thin, tough, transparent, and flexible sheet, and in my opinion he does not anticipate the patent in suit.

In the Parkes patent, No. 2,359, the enumerated solvents are vegetable naphtha, alcohol, methylated alcohol, or other ether "or other solvents" of guncotton or pyroxyline; and according to Dr. Chandler, as these solvents were all low-boilers and hygroscopic, it was impossible to clearly flow the solution without puckering or wrinkling the sheet. But Prof. Main swears that, while it might be impossible to flow the solvent to produce the required sheet, yet in his opinion, when the solution was spread and leveled, a satisfactory transparent and flexible sheet was produced; still I am of opinion that the sheet to which Parkes referred in his later specification was more in the nature of a coating for a glass than of a film support, much less one for use in a roll-holder camera, and it therefore is not anticipatory.

The defendant further claims that transparent, flexible pellicles were available many years prior to the Goodwin invention but were not used on account of the great expense involved in manufacturing them in long strips for rolling. But the contrary appears by the testimony of the witnesses Bellsmith and Eastman.

The French patent to Ferrier was for a gelatine film with a layer of collodion poured upon it, but there is no suggestion in the description of a nitrocellulose support. The Beals patent, No. 239,425, describes a vegetable wax with camphor in a celluloid mixture which was to be employed in general use, it not being supposed at the date of the invention that the patentee's composition was usable for films; and the experimental test since made to show that films could be produced by compounding his ingredients, in the light of subsequent knowledge, is not to be considered to anticipate the claims in suit. In the Parkes United States patent, No. 265,337, is described a new solvent for nitrocellulose composed of camphor and other compounds but not the compounds of the Goodwin patent.

In the published articles of David at different times in the years 1881, 1882, and 1883, a transparent, flexible film support is suggested,

but the record fails to show that one was ever produced. The experiments of David, for such they were, consisted of celluloid sheets reduced in thickness by hydraulic pressure, and his object at the out-start was to produce a composition which would successfully take the place of glass plates, but subsequently (*Les Mondes* 1883 article) he aimed to produce a very thin, smooth, transparent, and solid sheet, to be used as a film support in photography. His earlier experimental sheets consisted of gelatine coated with fluid celluloid, and his description is not unlike the description of Fig. 3 of the Goodwin patent. He next tried to produce a satisfactory film consisting of a solution of celluloid, alcohol, and ether, and, according to the evidence, his last attempt was to make a film support of nitrocellulose by flowing a celluloid solution on a hot plate, using alcohol and ether as a diluent. In his addresses and published articles the composition or the solvents are not specified; but, conceding that celluloid consisted of a solution and composition closely allied to Goodwin's high and low boilers, et cetera, yet it is not shown that any of the David films was a marketable success. On the contrary, they were failures and incapable of producing the resultant of the Goodwin's process. By the *Photographic News*, vol. 25, p. 187, it appears not only that the David processes were experimental but also that they were incomplete and incapable of practical application, while his later thin sheets of collodion already mentioned were difficult to handle and too expensive for use in photography. Indeed, the witness Eastman, who at this time was deeply interested in the successful production of a flexible film, substantially testified that prior to the Reichenbach invention of 1889 no film support, aside from stripping paper films, was practicable for use in roll-holder cameras.

The defendant attaches importance to other prior patents, viz., the patents to Spill, to Ollion, and to Ellis, to prove the invalidity or limited scope of the Goodwin claims and to show that it was old in the art to dissolve nitrocellulose in a menstrum of nitrobenzole and then spread the solution on surfaces of one kind or another; but, after examining said patents, I believe that they are not anticipatory. The solution of celluloid in alcohol and ether was old. The flowing of collodion and gelatine and nitrocellulose was not new and nitrocellulose had been dissolved by various solvents; yet the combination of the various steps of the patent in suit, by which a film support for use in a roll-holder camera was produced by dissolving nitrocellulose in nitrobenzole or other nonhydrous and nonhygroscopic solvents and diluting the solution with alcohol or other hygroscopic element miscible with water and highly volatile, was new and novel. Of such a combination Goodwin was the original inventor, and his claims are entitled to a liberal construction. Prior to his application, pellicle supports only existed in a theory too vague and indefinite for reduction to practice at a time when the demand for flexible, transparent, and tough films seemed most earnest.

That benefits and advantages would flow from such a film support was thoroughly recognized in the art. The patents to Parkes and the addresses of David (the best references) suggest the possibilities of

such film supports, but mere suggestions in prior patents and publications do not anticipate.

[3] The rule is that anticipating patents and publications must disclose the invention without patentable change or alteration to make them anticipatory. *Waterbury Buckle Co. v. Aston*, 183 Fed. 120, 105 C. C. A. 410. If the anticipatory matter relied upon was capable of producing a satisfactory support for the film, the evidence relating thereto is not sufficiently persuasive of the fact. In the light of the invention in suit and subsequent developments in the film-making art, it is not improbable that the earlier processes might now be quite easily altered to attain the Goodwin result, and because of such probability this court is reluctant to give weight to the test films made by Prof. Main since this action was brought, in support of the assertion that the prior art described a process for successfully making films of the Goodwin type.

Has Goodwin solved the problem of making a pellicle for a photographic support, an undertaking wherein others before him failed? A specimen film filed in the Patent Office was exhibited at the hearing, and the file wrapper includes an affidavit of identification by one Crockett, who died in 1902. In appearance the specimen is transparent and very thin, but what the solvents were does not appear, though in an affidavit by Dr. Woodbury, inserted in the file wrapper, it is stated that such exhibit possessed qualities different from collodion, gelatine, or celluloid shavings. But no probative value is attached thereto as it was submitted several years subsequent to the Reichenbach application. There is, however, adequate evidence in the record that the Goodwin process was practicable and operative.

The defendant claims that, if the prior art celluloid disclosures were inoperative, then Goodwin likewise must be held to have failed to make a successful film support of his solution either with or without the diluent. It is conceded that in the beginning there were defects in the Goodwin film; they were either fogged or formed with bubbles therein; and there was undue delay in drying the solution after flowing, and moreover the film was greasy and did not fully respond to the involved claims, 7, 8, and 10. It is fairly shown, however, that later solutions (what are known as dopes in carboys containing either absolute wood alcohol or grain alcohol or amyl acetate or nitrobenzole as the eventual solvent), when mixed in substantially the manner described in the Goodwin patent, were not incapable of producing an operative film support. While I agree with the defendant that the operative films were not produced in exact conformity with the Goodwin process in that different high or low boilers, etc., were used, yet such modifications were unimportant in view of the broad invention and the underlying principles governing the determination of the questions herein involved, which, in my opinion, entitled the owners of the patent in suit to invoke the doctrine of equivalents. No limitations, therefore, confine the claims to nitrobenzole as the sole solvent or to any other single high or low boiling element.

[4] The patent law does not require that an inventor shall have succeeded in bringing his art to the highest degree of perfection; it

is enough if the skilled in the art understand the process and the specification points out a practical way of performing it. The Incandescent Lamp Patent, 159 U. S. 465, 16 Sup. Ct. 75, 40 L. Ed. 221; Telephone Cases, 126 U. S. 536, 8 Sup. Ct. 778, 31 L. Ed. 863. These provisions of the law were sufficiently complied with by the patentee.

In the discussion of the question of infringement, it is again necessary to refer to the Goodwin file wrapper and contents. After many rejections by the Primary Examiner of the Goodwin application, the Reichenbach application for a film support (patent No. 417,202, owned by the defendant) was filed, and interference was immediately declared involving Goodwin's broad claim for the process. Reichenbach, who had no knowledge at the time of his invention of Goodwin's application, describes his process as depositing or spreading a fluid solution of nitrocellulose and camphor upon a suitable surface. He disclaimed the issue of the interference and canceled his broad claims; but the broad claim of Goodwin was nevertheless again rejected on the David citation. Subsequently letters patent were granted to Reichenbach covering his specific process; i. e., a solution of nitrocellulose and camphor in methyl or wood alcohol, with a quantity of fusel oil and amyl acetate added. Goodwin had never claimed camphor as a solvent; but, on account of the resemblance of his solution to celluloid which contains camphor, the Examiner decided that interference with Reichenbach was proper.

[5] Presuming that his broad claim had been allowed, Goodwin practically conceded priority to Reichenbach's specific process, and consequently his successor in title is unquestionably estopped to assert infringement by film supports made in accordance with the Reichenbach formula. After its issuance, the Reichenbach patent was cited as anticipatory of Goodwin's broad claim until, on appeal to the Commissioner of Patents, it was held that such patent, being later than the Goodwin application, was not a proper citation. Meanwhile, however, the defendant company marketed film supports made in accordance with the Reichenbach process which were immediately regarded as solving the problem and were used largely in place of glass and in roll-holder cameras as a substitute for stripping paper films.

The complainant has proven that, in drying, the defendant's film support, produced from a solution of nitrocellulose containing camphor in the proportions stated in the Reichenbach patent, cockled or puckered, and that thereupon such proportion of camphor was appreciably diminished and fusel oil and amyl acetate added to overcome the objections. The expert witnesses have given discrepant testimony on all essential matters, but I am satisfied that the depreciation in the defendant's solution of the quantity of camphor and the addition of fusel oil and amyl acetate resulted in an infringement of the patent in suit. In departing from the specific formula of its own patent, the defendant utilized the equivalent of the method specified by Goodwin in his patent and achieved the same result. The Reichenbach solution was concededly prepared with approximately 60 per cent. of camphor, which, according to the proofs, was decreased from time to time to about 14 per cent. relative to about 22 parts

of nitrocellulose, a decrease in the quantity of camphor sufficient to overcome the asserted objections.

I am unable to accept the view that, either by the addition to defendant's process or the exclusion therefrom of amyl acetate, a high-boiling solvent, or of acetone, a low-boiling element, infringement is avoided. True enough defendant's *modus operandi* is somewhat different from Goodwin's, but the two processes are not distinguishable on principle, and to colorably change the solvents by modifying the Reichenbach proportions in the manner stated does not create a new process but seems simply to differently carry out one that is old and already known through the instrumentality of the patent which is the subject of this controversy. It is true that in the production of complainant's film supports nitrocellulose is not dissolved in nitrobenzole and alcohol alone, the specific solvents of Goodwin's invention. But the improvement in the film support is due to the combination of equivalent high and low boilers, and therefore the departure in its production is fairly within the scope of the claims. It is not improbable that certain of the new features or steps of the defendant involve novelty, but this of course would not justify infringement of complainant's broad invention.

It would serve no beneficial purpose to further discuss the evidence or the numerous chemical problems suggested in the briefs, for to do so would result in an opinion beyond reasonable length; but, aside from this, the court believes that the salient questions and defenses have been passed upon with sufficient elaboration.

As to the claims. The second, third, fourth, and fifth claims in suit are practically duplications of the first; the only difference being as to nomenclature of the essential elements. The seventh and eleventh claims omit the diluent; and though the high-boiling solvent alone will perhaps dissolve the nitrocellulose, yet as the defendant does not achieve its result without a diluent, said claims are not thought infringed.

It follows that the complainant is entitled to a decree, with costs for an injunction and accounting as to claims 1, 6, 8, 10, and 12, covering the process and product of the patent in suit, which in my estimation are infringed by the defendant company. So ordered.

LANG v. TWITCHELL-CHAMPLIN CO.

(District Court, D. Maine. August 11, 1913.)

No. 688.

1. PATENTS (§ 112*)—PRIORITY OF INVENTION—DECISION OF PATENT OFFICE.

The decision of the Patent Office in interference proceedings on the question of priority of invention between two applicants, if not conclusive, is entitled to weight.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.*]

2. PATENTS (§ 22*)—INFRINGEMENT—DOCTRINE OF EQUIVALENTS.

The doctrine of equivalents applies to all classes of inventions, although more broadly to those of a primary character.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. § 22.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MACHINE FOR MAKING SOLDER-HEMMED CAPS.

The Cobb patent, No. 1,009,474, for a machine for making solder-hemmed caps, for closing cans, was not anticipated and discloses patentable invention and merit although not a pioneer. Claims 46 and 58 also held infringed by the machine of the Odquist and Lyche patent No. 970,539.

In Equity. Suit by Edward M. Lang, Jr., against the Twitchell-Champlin Company. On final hearing. Decree for complainant.

Edward P. Payson, of Boston, Mass., and Payson & Virgin, of Portland, Me., for complainant.

Linthicum, Belt & Fuller, of Chicago, Ill., for defendant.

HALE, District Judge. This patent suit now comes before the court for final hearing upon pleadings and proofs. The complainant is assignee, by assignment before issue, of patent to Elmer M. Cobb, No. 1,009,474. The patent was applied for November 2, 1906, and, after delay by interferences, issued November 21, 1911, on "machine for making solder-hemmed caps." The defendant says that the patent is void by reason of anticipation; that it is not infringed; that the alleged invention was in public use and on sale more than two years prior to the date of filing Cobb's application; and that the patent is therefore invalid and void.

The case arises in the canning art. The invention relates to machines for the purpose of placing a hem of solder around caps intended for closing cans used for hermetically sealing goods. The necessity for cap-hemming machines is that solder is so soft and flexible that thin rings of it cannot easily be carried about and handled; and that it becomes convenient and useful in the art to have the cap bordered with solder in order that, in placing the cap over the orifice in the top of the can, the solder can be easily melted by a hot iron, or by some other device, to hermetically seal the can. The solder-hemming machines include mechanism for introducing the caps, one at a time, from a large supply at the proper point for use, for supplying solder and making it into rings, for bringing the caps and rings into proper rel-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ative position by locating the margin of the cap within the encircling solder ring; and also a turntable or turret for bringing the rings into position quickly and conveniently; also receptive and active dies for the several operations which are necessary for making the hem or border of solder around the edge of the caps. The claims of the Cobb patent in suit are two, namely:

(46) In a machine for making solder-hemmed caps, the combination of means for providing rings of solder, a turret having a plurality of dies therein adapted to receive said rings in succession, means for revolving said turret, and a cap-dropping device, including means for holding a vertical column of caps, and mechanism for separating the caps from said column one by one and delivering them in succession upon said rings in said dies, substantially as described.

(58) In a cap-hemming machine, a plurality of active dies, a coactive receptive die, means for depositing a cap upon the receptive die, means for bringing said die into successive positions under said active dies, which perform the hemming operation, and means for expelling the hemmed cap from said die in its final position, substantially as described.

It will be seen that claim 46 expressly recites a combination of means for providing the solder rings; a revolving turret having a plurality of receptive dies; means for revolving the turret; a cap-dropping device, including means for holding vertical column of caps; and a mechanism for separating the caps from the column, one by one, on rings. 58 is a broader claim. Without specifying means for providing the solder rings, it expressly calls for: (1) A plurality of active dies; (2) a coactive receptive die; (3) means for depositing a cap on the receptive die; (4) means for bringing the die into successive positions under the active dies; (5) means for expelling the hemmed cap from its final position.

The Cobb machine of the patent in suit is mounted upon a heavy base and consists of means for making solder rings from a ribbon of solder; a rotatable turret or turntable, operated rapidly by power and carrying five receptive dies, each adapted to receive a solder ring; a cap carrier, out of which the caps enter the receptive dies in succession, each one to rest in turn on the solder ring, after having been separated from its fellows by a separator, or finger, as each receptive die on the turning turret goes under the cap carrier; and a plurality of active dies.

The Cobb machine produces its results by five steps:

First. A solder ring is made from a narrow strip of solder grooved and deposited on a shoulder in the receptive die.

Second. As the turret revolves, a cap is separated from those upon the cap carrier and drops upon the inner margin of the solder ring.

Third. The outer part of the ring is turned straight up, past the edge of the cap.

Fourth. The upstanding edge of the solder ring is forced down upon the upper margin of the cap and hems it.

Fifth. The hemmed cap is expelled.

The experts describe the operation of the machine in detail; but for present purposes it is not necessary to follow the description.

1. The defendant says that the Cobb machine is invalid by reason

of anticipation; that the Cobb patent is not a pioneer one; that the complainant has no right to monopolize a result, nor the means of accomplishing a result in terms so broad and comprehensive as would be necessary to include the defendant's machine; that the claims of the patent cannot be held to cover every means but only such means as are shown and described in the Cobb patent and a plain equivalent for them; that the claims must be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements of different construction and arrangement.

[1] The question of anticipation is directly presented in the Odquist & Lyche patent, No. 970,539, September 20, 1910; the Johnson patent, No. 860,302, July 16, 1907; and the Norton & Krummel patent, No. 941,806, November 30, 1909. All these patents are in the canning art. The defendant's machine is made under the Odquist & Lyche patent, which was brought into interference in the Patent Office with the patent in suit. A very important question of anticipation arising in the prior art is whether Cobb or Odquist & Lyche first invented the cap-hemming machine which we will assume for the present to have been described in claim 58. This question has been before the Patent Office on interference proceedings, involving the application of Cobb filed November 2, 1906, and the application of Odquist & Lyche filed September 4, 1906. The adjudication of the Patent Office was favorable to Cobb. Claim 58, which had formerly been a claim of the Odquist & Lyche, was made a part of the Cobb patent. Without undertaking to decide how far the decision in the interference proceedings was conclusive upon the parties, no steps having been taken to set it aside, I can find no reason for holding that the examiner came to an incorrect conclusion. There is no necessity for deciding how far the Johnson patent is involved in the decision of the Patent Office relating to interference; I do not need to discuss the evidence in detail upon this point. I think the proofs fail to show, by machine or model, an earlier disclosure of Johnson's invention than that made in his application of June 26, 1905. Both in reference to the Odquist & Lyche patent and the Johnson patent, the conclusion of the Patent Office is entitled to weight. *Robinson on Patents*, 1017; *Morgan v. Daniels*, 153 U. S. 120, 125, 14 Sup. Ct. 772, 38 L. Ed. 657; *McCarty v. Lehigh Valley R. R. Co.*, 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358; *Gandy v. Marble*, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. Ed. 1223; *Fasset v. Ewart Mfg. Co. (C. C.)* 58 Fed. 360, 366. With reference to the Norton & Krummel patent, the proofs of an invention earlier than the date of application, April 6, 1905, do not seem sufficient to carry back their invention beyond the date of their application. The same is true also of the Schultz patent, No. 816,943, April 3, 1906.

With regard to the date of invention in the Cobb patent, the patentee claims that he conceived his inventive thought in June, 1903; that he reduced it to a practical working machine in the fall of 1903 and winter of 1904; that in the fall of 1904 he exhibited the machine to Mr. Sleeper with a view to procuring his assistance in improving

some of the mechanical motions and strengthening some of the parts; that this machine had a cap-carrying device differing somewhat from the cap dropper shown in the Cobb patent, whose drawings were made from the machine now in use, called the "Little Red Machine"; and that from the early machine, rebuilt by Sleeper, came ultimately the machine which we have before us in the case. There is testimony tending to show that in November, 1903, when Cobb's patent for a spiraling device, No. 799,974, was applied for, Cobb had a complete conception of the machine which he afterwards exhibited to Sleeper. Mr. Sleeper's testimony is convincing that a machine was shown to him in the fall of 1904, and, on being perfected in adjustment and the strengthening of parts, it finally became the Cobb machine, now in the case. While the machine submitted to Sleeper in the fall of 1904 does not appear by the proofs to have been put in public use at that time, it was then exhibited and found to embody its inventive thought. The proofs convince me that the invention of Cobb's machine, shown to Sleeper, and appearing in testimony, antedates the invention of Odquist & Lyche, Johnson, Norton & Krummel, Schultz, or that of any patent other than Norton's to which last I shall refer. The testimony of Sleeper is important in reference to the time when he saw the machine involving Cobb's invention. To establish the date of this invention as early as the autumn of 1904, we have, then, the concrete, visible, contemporaneous proofs, sufficient even to meet the very strict test in this circuit announced in *Emerson & Norris v. Simpson Bros. Corporation* (C. C. A.) 202 Fed. 747, 752. It may be observed, also, that the lapse of time and other conditions in the case last cited called, perhaps, for a severer test than ought to be invoked in the case at bar.

An examination of the prior art shows that hemming caps by machinery is old. The Norton patent, No. 702,376, June 10, 1902, shows a machine by which a solder band wider than a cap is fed in; out of it a disc is cut and dropped; and a groove is formed in the solder band surrounding the hole left in the band. The grooved solder band, with the hole in it, is then moved straight on, to and between another set of dies where a cap descends into the groove in the solder band; and a die simultaneously cuts the outside periphery of a ring from the grooved band, thereby completing the solder ring. The die also slightly turns up two ears from the cap, upon this ring, to hold it to the cap. No turntable being provided, the cap and ring slide off by gravity, at right angles, down a transverse passage to a hemming die; and the grooved solder ring is hemmed upon the cap. The learned counsel for the complainant has aptly and briefly described the operation of the Norton patent; and I have followed quite closely his description of such operation. The Norton patent provides no rotary carriage for carrying the work to the successive positions for the several operations. It provides no turntable or turret. It is contended by the defendant that the matter of sliding the partly formed ring by gravity to the desired position is an equivalent for the turntable in carrying the work to the necessary positions for the performance of the three operations necessary to hem the cap; that, inasmuch as rotary carriers were known in the art, no invention is involved in the Cobb machine, under the broad language of the two claims involved,

in combining the ring forming, ring and cap assembling, and hemming instrumentalities of the Norton patent with a rotary carrier known in the prior art. In the Norton machine, the materials instead of being carried by a part of the machine from one set of active dies to another, they themselves travel, without any accompanying part of the machine, from one working point to another; and complainant urges that taking the several elements used by Norton and combining them with the revolving turret or turntable, as a part of the machine, and as described in the Cobb patent, involves invention. Without entering upon a detailed discussion of the subject of the Norton alleged anticipation, I am satisfied with the reasoning of the complainant touching this matter. I think the Norton patent, No. 702,376, is not anticipatory of the combination set out in claims 46 and 58 of the patent in suit and does not invalidate those claims. I shall again refer to the Norton patent after considering the question of the defendant's infringement.

The defendant also refers to the Young patent, No. 52,240; the Towne patent, No. 86,473, and the reissue thereof, No. 9,837; and the Palmer patent, No. 90,681. These patents disclose dies constructed to make hooks and eyelets and are in an art, in many respects, dissimilar to the canning art. While they present points of similarity, justifying their use as a reference, and requiring study, they do not seem to me to present combinations which anticipate the claims of the patent now before me. The still earlier Norton patent, No. 364,662, describes the hemming of a solder ring upon a can cap but does not embody the features of the later and more complete Norton patent which I have considered. Reference is made to other patents in the prior art. Upon an examination of these patents, I do not think it necessary to consider them in detail. None of them can, I think, be held to be anticipatory of the Cobb patent. Upon consideration of the proofs on this subject, I am of the opinion that Cobb was the first inventor of the mechanical combination of means whereby a solder ring is made, partly grooved, and placed in a receptive die on a turntable, on revolution of which a cap is separated from its fellows and placed in the groove in the ring; on further revolution this solder ring is turned up past the edge of the cap by an active die; and upon further revolution, by a succeeding die, this turned-up portion is turned down upon the upper surface of the cap edge and hemmed upon this cap edge; the hemmed cap is then expelled. This mechanical combination is sufficiently described in claims 46 and 58 of the patent in suit. Although reference is made to different patents which disclose inventions containing the several elements of the Cobb patent, I think the combination recited in the two claims in suit is new and useful. While the patent is not a pioneer in canning, it cannot be said that it is a "late patent in a crowded art." I find nothing in the prior art which, in my opinion, ought to be held to invalidate the patent. It is, I think, of value and should be sustained.

2. Do the proofs show infringement of the Cobb patent in suit?

The defendant contends that, with the limitation which the court must give to the claims in suit, in order to sustain them, those claims must be restricted to the peculiar construction and arrangement of

the contrivances shown in the Cobb patent; and that, when so interpreted, it does not infringe. The complainant's solder rings are made by curling a narrow ribbon formed by flattening a round solder wire, while defendant's solder rings are made by stamping them out flatwise from a wide solder strip. In the Odquist & Lyche patent, under which defendant's machine is built, the wide solder ribbon is supplied from a reel on the floor and passes over a pulley and across a carrier from one roller to another; the rotating carrier has only four receptive dies, all constructed alike, and adapted to receive the solder rings and caps; there are three dies mounted above the turret to move vertically to perform their several operations on the work in three receptive dies, while an air blast through a passage expels the hemmed cap from the other receptive die; in the first position of any receptive die, a die descends onto the solder ring, stamping out the solder ring and depositing it in the receptive die and partly grooving it; in this initial operation defendant's machine does what complainant's machine performs in the first and second operations; the turret then carries the partly formed ring to the second position, when the cap is inserted and pushed down into the ring by a die, and the ring is grooved; the turret then moves a quarter turn, carrying the work to the third position shown in the exhibits, where a die completes the hem as shown; in the fourth and last position the hemmed cap is blown out of the receptive die by an air blast through a passage. The defendant illustrates its contention by various figures. It is urged that the two machines are notably different in appearance; that the complainant's is an upright machine; that its moving parts travel in vertical and horizontal planes; that Cobb selected and preferred this type of machine and must strictly hold to it, the patent not being a broad, pioneer patent; that Cobb's mechanism is made for a machine moving in vertical planes and for this reason is provided with a special cap-feeding mechanism to separate and deliver the caps singly from a vertical cap-feeding device to a horizontal movable turntable; that, on the other hand, defendant's machine is tilted and is designed in this way for special reasons in order to permit the use of an edge to edge cap, gravity feed, and an air jet for expelling the hemmed cap; that the machines differ also in the number of operations and in the character of the work done in the several operations. The learned counsel for defendant compares the operations of the two machines in detail and claims that in complainant's machine there is no die action involved in depositing the cap, while in defendant's machine there is a distinct die action in forming the ring which is stamped out of a wide, flat ribbon and is partly grooved in the same operation. The different operation of the two machines is further followed by counsel with great detail and clearness. The expert, Mr. Livermore, has pointed out the specific differences between the instrumentalities of the defendant's machine and those shown and described in the Cobb patent. In a discussion of these differences, quite clear and not too much incumbered by technical learning, he shows in a convincing manner that these differences are immaterial so far as the subject-matter of claim 58 is concerned; and that the specific contrivances employed in the

several operations in defendant's machine are the equivalents of the contrivances shown for performing the same operations in the Cobb patent, in the organization recited in claim 58, inasmuch as they co-operate together in like manner on like materials to produce substantially the same result. In the same line it must be said, in reference to claim 46, that in the defendant's machine, although the inclined chute in the Odquist & Lyche patent does not, literally speaking, hold a vertical column of caps as recited in the claim, it is in effect identical, so far as coaction of the elements in claim 46 is concerned, with the vertical holder in the Cobb patent, for it supports an indefinite string of caps, continually pressed by gravity towards the separating mechanism; and this mechanism is thereby enabled to perform its office of separating the caps, one at a time, from the lower end of the column; this column automatically advancing to bring forward another cap, after each cap has been in turn separated. Still, further, I do not think the defendant can avoid infringement by showing that, instead of using a comparatively narrow ribbon of a width equal to a ring of solder, it uses a strip of a width greater than the external diameter of the solder ring; one device for producing the solder ring from the solder strip is clearly the equivalent of the other. The same, I think, may be said of defendant's mechanism for feeding appliances, and, indeed, of each of the several mechanisms of the defendant's machine. It is true that Cobb's invention in the broad field of cap hemming cannot be said to perform a function never performed by any earlier invention; for it appears that a machine has hemmed caps before Cobb's machine; but Cobb's machine seems to me to perform that function in substantially a different way from any that preceded it and is entitled to invoke the application of the doctrine of equivalents, although not in the broad way that a primary invention could invoke that doctrine.

[2] Primary inventions are entitled to a looser application of the doctrine of equivalents than secondary inventions; but even a secondary invention is entitled to invoke the doctrine of equivalents, although to a more limited extent. The doctrine of equivalents applies to all classes of inventions. Walker on Patents, § 359; Robinson on Patents, § 258; *McCormick v. Talcott*, 20 How. 405, 15 L. Ed. 930.

The defendant also claims that the complainant's patent is so limited by the Norton patent, No. 702,376, that the defendant does not infringe the patent in suit. It will be seen that, while referring to the Norton patent as involving all the substantial invention appearing in the Cobb patent, the defendant uses a machine made under the Odquist & Lyche patent and not under Norton. Odquist & Lyche do not make a machine like Norton's. Their patent makes and grooves the solder ring and deposits it on a shoulder, as the Cobb Patent does, except that he only partially grooves the ring. I have already referred to the complainant's five steps. Odquist & Lyche complete the grooving and also accomplish these second and third steps by two movements, whereby defendant's cap is separated, drops upon a solder ring which is partly grooved and its edge turned up past the mar-

gin of the cap. Under the Odquist & Lyche patent, the third step is the same as Cobb's fourth step; and the defendant's patent accomplishes in the fourth step what Cobb accomplishes in the fifth step.

I have examined with interest the operation of both machines. After a careful consideration of the proofs, I am satisfied that the complainant has met the burden of showing infringement on the part of the defendant.

3. The defendant contends that the invention involved in the Cobb patent was in public use and on sale more than two years prior to the date of filing the application in the Cobb patent; and that such invention is therefore invalid and void under the Revised Statutes of the United States, § 4886.

In considering the date of the invention in the Cobb patent, I have already found that a machine was submitted to Mr. Sleeper in the fall of 1904, and that from such machine, after it became perfected in adjustment and the strengthening of its parts, finally came the machine which is now the Cobb machine. The proofs fail to show that the machine submitted to Sleeper was put in public use or upon sale at that time. While the machine submitted to Sleeper showed the invention of the patent in suit, it appears to have been submitted to Sleeper for examination and experiment and with a view of perfecting the machine. I think the proofs cannot be held to show that the machine was put to public use and sale at that time; but, on the other hand, that it is established by competent proofs that the Cobb invention was not in public use and on sale more than two years prior to the date of filing the application; and that the patent is therefore not invalid and void under section 4886 of the United States Revised Statutes.

[3] I am of the opinion, then, that the complainant has by competent proofs shown:

(1) That the two claims (46 and 58) of the complainant's patent, No. 1,009,474, are valid and are not anticipated by anything cited in the prior art.

(2) That the defendant has infringed claims 46 and 58 of the patent in suit.

(3) That the invention of the patent in suit was not in public use and on sale more than two years prior to the date of filing the application; and that therefore the patent is not invalid and void by reason of public use under section 4886 of the Revised Statutes of the United States.

A decree may be entered for the complainant for an injunction and for an accounting.

The case will be referred to a master for an accounting.

Upon the coming in of the master's report, this court will pass upon the question of costs.

The complainant may file draft decree on or before September 1, 1913.

The defendant may present corrections on or before September 10, 1913.

Decree to be settled on September 16, 1913.

BARRELL v. FITCHBURG DUCK MILLS.

(District Court, D. Massachusetts. August 7, 1913.)

No. 217 (C. C. 790).

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DRIER-FELTS FOR PAPER MACHINES.

The Barrell patent No. 636,482 for a drier-felt for paper machines *held* not anticipated, valid, and infringed.

In Equity. Suit by William L. Barrell against the Fitchburg Duck Mills. On final hearing. Decree for complainant.

William Quinby, of Boston, Mass., for complainant.

Emery, Booth, Janney & Varney, of Boston, Mass., and H. P. Doolittle, of Washington, D. C., for defendant.

DODGE, Circuit Judge. The plaintiff is the patentee named in United States Patent 636,482, November 7, 1899, for an improvement in drier-felts for paper machines. His patent contains two claims. He charges the defendant with having infringed both.

The general nature of what are called "drier-felts" in paper making, and the use made of them in that art, are sufficiently well stated for the purposes of the case in lines 10-20, p. 1, of the patent, as follows:

"In paper-machines it is usual to employ a drier-felt made as a strong closely woven textile fabric as an apron or carrier to support the damp new web of paper as it comes in a still soft condition from the wet woolen felt, the drier-felt holding the paper-web firmly and smoothly against the heated metal drier-cylinders, around and over which the web passes until dry and ready for the calender-rolls. Only one side of the drier-felt or apron comes in contact with the damp web of paper, through which the heat from the driers passes."

The first claim of the patent is for:

"A drier-felt for paper-machines consisting of two superposed plies of double-face woven fabric having large face-warps, said plies being united by smaller binder-warps adjacent the under or inner sides of the face-warps and buried under the said face-warps of the plies, substantially as described."

The second claim differs only in having, instead of "double-face woven fabric," "close woven double-face fabric," and in having, after the words "adjacent the under or inner sides of the face-warps," "the binder-warps passing from one to the other ply and buried under the said face-warps; successive binder warps crossing each other as they pass from one to the other ply, substantially as described."

The advantages possessed by drier-felts made according to the patent over those not so made are shown to be, as the patentee has also set forth in his patent, as follows: The action of the dampness driven off from the paper-web, combined with the action of the heat which drives it off, upon the fabric of the drier-felt whereby the paper-web is held against the drier-cylinders is such as to rot the fabric and thus develop holes in it, loosening the warp threads of the fabric

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and leaving holes in its surface, jagged and irregular, and these holes will produce bunches or excrescences on the paper-web as it is pressed into them while in a moist and soft condition. If, however, two plies of woven fabric are used, connected by binder-warps smaller than the face-warps of the plies, and so buried by and between the face-warps that they will continue to hold the plies together though the face-warps be rotted and burned, the ply nearest the drier-roll will continue, after its fabric has thus become considerably rotted or burned, to perform its function in the machine without damage to the paper-web by holes produced as above, and its period of usefulness will thus be prolonged.

The defendant company manufactures drier-felts for paper machines consisting of two superposed plies, like those of the patent, and these plies are united by binder-warps adjacent the under or inner sides of the face-warps, smaller than the latter, and connecting the plies in the same manner as do the binder-warps of the patent. The defendant's binder-warps also cross each other as they pass from one ply to the other. They are so much smaller than the face-warps of the plies which they connect that I am unable to see why they may not fairly be described as "buried" by the latter, for all purposes described or contemplated in the patent. They are certainly protected by the face-warps against the action of the heat and moisture referred to until after the latter have yielded to that action, meanwhile holding the plies together so that the one may continue to serve as a protection for the other. The defendant says that in its drier-felt the binders are not "buried" or covered. I think it may be true that the binders in the defendant's drier-felts are not so much covered or concealed from view as in the plaintiff's when the drier-felts are off the machine and not in use, so that, in looking at specimens of the two side by side, more of the binder-warps are distinguishable by the eye in specimens of the defendant's product than in specimens of the plaintiff's product. I am unable, however, to see that it follows from this fact that when in use on the machine the defendant's binder-warps are not, for all practical purposes, as much "buried" as the plaintiff's for the purposes of the patent. So far as heat from the drier-roll or moisture from the paper-web are concerned, the binder-warps in both seem to me necessarily shielded from the rotting action due to those causes, to substantially the same extent, by the adjacent face-warps of the plies; and so shielded, not merely because the face-warps project beyond the plane of the binder-warps and thus hold the latter from contact with the drier-roll, but because the face-warps in both prevent the heat or moisture referred to from reaching the binder-warps by first receiving it themselves. If the patent be valid, I must hold that the defendant infringes it.

The defendant attacks the patent first on the ground of anticipation. It is not disputed that, regarded merely as a two-ply fabric woven in a particular manner, the plaintiff's fabric is not new. In the prior art are found inner soles, lamp-wicks, belts for personal wear, some adapted for carrying cartridges—webbing for machine belting, cordage, mule-harness, or other useful purposes—webbing for

various uses, sometimes elastic and sometimes nonelastic—belts for power transmission and carpets; all of them consisting of two superposed plies of double-face woven fabric, united by binder-warps smaller than the adjacent face-warps, and thus of a construction very similar to that which the patent describes. But I find no reason to suppose that by any of the prior fabrics, whether patented or not patented, the peculiar qualities required in a drier-felt as used in paper making were supplied, or that they, or any requirements like them, were in any way contemplated by the contrivers of those fabrics. None of them seem to me capable, as they exist or as they are described, of being so used as drier-felts as to produce the results attained by the plaintiff's patented drier-felts. The Cooke United States Patent, 22,528, January 4, 1859, is the patent most relied on by the defendant. This was for "a new or improved manufacture of webbing for machine belting, cordage, mule-harness, or other useful purposes." This was the only citation against the issue of the plaintiff's patent while it was pending in the Patent Office. In 1859 drier-felts were unknown in paper making. The plaintiff amended his claims to meet the citation by substituting "binder-warps buried under the adjacent face-warps" for "binder-warps protected by the face-warps," as described. The Cooke patent neither describes nor discloses any "burying" of the binder-warps, nor was anything of the kind necessary for the result set forth in the Cooke patent, according to which the purpose of the binder-warps was "to bind together the cloths made by the body-warps and form them with no straight or continuous parallel ridges." The defendant produced the Cooke original specimen deposited with the Patent Office, but, if its binder-warps are to be described as "buried" by its face-warps, this feature cannot be called an essential part of the Cooke invention or disclosure. I am unable to regard anticipation as proved by the Cooke patent or by anything in the evidence relating to the prior art.

The defendant further contends that the patent sued on is void for lack of invention and that it is, at best, for a mere "double use." I am unable to believe, however, that it can be properly said in this case that the patentee has taken any fabric of the prior art and merely put it into use as a drier-felt, without change in object, structure, function, or result. It seems to me that in the adaptation of the known method of weaving to the peculiar requirements of drier-felts, which the patentee has set forth in his specifications, there lay sufficient invention to sustain the patent. *Forsyth v. Garlock*, 142 Fed. 461, 73 C. C. A. 577. I cannot doubt, upon the evidence, that immediately upon their introduction the patented drier-felts proved themselves so superior to the drier-felts previously known and used that they have to a large extent displaced all others, notwithstanding their greater cost. Under the circumstances shown, I must regard the prima facie evidence of invention arising from the issue of the patent as sufficiently sustained.

There may be a decree for the plaintiff in accordance with the prayers of the bill.

VALVONA-MARCHIONY CO. v. LOUISVILLE CONE CO. et al.

(Circuit Court, W. D. Kentucky. April 15, 1911.)

PATENTS (§ 328*)—VALIDITY—MOLDS FOR BISCUIT CUPS—INFRINGEMENT.

Valvona patent, No. 701,776, for a mold for making biscuit cups to be used to hold ice cream, *held* valid and infringed.

In Equity. Bill by the Valvona-Marchiony Company against the Louisville Cone Company and others for infringement of Valvona patent, No. 701,776, for a mold for making biscuit cups to be used to hold ice cream. Decree for complainant.

H. H. Huffaker, of Louisville, Ky., for complainant,
W. M. Smith, of Louisville, Ky., for defendant.

EVANS, District Judge. A careful reading of the testimony has not led me to change the views formed when the motion for an injunction pendente lite was sustained. Nor has it led me to differ from Judge McPherson in *Valvona v. D'Adamo* (C. C.) 135 Fed. 544, who sustained the patent which forms the basis of this action, and which has been assigned by the patentee to the complainant.

To support what we may call the positive defenses set up in the answer the defendants offered no satisfactory testimony. In view of the evidence, the opinion and ruling of Judge McPherson, and the presumptions arising in favor of the validity of the patent issued to Valvona by the United States, we have reached the conclusion that the complainant's cause of action has been sustained, and that it is entitled to such part of the relief prayed for in its bill as it may insist upon, though I can myself hardly see the wisdom of having an accounting with the defendants, who are apparently very poor. That, however, is for the complainant to say.

It may be remarked that we can see no difference in the applicable principles between a cup and a cone, inasmuch as the latter seems, in this connection, to be nothing more than the former in a different shape.

A judgment may be prepared and submitted.

VALVONA-MARCHIONY CO. v. SILVERSTEIN et al.

(Circuit Court, D. Massachusetts. August 17, 1910.)

No. 759.

1. PATENTS (§ 328*)—VALIDITY—MOLDS FOR BISCUIT CUPS.

Valvona patent, No. 701,776, for a mold and oven for baking biscuit cups to be used to hold ice cream, *held* valid.

2. PATENTS (§ 301*)—INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction will not ordinarily be granted in a suit to restrain the infringement of a patent, if there is any substantial doubt as to the validity of the patent or the infringement; nor will a pre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

liminary injunction be as readily granted against a mere user as against a maker or seller of the patented invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489–495; Dec. Dig. § 301.*]

3. PATENTS (§ 301*)—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where, in a suit against a mere user of an alleged infringing patented invention, there was doubt as to whether an infringement in fact existed, and there was ground to believe that defendant's use of the appliance, if unlawful, had been to some extent induced by complainant's delay in asserting its rights, a preliminary injunction will not be granted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489–495; Dec. Dig. § 301.*]

Grounds for denial of preliminary injunctions in patent infringement suits, see note to 72 C. C. A. 123.]

In Equity. Suit by the Valvona-Marchiony Company against Moses Silverstein and others to restrain infringement of a patent. On motion for a preliminary injunction. Denied.

N. N. Jones, of Boston, Mass., for complainant.

William Charak, of Boston, Mass., for defendant.

DODGE, District Judge. This suit is for alleged infringement of United States letters patent No. 701,776, issued June 2, 1902, to Antonio Valvona of Manchester, England.

[1] In *Valvona v. D'Adamo* (C. C.) 135 Fed. 544, this patent was held valid on final hearing by the Circuit Court in the Eastern District of Pennsylvania. This decision was on February 24, 1905. No appeal was taken, and the validity of the patent does not appear to have been elsewhere or since in dispute. I must regard its validity as not open to question in this hearing.

Coming to the question of infringement, it is clear that the scope of the patent is a narrow one. The record in *Valvona v. D'Adamo* is before me, and in it are contained the proceedings in the Patent Office while the application for the patent was there pending. There were five amendments of the original application. The patent was not granted until the claims had been limited to an apparatus in which "all the heat absorbing and conducting sides of the mold are of substantially the same thickness." Without this limitation the alleged invention was regarded as anticipated by various forms of waffle irons, with which it was classed by the Patent Office.

The bill charges the defendants with having made or caused to be made for their use, and with having sold to others, a large number of infringements upon the patent. The complainant's affidavits show only that Louis Hahn, who has since become a licensee under the patent, was using in March, 1909, certain devices for baking biscuit cups for ice cream, two of which, marked A and B, were produced in court; that, also in March, 1909, Nathan Werlinsky, then in Hahn's employ, had six similar devices made, which he sold to the defendants; that in October, 1909, Werlinsky had six other similar devices made and sold them also to the defendants; and that the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

defendants have been using the devices thus acquired by them, or devices similar thereto, in baking biscuit cups for ice cream in their factory. There is nothing to support the allegation that the defendants themselves make the infringing devices, or that they sell them. The defendants are, on the affidavits, mere users, at most, of the patented device.

Whether the devices A and B infringe the patent in suit seems to me a question of some doubt. They do not very closely resemble the device shown in the patent itself. The cores and dies are so shaped as to make conical cups, in this respect resembling the cores and dies shown in the Swiss patent to J. Aegeter, discussed in the opinion in *Valvona v. D'Adamo*. It is true that the patent in suit states that the cups or dishes produced may be either of the shape shown in the attached drawings or "of other preferred pattern according to the shape of the cores and dies employed." But it seems to me not equally true of the devices A and B as of the device described in the patent that all the heat absorbing and conducting sides of the mold are of substantially the same thickness. If this is true of that part of the mold containing the dies, it is far from being equally true of that part which contains the cores, and the "mold" consists of both parts connected by a hinge.

It appears from the defendants' affidavits that molds like A and B have been in use for several years prior to the filing of this bill by persons engaged in baking cups of this kind in or near Boston; that the molds so used have been made by persons other than the complainant, and have not been understood to be covered by any patent; also that such use goes back as far as 1905. And, in the complainant's supplementary affidavits, Louis Hahn, above referred to, states that he bought such a mold in 1904 of a person whose name he cannot recall, had duplicates of it made, thereafter used them in his manufacture of cups, and did not know until June, 1909, of any patent claimed to cover them. He was then notified by the complainant that he was infringing, and in consequence secured a license from it.

If there has been a use of molds like A and B since 1904 or 1905, such as these affidavits indicate, the complainant, it would seem, might easily have become aware of it. It describes itself in its bill as a corporation under New York laws, and as having its principal place of business in New York City; but there is hardly enough in these allegations to show that reasonable activity on its part would not have disclosed to it what was being done by persons in the business in this vicinity. More than a year before this bill was filed, it became aware of what Hahn was doing. Hahn is of Cambridge, and, according to Werlinsky's affidavit, carried on business as the Central Biscuit Company of Boston. There is nothing to show that the use of the molds by persons in this neighborhood, other than Hahn, might not have been just as easily ascertained. Hahn had continued his use of the molds, without objection, for four years after the decision in Pennsylvania before the complainant undertook to treat him as an infringer. The defendants got their molds from Hahn's employé during this interval, and have been using them without objection for a year since the notice to Hahn.

[2, 3] Preliminary injunctions have not ordinarily been granted by this court, if there is any substantial doubt regarding either the validity of the patent or infringement. Nor is a preliminary injunction so readily granted against a mere user as against a maker or seller of the patented invention. No exceptional reasons are alleged in this case sufficient to require any departure from these rules. In view of the doubt existing upon the question of infringement, and the reasons which appear for believing that the defendants' use of the mold, if unlawful, has been to some extent induced by the complainant's delay in asserting its rights, I think no injunction should issue before final hearing

Motion denied.

VALVONA-MARCHIONY CO. v. PERELLA et al.

(District Court, W. D. Pennsylvania. March 12, 1913.)

No. 114.

1. PATENTS (§ 328*)—VALIDITY—MOLDS FOR ICE CREAM BISCUIT CUPS.

The Valvona patent, No. 701,776, for a mold for making biscuit cups to be used for holding ice cream, *held* valid, especially in so far as it provides for an appliance having all the heat absorbing and conducting sides of the mold of substantially the same thickness.

2. PATENTS (§ 328*)—ICE CREAM BISCUIT CUP—INFRINGEMENT—"SUBSTANTIALLY."

Complainant sued for infringement of Valvona patent, No. 701,776, for a mold for making biscuit cups for holding ice cream; the important provision of the claim being a mold so constructed that all the heat absorbing and conducting sides were substantially of the same thickness. *Held*, that the word "substantially" meant that it was the same in all important particulars, implying that the results of the use of the device could not be obtained if there was a difference in the thickness; and hence the patent was not infringed by a similar mold used by defendant, much heavier in construction, and the heat absorbing and conducting sides of which were not substantially of the same thickness.

3. PATENTS (§ 312*)—INFRINGEMENT—NATURE OF WRONG—BURDEN OF PROOF. Infringement of a patent is a tort, and the burden of proving it is on him who asserts it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

In Equity. Suit by the Valvona-Marchiony Company against Fred Perella and another. Bill dismissed.

F. W. Winter and F. W. H. Clay, both of Pittsburgh, Pa., and H. H. Huffaker, of Louisville, Ky., for complainant.

Paul Synnestvedt and James C. Bradley, both of Pittsburgh, Pa., for defendants.

ORR, District Judge. This patent case comes before the court for final hearing upon bill, answer, replication, and proofs. The defense by the defendant Gambadella is that he is not a partner of the other defendant, but is merely an employé. No evidence was offered by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complainant in support of its averment that Gambadella was a partner, and therefore the bill should be dismissed as to him.

[1] The defenses set up by Perella are that the patent is invalid and that, even if valid, his apparatus does not infringe complainant's. That the patent is valid was held by Judge McPherson in the Eastern District of Pennsylvania in *Valvona v. D'Adamo*, 135 Fed. 544, by Judge Evans in the Circuit Court for the Western District of Kentucky in *Valvona-Marchiony Co. v. Louisville Cone Co.*, 207 Fed. 374, and by Judge Dodge in the Circuit Court for the District of Massachusetts in *Valvona-Marchiony Co. v. Moses Silverstein*, 207 Fed. 374. Both Judge Evans and Judge Dodge approved the opinion of Judge McPherson. This court is of the opinion that Judge McPherson's conclusions as to the validity of the patent are right in all respects. The question of validity is therefore found in favor of the complainant in this present case.

The patent in controversy is No. 701,776, issued June 2, 1902, and relates to improved apparatus for baking biscuit cups for ice cream. There is but one claim in the patent, which is as follows, except that the court has italicized a part:

"A combined mold and oven for producing biscuit cups or dishes, consisting of two metal plates connected together by a hinge and provided with handles and means for securing said plates in closed position, the opposing inner faces of the said plates being provided, one with a projecting core and the other with an indented mold in the metal of such face into which the core fits, with a small space between the two, and the outer faces being so formed as to be adapted to rest on the top surface of a stove either side up, so that heat may be evenly conducted through the body of the mold, *all the heat absorbing and conducting sides of the mold being of substantially the same thickness*, whereby a cup may first be formed with the projections downward and afterward baked in the reverse position to facilitate the baking and allow the cup to be turned out of the mold, as and for the purpose described."

The application was filed in the Patent Office on July 12, 1901, and rejected in view of the prior art until the applicant had inserted in his claim the language above italicized and had inserted in his specifications the following:

"All the heat absorbing and conducting sides of the mold are of substantially the same thickness, so that heat may be evenly conducted through the body of the mold, as will be seen by reference to the drawings."

Many of the elements found in the claim are old, as is apparent to any one familiar with waffle irons and kindred apparatus. The device is therefore one of narrow limitations. This is the view expressed by Judge McPherson in *Valvona v. D'Adamo* (C. C.) 135 Fed. 544, 545, where he says:

"While it must be conceded that no marked advance in the art is presented by complainant's device, it has taken the final step to complete success, and I see no reason for denying it the protection of the law. The exercise of inventive talent may not have been severe; but invention in some degree has been shown, I think, and if this be true, the court is not called upon to measure it by an exacting standard."

He further says (page 546):

"Valvona's apparatus is so constructed that the distribution of heat is approximately uniform, and the result is that the cup is evenly baked—a matter of prime importance."

[2] We must conclude, therefore, from the action of the Patent Office and from the consideration given by Judge McPherson to the patent, that the important feature is found in a requirement of—
“all the heat absorbing and conducting sides of the mold being of substantially the same thickness.”

The apparatus used by the defendant Perella is much heavier than that of the complainant, so far as the evidence discloses, and has not got the heat absorbing and conducting sides of substantially the same thickness. It is also in evidence that it is not adapted to rest on the top surface of a stove either side up. It rests upon trunnions, so that it may be turned as necessary toward the flame. If uniformity of thickness in all the sides of the mold is necessary, in order that heat may be evenly conducted through the body of the mold, then it seems as if the heat which bakes the cup or cone in the defendant's apparatus is not evenly conducted through the body of the mold. If the patent were to be construed broadly, there is no doubt in the mind of the court that the apparatus of the defendant would infringe that of the patent. But in view of the narrow limitation of the patent, this court cannot see, from the testimony or from the exhibits, that the defendant's apparatus infringes.

[3] Infringement is a tort, and the burden of proving the commission of a tort rests upon him who asserts it. If the tort is not clearly established, then infringement should not be found.

In construing the word “substantially” in the portion of the claim italicized as above, the court is disposed to take the view of Judge Woodbury in *Adams v. Edwards*, Fed. Cas. No. 53, 1 Fed. Cas. 112, 114, 115:

“When we say a thing is substantially the same, we mean it is the same in all important particulars. It must be of the same material, when the material is important; it must be of the same thickness, when thickness is important.”

That thickness was considered important by the patentee is without doubt, and that it was the controlling influence upon the Patent Office appears in the file wrapper. The use of the word “substantially,” then, in connection with the words “the same thickness,” implies that the results of the use of the device of the patent could not be obtained if there was a difference in the thickness.

It does not appear just exactly what form of apparatus the complainant is now using in its business, but it may reasonably be inferred from the testimony that it is not using apparatus which conforms in all respects to the apparatus described in the specifications and drawings of the patent.

The court cannot find under the evidence that the defendant Perella has been guilty of infringement, and therefore must dismiss the bill. at complainant's costs.

VALVONA-MARCHIONY CO. v. MARCHIONY.

(District Court, D. New Jersey. July 10, 1913.)

1. PATENTS (§ 157*)—CONSTRUCTION OF CLAIMS—"SUBSTANTIALLY."

"Substantially" is a relative word, which, while it must be used with care and discrimination in a claim of a patent, must nevertheless be given effect by allowing considerable latitude of meaning, where it is applied to such subjects as thickness, as by requiring two parts of a device to be of substantially the same thickness, and cannot be held to require them to be of exactly the same thickness.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229-232; Dec. Dig. § 157.*]

For other definitions, see Words and Phrases, vol. 7, p. 6741.]

2. PATENTS (§ 163*)—CONSTRUCTION OF CLAIMS—ESTOPPEL BY ACTION OF PATENT OFFICE.

To be estopped by the action of the Patent Office, a patentee must be shown to have surrendered something which he now claims, in order to obtain that which was allowed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 238; Dec. Dig. § 163.*]

3. PATENTS (§ 328*)—INFRINGEMENT—APPARATUS FOR BAKING BISCUIT CUPS.

The Valvona patent, No. 701,776, for apparatus for baking biscuit cups for ice cream, construed, and *held* infringed.

4. EQUITY (§ 69*)—LACHES.

Mere laches does not usually bar a party, unless under circumstances which work an equitable estoppel against him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 197-199; Dec. Dig. § 69.*]

In Equity. Suit by the Valvona-Marchiony Company against Italo Marchiony. On final hearing. Decree for complainant.

H. H. Huffaker, of Louisville, Ky., and F. W. H. Clay and Frederick W. Winter, both of Pittsburgh, Pa., for complainant.

Lucius E. Varney, of New York City, for defendant.

CROSS, District Judge. The patent involved herein was sustained in 1905, by Judge McPherson, then District Judge for the Eastern district of Pennsylvania, in the case of Valvona v. D'Adamo (C. C.) reported in 135 Fed. 544, and again in 1913, by Judge Orr, of the Western district of Pennsylvania, in Valvona-Marchiony Co. v. Fred Perella et al., 207 Fed. 377. It has also been sustained in two or three other unreported cases, which, however, do not require special mention, since the defendant's counsel, at the argument herein, admitted the validity of the patent in suit, but claimed that in view of the prior art, and in consonance with said decisions, it must be narrowly construed, and that, so construed, it has not been infringed by the defendant.

It is stipulated in the case that the patent in suit, No. 701,776, was duly granted in 1902 to Antonio Valvona; that since April 9, 1910, the same has been the property of the complainant; that the three machines marked "Complainant's Exhibit, Defendant's Machines, A, B, and C," were made and used by defendant within the jurisdiction

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of this court before the filing of the bill of complaint herein, and since the complainant acquired title to the patent as above stated; and, furthermore, that the said machines are the identical machines which were exhibited to and inspected by the complainant's expert witness. The machine is entitled in the patent an "Apparatus for Baking Biscuit Cups for Ice Cream." It is very simple and readily comprehensible, notwithstanding the conflicting explanations of the experts of the respective parties. The patent has only one claim, which reads as follows:

"1. A combined mold and oven for producing biscuit cups or dishes, consisting of two metal plates connected together by a hinge and provided with handles and means for securing said plates in closed position, the opposing inner faces of the said plates being provided, one with a projecting core and the other with an indented mold in the metal of such face into which the core fits with a small space between the two, and the outer faces being so formed as to be adapted to rest on the top surface of a stove either side up, so that heat may be evenly conducted through the body of the mold, all the heat absorbing and conducting sides of the mold being of substantially the same thickness, whereby a cup may first be formed with the projections downward and afterward baked in the reverse position to facilitate the baking and allow the cup to be turned out of the mold, as and for the purpose described."

The objects and aim of the patented device are stated by the patentee as follows:

"By the use of the apparatus of this invention I make cups or dishes of any preferred shape or design from dough or paste in a fluid state that is preferably composed of the same materials as are employed in the manufacture of biscuits, and when baked, the said cups or dishes may be filled with ice cream, which can then be sold by the venders of ice cream in public thoroughfares or other places. In order to produce said cups or dishes, I provide a combined metallic mold and oven, consisting of two plates, as *a* and *b*, each of said plates having a piece *c* projecting from its edge at one side, connected by a hinge *d*, and each plate provided with a handle *e*, projecting from its opposite edge. The faces of the aforesaid two plates are provided or formed, respectively, with one or more cores *f* and dies *g*, one fitting close to each other. All the heat absorbing and conducting sides of the mold are of substantially the same thickness, so that heat may be evenly conducted through the body of the mold, as will be seen by reference to the drawings.

"The biscuit dough or paste, which is of the consistency of a thick fluid, is poured from a can, that may be provided with one or more spouts for depositing the required quantity of paste either successively or simultaneously in each of the dies or molds *g*. The plates are then closed, and the cup or dish is formed by the dough being pressed into the space between the core *f* and the mold *g*. It is then baked by the apparatus being placed over a gas or other fire, the formation of said apparatus enabling it to be turned as frequently as required, and the biscuit cup thereby uniformly baked. To make these thin-shaped cups satisfactorily from paste, with the thin walls described, and to insure their proper 'turning out' of the molds in good shape, properly baked, I find it necessary to first heat the molds, then pour in the batter, and bake with the projections downward for awhile, then reverse the mold and bake in that position. This enables me to readily remove the cups from the mold in perfect condition, and to this end I have constructed my mold so as to enable it to be readily reversed and to occupy a stable position on the top of the gas range or the like."

In view of the admission made at the oral argument that the patent in suit is valid to the extent above mentioned, the only vital question

remaining for solution is that of infringement, which it is thought may be solved readily by a simple examination and comparison of such differences as exist between the apparatus of the patent and that of the defendant. With that end in view, such an examination has been made, without, however, disclosing any material differences between them; such as exist are matters of form and degree. Structurally and functionally the devices are substantially alike. Among the differences that may be noticed are a somewhat changed contour, particularly of the lower side of the lower plate, and a larger number of mold cavities in the apparatus of the defendant, with their corresponding cores, as well as a difference in the depth and shape of such cavities. These, however, are all matters of detail, which do not require serious consideration. As to the differences in the shape of the recesses and cores, it appears that those of the patent are truncated cones, while the defendant's are perfect cones. The specification of the patent, however, provides in specific terms for modifications of this character; but, whether it did or not, such changes are immaterial and would not avoid infringement. What has just been said as to the change in the shape of the cones and mold cavities is equally applicable to their increased number. The drawings of the patent show but two or three cones with corresponding cavities, while the defendant's device has perhaps ten or more. This, however, is but a matter of duplication, and forms no basis for patentable invention, or of justification for infringement.

What apparently furnishes the main reliance of the defendant in support of his claim of noninfringement is contained in the allegation that the contour of the lower plate—that is to say, the bottom of the lower member containing the mold cavities of his machine—varies from that of the patent, and that such variation is vital, because the complainant, by the term “indented mold,” as used in the claim, is restricted to a particular form of mold, which the defendant does not use. This argument seems to be based upon a suggestion of defendant's expert, who maintains that a mold made conformably to the term “indented mold” must have its cavity formed in part only in the plate forming the lower member of the device, the balance being positioned in a boss which projects from and below the lower face of such plate; that is to say, the defendant contends for a construction which will not be satisfied with indentations or cavities which appear in their entirety in the inner face of the lower plate, but rather for a construction which requires that such indentations or cavities shall have corresponding protuberances or projections on the opposite and outer face of the lower plate. Manifestly, however, the term relates to and describes merely a die cavity or recess *in the inner face* of the lower plate, or, using the language of the claim, “in the metal of such face,” and does not even suggest, much less require, a projection opposite thereto, upon the outer face of such plate. A thing may fairly and truthfully be said to be indented when it has a hollow or depression in its surface, and this in utter disregard of whether the hollow or depression is manifested upon the opposite side by a corresponding protrusion; in other words, an indentation may exist without regard to the configuration of the opposite side of the article in which the in-

dent appears. The only apparent justification for the expert definition just referred to is found in the fact that the drawings of the patent, which show the cavities in the lower plate, also show bosses or projections on the under side of such plate opposite the indents or depressions.

At this point it may properly be remarked that the defendant at first made his mold cavities in that form; but upon being threatened with a suit for infringement of the patent in suit, and in order to avoid that charge, he thereafter made the lower plate of the machine of sufficient thickness in and of itself to contain the cavities, thereby avoiding the necessity of having any corresponding bosses or projections on its opposite side. It is manifest, however, that the functional effect of the device was not altered by the change. It was a rather poor expedient, admittedly adopted to avoid a charge of infringement. The functional effect of the mold is not altered, whether the lower face of the plate, in which the indentations are, is by reason of its thickness smooth and solid, as in defendant's machine, or in the form of projecting bosses, as in the patent. As already suggested, the claim says nothing about the thickness of the plate, or of the contour or form of its lower and outer surface. All that the claim requires is that the plate should have therein indentations or mold cavities, which, as interpreted by the specification, must be sufficiently large to contain the corresponding cores of the upper plate, while at the same time leaving between them the requisite space to hold the batter to be baked. What the defendant did, and all that he did, by way of distinguishing his device from that of the patent, in order to avoid a charge of infringement, was to increase the thickness of one of the parts; and, even if it were unguardedly and improperly admitted that this change constituted a patentable improvement, still the device as a whole would not even then escape the charge of infringement.

Another point which defendant's counsel claims distinguishes the defendant's device from the complainant's has reference to the meaning which should properly be attached to that part of the claim which says:

"All the heat absorbing and conducting sides of the mold being of substantially the same thickness."

He strenuously contends that this language relates to the lateral or sloping side walls of the bosses or protuberances within which are formed the small mold cavities of the lower plate. In considering this clause, it should be kept in mind that the phrase does not say that all of the sides of the molds are to be substantially of the same thickness, but only the "heat absorbing and conducting sides of the mold." In determining which of the sides of the mold answer that description, reference must be had to the specification, from which we learn that all of the small forms in which the pastry cones or cups are baked are attached to or form a part of the larger plates *a* and *b* of the "mold and oven," and that it is these plates which in the process of baking are, by turning the apparatus, successively exposed to the direct heat of the "gas or other fire," and so become the "heat absorbing and conducting sides of the mold." Thus the patentee says that his mold, evi-

dently the entire apparatus, is constructed so as "to be readily reversed and to occupy a stable position on the top of the gas range or the like." The specification tells us, as does also the first line of the claim, that his apparatus as a whole is "a combined mold and oven for producing biscuit cups or dishes," and it is this combined mold and oven, the upper and lower sides of which consist of two large metal plates, whose outer faces are, pursuant to the claim, to be "so formed as to be adapted to rest on the top surface of a stove either side up, so that the heat may be evenly conducted through the body of the mold."

[1] From the reference just made, it seems plain that the heat absorbing and conducting sides of the mold are the two plates which form the upper and lower sides of the apparatus as a whole, and which the patentee repeatedly directs to be exposed successively to the fire by turning in the process of baking. The language referred to does not, therefore, it may be said with assurance, refer to the inclined sides and surfaces of each of the small individual molds. These are not, within the meaning of the claim, as interpreted and explained by the specification, in any sense the "heat absorbing and conducting sides of the mold." At no time are the sides of the small molds directly exposed to the flames, or laid, or capable of being laid, upon the heated surface of a stove or range. So much only of the "mold and oven," therefore, as is directly exposed to the flame, or rests directly over the gas, or upon a stove, can, with propriety be said to be its heat absorbing and conducting sides. That this is the correct interpretation is, moreover, apparent from the discussion which took place in the Patent Office when amendments D and E were under consideration therein. An examination of the device of the defendant shows that its upper and lower plates are exposed, exactly as those of the complainant's are, to the heat of the flame in baking, which heat they absorb and in turn conduct to the small molds. Furthermore, the heat absorbing and conducting sides of the molds of the two devices are of substantially the same thickness, which is all that the claim demands. Unquestionably considerable latitude must be allowed in determining the meaning of that phrase. Individual opinion is bound to differ in regard thereto.

Counsel for the defendant has brought to the court's attention the case of *Adams et al. v. Edwards et al.*, 1 Fed. Cas. 112, 114, 115 (No. 53), where Judge Woodbury, in charging a jury as to the meaning of the word "substantially," said:

"When we say a thing is substantially the same, we mean it is the same in all important particulars. It must be of the same material, when the material is important; it must be of the same thickness, when the thickness is important," etc.

Manifestly the judge, in defining the phrase as he did, acted without due consideration, or else, as is more probably the case, was misreported, since by the language as reported he gave no effect whatever to the word "substantially" in the sentence in which he spoke of "thickness." The reporter put him in the attitude of saying that the phrase "of substantially the same thickness" means precisely the same as the phrase "of the same thickness," thereby leaving wholly out of

consideration the very word he was attempting to define. "Substantially" is a relative word, which, while it must be used with care and discrimination, must nevertheless be given effect. The patent demanded that uniformity of thickness of metal, and that only, which would necessarily tend to secure the equal heating and consequent uniform baking of the pastry in the mold.

[2] Much stress is laid by defendant's counsel upon the fact that this clause was inserted in the Patent Office by the examiner immediately prior to its allowance, and that because of its forced insertion a very serious limitation was imposed upon the claim. The patentee, however, surrendered nothing when the clause in question was added, as it was, to distinguish it from the Ageter Swiss patent of 1889, which device, by the way, was only intended for use in an ordinary closed oven, while that of the patent in suit combined in itself a "mold and oven," manifestly a **totally** different apparatus. Hence the added clause worked no estoppel against the complainant of the character now claimed. As was said by Judge Lurton, in *Bundy Mfg. Co. v. Detroit Time Register Co.*, 94 Fed. 524, 543, 36 C. C. A. 375, 394:

"To be estopped by the action of the Patent Office, the patentee must be shown to have surrendered something which he now claims in order to obtain that which was allowed."

This familiar language is instructive as to the line of demarcation between the conduct of an applicant which will, and that which will not, work an estoppel against him. The complainant is not here contending that the heat absorbing and conducting sides above indicated should not be of substantially uniform thickness, and for the purpose mentioned. Indeed, its patent is in part based upon that very condition, and its drawings show clearly the intention of the claim in that respect. What it is claiming, and what the defendant is denying, is that his apparatus infringes that portion of the claim; the defendant meanwhile, in furtherance of its contention, urging upon the court what is believed to be an erroneous definition of what constitutes the heat absorbing and conducting sides of the mold.

[3] The patentee of the patent in suit apparently was not treated very generously in the Patent Office. He seems to the court to have invented more than he secured. How this occurred it is unnecessary to speculate, although the solution seems to lie on the surface of the contents of the file wrapper. But, however it happened, this court is averse to paring away the comparatively little he did secure, particularly in favor of a former partner, who at first admittedly infringed the patent, and then, in attempting to escape that charge, made, under the advice of counsel, but a slight mechanical change in construction. The defendant never invented a single detail of the apparatus in question. He never invented the biscuit ice cream holder. All he did was to enter into partnership with the patentee, as above stated, and in a few months, and quite probably as soon as he had learned all that he wished to about the biscuit machine and business, dissolved the partnership, went into business for himself, at the same time adopting and using the patented machine, until he was warned that he was infringing it, whereupon, with the aid of a lawyer, he made such changes therein, and such only, as he was advised would distinguish his de-

vice from that of the patent, and enable him with safety to continue his business at the expense of the patentee.

Indeed, a short extract from the defendant's brief will show how little of real difference there is, according to his own contention, between the defendant's machine and that of the patent in suit. The extract referred to is as follows:

"There is no question that these machines [Complainant's Exhibit, Defendant's Machines A, D, C] embody the organization stated in that claim which Valvona sought to secure before he limited it by adding the qualifications in respect to the adaptability of the apparatus to rest upon the top surface of a stove, and in respect to the uniform thickness of the heat absorbing sides."

As already shown, the defendant's machines undoubtedly have a somewhat different configuration from the complainant's on their bottom face, but not sufficiently different to prevent their action in substantially the same way, to produce the same result, by substantially the same means. Sufficient has already been said, however, with reference to the heat absorbing and conducting sides of the mold, while as to the adaptability of the two machines to rest on the top surface of a stove nothing need be said, except that either will rest there if desired, or either can be supported, as the defendant's is, on trunnions, and by that means have its upper and lower plates exposed alternately to the fire. Under the strictest rules of estoppel that can be properly be applied to the complainant's case, the defendant must be adjudged to have infringed the patent in suit.

[4] The defense of laches has been interposed, but under the circumstances disclosed does not seem to require any special or protracted discussion. Mere laches does not usually bar a party, unless under circumstances which work an equitable estoppel against him. No such facts appear in this case. The defendant was repeatedly warned that he had adopted and was using a device which infringed the patent in suit. He thereupon sought the advice of counsel, and apparently in deference thereto made some slight changes in his apparatus, which he thenceforth continued to use. It is not perceived that he has been misled or induced to pursue any specific course of conduct by any act of the complainant, who on its part has meanwhile, with considerable diligence, pursued other infringers of its patent.

A decree will be entered in favor of the complainant, with costs, upon the ground of infringement.

SIMONS-MAYRANT CO. v. ATLANTIC COAST LINE R. CO.

(District Court, D. South Carolina. July 21, 1913.)

1. REFERENCE (§ 99*)—FINDING OF MASTER—CONFLICTING EVIDENCE—EXCEPTIONS.

In an action against a railroad company for injuries to a steam shovel in transportation, a master's finding that verbal notice was given to defendant before shipment that plaintiff needed the shovel for use on a contract under which it would be liable for a penalty of \$50 for each day beyond the time limit provided for in the contract, based entirely on the conflicting evidence of two witnesses, would not be reversed by the court on exceptions.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148-156; Dec. Dig. § 99.*]

2. CARRIERS (§ 134*)—TRANSPORTATION OF MACHINERY—INJURIES—MASTER'S FINDINGS—EVIDENCE.

In an action against a carrier for injuries to a steam shovel, evidence held insufficient to support a master's finding that a further injury following derailment of the shovel after delivery to the owners at destination was due to undiscovered and unrepaired injuries resulting from the original wreck of the shovel while in the custody of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 588-592, 607; Dec. Dig. § 134.*]

3. CARRIERS (§ 105*)—SPECIAL DAMAGES—NOTICE.

Where, in an action against a carrier for injuries to a steam shovel during transportation to the place where plaintiff intended to use the shovel in certain contract work, the only notice of special damages given to the carrier that would result from injury to the shovel beyond necessary repairs was from the delay which the carrier was notified would cause a loss of a contract penalty of \$50 a day, plaintiff not having suffered such penalty and the contract having been terminated for other reasons and the injuries to the shovel having been fully repaired, plaintiff was only entitled to recover nominal damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451-458; Dec. Dig. § 105.*]

4. CARRIERS (§ 105*)—SPECIAL DAMAGE—CARRIERS.

Special damages cannot be recovered against a carrier for delay in delivering machinery required by the plaintiff for contract work unless the carrier had notice of the circumstances from which such special damage might reasonably be expected to result at the time the contract of shipment was made, and it is further shown that the damages suffered were reasonably within the damages contemplated at the time the notice was given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451-458; Dec. Dig. § 105.*]

At Law. Action by the Simons-Mayrant Company against the Atlantic Coast Line Railroad Company. Judgment for plaintiff for nominal damages.

Whaley & Bissell and Mitchell & Smith, all of Charleston, S. C., for plaintiff.

W. Huger Fitz Simons, of Charleston, S. C., for defendant.

CONNOR, District Judge. This is an action for the recovery of special damages alleged to have been sustained by reason of the delay in shipment of, and injuries sustained by, a steam shovel delivered to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant at Lakeland, Fla., for transportation and delivery to plaintiff at Ft. Lawn, or Great Falls, S. C. The plaintiff alleges that, prior to the receipt for shipment, defendant was notified that the shovel was to be used by plaintiff in performance of a contract which it had theretofore entered into with the Southern Power Company at Great Falls, S. C.; that prompt shipment and delivery was necessary to enable plaintiff to perform the work (excavation of a canal); that the contract of shipment was entered into by defendant with notice that special damage would be sustained if the shovel was not promptly shipped and delivered; that defendant negligently delayed the shipment and delivery and so negligently handled said shovel that it was injured, etc. Defendant denied that, at the time of, or prior to, said shipment, it had notice of the contract existing between plaintiff and the Southern Power Company or the purpose for which the shovel was to be used at Great Falls. It further denied negligent delay in the shipment and delivery of the shovel. It admitted that the shovel was, while in transit, derailed at Savannah, Ga., and injured, but alleged that it was repaired, put in as good condition as when received by it, and delivered to plaintiff at Great Falls in such good condition. The cause was, by consent, referred to Mr. George H. Moffett, as special master, to hear the evidence and report his conclusions of fact and of law to the court, with the right of either, or both, parties to file exceptions, etc. The special master filed his report, to which both parties filed exceptions.

[1] The master finds:

"That verbal notice was given, before the shipment, to the defendant to the effect that Simons-Mayrant Company needed the shovel for use on a contract under which they were liable for a penalty of \$50 a day for each day beyond the time limit provided for in the contract."

Defendant excepts to this finding of fact. Exceptions 1 to 7, inclusive, are directed to this phase of the case. The master sets out in his report the evidence which he deems relevant to this issue, being the testimony of Mr. S. Lewis Simons, secretary and treasurer of plaintiff company, and Mr. W. E. Renneker, commercial agent of defendant. Their testimony is contradictory and irreconcilable, except upon the theory that the memory of one of them has failed him. It is found by the master, and conceded by counsel, that both are men of high character for truth and integrity. Mr. Simons says that, several days before the shovel was shipped, he stated to Mr. Renneker that:

"We had bought this shovel to be used on a contract which we had for the Southern Power Company, Ft. Lawn; that it was a matter of vital importance for us to get the shovel; that our work was dependent on it; that there was a demurrage of \$50 a day, and we would get \$50 a day if we got through ahead of time. I urged (upon) him the importance of a prompt shipment, in getting it to us as soon as he possibly could."

Mr. Renneker says:

"My first connection with that shipment was that we solicited it from Simons-Mayrant Company; after ascertaining that the shipment would move from Lakeland, Fla., we received a letter from the Cameron & Barkley Company, or from Mr. Jenkins, the president, under date March 8, 1906, inclosing two bills of lading covering the shipment of one steam shovel on its own wheels in part, and requesting that we insert the rate in the bill of lading."

The shipment was made from Lakeland, Fla., by the Cameron-Barkley Company and bill of lading issued to them; no notice of the purpose for which it was to be used was given to defendant's agent at Lakeland. The foregoing is the only direct evidence upon the issue in regard to notice upon which the claim for special damage is founded. Several years elapsed between the date of the transaction and the hearing of the cause. There is evidence of conversations and correspondence between Mr. Simons and Mr. Renneker subsequent to the shipment and issuing of the bill of lading, from which the parties draw differing inferences in respect to the principal or direct evidence. Their subsequent conversation and letters are capable of different constructions. The master rests his conclusion upon the belief on his part that it is probable that Mr. Renneker had forgotten the first conversation, in regard to which Mr. Simons testifies with much confidence. The master was personally acquainted with both witnesses, heard them, saw their manner while testifying, etc. In view of the principle by which courts are governed, in passing upon exceptions to findings of fact by the master, I would not think myself justified in reversing his conclusion. The defendant's exception to the first finding of fact is not sustained.

[2] The master finds that the shovel was delivered to defendant's agent at Lakeland, Fla., on February 28, 1906; arrived at Savannah March 8th; was derailed at Savannah and fell into Bilboa creek on March 14, 1906; was raised (that is, taken from the canal) March 21st and "survey for damages made April 2, 1906"; repairs commenced April 4, and completed April 18, 1906. It was accepted by the Seaboard Air Line Railway Company April 24th, reached Ft. Lawn, S. C., May 9th, and delivered to plaintiff May 12, 1906. He further finds: That from the date of shipment at Lakeland, Fla., two weeks, or March 14th, was a reasonable time within which it should have reached Ft. Lawn or Great Falls, S. C. That on March 21, 1906, plaintiff was prepared to receive it, and therefore "this date is found when the shovel should have arrived, and that the delay beyond this date was caused by the negligence on the part of defendant, for which it would be liable." There is no controversy in regard to these events or the dates upon which they occurred. The master further finds:

"From the testimony it appears that the shovel was derailed and thrown into Bilboa Creek, at Savannah, and allowed to remain in the canal for one week. From the testimony it appears that one truck was badly damaged, one side sill of the car damaged and bent, the piping was broken, the pump was broken, the boiler knocked loose from the machine and out of the machine altogether, the beam of the car was bent, and the house was completely broken off, the iron holding the roof and parts of the house bent and twisted. The small boiler connections were broken and the injector gone, the top valve gone, the small gauge gone, the gauge cock gone, and a portion of the castings. The repairs were made by the railroad company at Savannah, consumed two weeks, and cost \$271.50. The testimony of the railroad witnesses tend to show that, after the repairs, the shovel was tested and found to be in as good condition as it was when received."

There is no substantial controversy respecting the extent and character of the injuries sustained by the shovel at Savannah, which were visible to the witnesses who saw, examined, and repaired it. A careful

examination of the testimony of all of the witnesses who testified regarding the condition of the shovel, as disclosed by an examination at Savannah, and the repairs thereto, convinces me that the testimony of Mr. Wright, superintendent, Mr. Sprowl, superintendent of motive power, Mr. McPheren, machine shop foreman, Mr. Hampton, foreman, freight car department, Mr. Petronovitch, foreman of boiler makers, all of whom examined the shovel and either superintended or assisted in its repair, some of whom tested it after repairing, and who testified intelligently and frankly, is reliable and entitled to credit. The testimony of Mr. Tovey in respect to his capacity to form an opinion, his opportunity for doing so, etc., should not be taken as discrediting these witnesses. In many material respects he does not contradict them; he did not see the shovel after the repairs were made. He is not a machinist and only saw the shovel while at Savannah, on one occasion, and but for one day, April 9, 1906, nine days prior to the completion of the repairs. The testimony shows that all injuries which were discovered while the shovel was in the defendant's shops at Savannah were repaired. The claim of the plaintiff is, to a large extent, dependent upon the question whether it sustained injuries, which were not discovered by the witnesses, which caused further injury to the shovel.

The testimony shows that it was delivered to the Seaboard Air Line Railway Company and by said company delivered to the Lancaster & Chester Railroad Company and by said carrier delivered to (that is, placed upon the track of) the Simons-Mayrant Company at Ft. Lawn or Great Falls on May 12, 1906, the point at which the work of excavation was to be done. In this connection the master makes the following finding:

"The shovel was received at its destination by the Simons-Mayrant Company under notice from them that the shovel was received subject to any claims for damages on account of its condition after its receipt. The shovel was not thoroughly examined but was set up, and, on the day it was received it was being moved along the tracks of the Simons-Mayrant Company to a point where it was proposed to be worked, when a second derailment occurred, and the shovel fell down an embankment and was injured, necessitating its repair and a loss of three weeks time to plaintiff during which these repairs were made."

The master finds that this derailment was caused by the breaking of a casting and—

"that this occurred from the derailment in Savannah and must have been overlooked by the railroad and employes when the repairs were made, and that the subsequent derailment and injury to the shovel resulted therefrom."

Defendant challenges the correctness of this finding, insisting that:

"The master erred in finding that the break in the casting occurred from the derailment in Savannah and must have been overlooked by the railroad employes when repairs were made, and that the subsequent injury to the shovel at Great Falls resulted therefrom. The finding is purely conjectural and speculative, for the master himself says, 'There is no testimony as to when the break occurred,' and that the railroad witnesses testified that, after the repairs, the shovel was tested and found to be in as good condition as when received."

It appears that the shovel and its parts were shipped upon two cars; the former being on, and attached to, a car upon its own trucks. When plaintiff received the shovel at its destination, it gave notice that it did not waive any claims for damages; it is found "that no thorough examination was made at that time." The trucks upon which the shovel was carried were placed upon and were being moved along the track of the plaintiff when, at a point described by the witnesses with some variation, the trucks left the track, a casting holding the boom broke, causing the boom to swing at a right angle to the track, carrying the shovel over the embankment. The track was built by plaintiff company and had been in use some two weeks; the testimony as to the character and extent of the use made of the track before the derailment is conflicting. There is contradictory testimony as to the exact point, whether on the main track or a spur thereof, the derailment occurred; the plaintiff's witnesses describe the track, pointing out by means of a rough diagram, made by one of defendant's witnesses, where the derailment occurred; they say that the shovel was not on the spur. Mr. Leland says:

"It had not reached it, but I don't think it was very far from the beginning of the spur. (Page 66)."

Rosemond, for defendant, said that it was on the spur. (Page 20.) Mr. Stevenson, for plaintiff, says:

"We were taking it down the track to get it in position, and the rear truck left the track; that is, the truck away from the— It was the forward truck as the shovel was going; but the rear truck when the shovel was in operation, and the wheels left the track. That caused a jar to the shovel and the boom. I was noticing it very carefully; I was in direct charge of it, noticing it very carefully. If it had been a sail probably no damage would have been done, but the boom began swinging and as soon as it swung at right angles with the track the boom carried it over. There was a pin that went through the fore truck into the casting to hold the boom in position; this casting gave way."

This statement, to the extent quoted, is not contradicted. Mr. Royall says that there was a branch on the side of the embankment on which the track ran. Mr. Cuthbert points out on the plat the place at which the shovel went over; says it was "somewhere up here at the end of upper end of this track; there was a big bluff right up about there; this spur went in around a big hill up there; * * * was not on the spur track." He saw it "turn over." He says:

"I guess it was out of order. I don't know positively one way or the other."

Mr. Stevenson, for plaintiff, says that Mr. Rosemond was directed to take it up, and did so. He says that:

"There was a stream at the embankment where the shovel turned over; does not think it caused the derailment."

Mr. Rosemond who, it is conceded, took the shovel up after the derailment, and who is not in any way interested in the action, having no business or other relation with either party, is introduced by defendant. He says that the truck was on the spur track but in this respect is contradicted by the plaintiff's witnesses; the weight of the

evidence is against him on that question, although all agree that it was near the spur. He says:

"They had graded a spur track down the side of a branch, and, in digging in the hill, the soft dirt was on the side next to the branch, and I presume from the looks of it that the shovel had run up on this soft place and tipped over in the branch; the soft side of the branch being next to the track and run down considerably. I judge that that is what turned the shovel over. There was a grade up, as well as I remember; it ran up grade for a little ways, for a short space, and then turned over a kind of hump or rise in the track, and it was down grade when it turned over."

When asked whether the track was in good condition, he says:

"I would not consider that it was at this particular place where it turned over; it was too narrow and the bank was not sufficient to hold, on both sides, soft dirt. * * * I turned it back, worked over it several days." (Pages 20, 21.) "Did not see any broken castings; never noticed any."

The witness drew a diagram which he says shows where the shovel turned over. Plaintiff's witnesses do not agree with him in regard to the diagram. Upon cross-examination he says that he did not hear anything about any casting being found at the time, but:

"It strikes me that some two or three weeks afterwards there was something said about a broken casting; I am not sure about that. You righted the shovel up, did you not? Yes, sir. And you put it in shape after it was turned back up? I set it up; I did not do the pipe work. You did not see any broken castings at that time, did you? No, sir. You examined the shovel when you took it up, did you not? Oh, I looked over it; naturally I would."

There is some testimony, rather unsatisfactory in character, that the truck left the track because it was out of alignment. (Page 74.) The fact that it had come from Savannah, over the line of the Seaboard Air Line Railway and the Lancaster & Chester Railroad, tends to disprove this theory. In regard to the condition of the track, Mr. Royall, a witness for plaintiff, a civil engineer, who saw the place at which the shovel turned over, on cross-examination says that there was a branch at the point of derailment.

"My opinion is that the—well, I will have to put in an 'if,' because I did not see it, if that shovel ran off, before it started to turn, then it was very natural that the truck would be depressed on one side or the other; whichever way was the softest side, the jar would depress it on that side, and then that would get this shovel eccentric, and it would be very natural for any weight on one side or the other to continue the moving of the shovel on the other."

The fact that the shovel came safely, on the same truck, over the railway from Savannah to Ft. Lawn shows that the pin, or casting, did, under normal conditions, have sufficient strength to hold the boom in position. That the truck, leaving the track, was the immediate cause (that is, in order of time, the condition), which immediately preceded the derailment, is clear. It therefore becomes necessary to inquire why the truck left the track. This must have been caused either by some defect in, or injury to, the truck or the condition of the track. The burden of proof in this respect is on the plaintiff; the shovel was on its track in control of its employés. Several of plaintiff's witnesses testify that cars loaded with coal and cement had been carried over the track a short time before the shovel was derailed. The track had been

completed about two weeks before the derailment. Mr. Rosemond says that no coal cars had been carried over this track or on the spur; "never had any occasion to do so," etc. Different conclusions in respect to the condition of the track may be drawn from this testimony. I am unable to find that the truck was out of alignment. There is no direct evidence of it, and no such suggestion was made at the time of the derailment by any of the persons who saw it; the natural evidence is otherwise. There is sufficient evidence to sustain the conclusion that the truck left the track by reason of the physical condition of the latter. I have examined the testimony with care and am brought to this conclusion. There is ample evidence that swinging of the boom carrying the shovel over was caused by the pin, or casting, breaking. This is undoubtedly true; but lying behind this fact is the question whether the pin, or casting, broke by reason of the jar caused by the truck leaving the track or because it had been theretofore broken by the derailment at Savannah and overlooked by the mechanics who repaired it. The master finds that the break occurred at Savannah. The exception to this finding raises one of the determinative issues as to the damage claimed after the delivery of the shovel to plaintiff. The finding in this respect is necessarily dependent upon the weight to be attached to the evidence of plaintiff's witnesses. Several of them are interested in sustaining plaintiff's contention; they testify some six years after the event. Mr. Cuthbert, who locates the place of the derailment, was the assistant of Mr. Stevenson, and when asked, "What was it that caused the shovel to turn over?" replied:

"I guess the shovel was out of order.

"Well, what was it that caused it? I guess it was out of order. I don't know positively one way or the other." (Page 58.)

Mr. Leland says that he saw the shovel lying in the ditch.

"I saw something that convinced me how it turned over. I did not see the accident."

He says:

"Well, it seems that the steam shovel was going down this grade of the main line, you might say, stern foremost; boiler was in front; and the trucks left the track; the front end of the car left the track; and this must have jarred a good deal and caused the casting to break that was holding the boom and the boom swung at right angles to the track and naturally the whole thing went right into the ditch; the piece that I was referring to, that, I thought, caused the accident, was this casting and it showed an old break, probably, certainly over half the value of the casting. I could tell it was an old break by the rust and grease running down into it."

He says that he told Rosemond to put the shovel back on the track, and he did so. He further says that he discovered the broken casting before it was taken up the day of the accident; that he could not tell how or where it was broken; "it looked like an old break; * * * it was unquestionably a secondhand shovel." This witness does not claim to have called the attention of Mr. Rosemond or any one else to the condition of the casting. Mr. Stevenson, who was in charge of the shovel at the time of the derailment, says:

"There was a pin that went through the fore truck into the casting to hold the boom in position; this casting gave way; but after the accident we ex-

amined and found that it was an old break; that it was not apparent before the accident, as the casting was covered with grease and stuff of that kind, etc.; if that casting had held, the boom would not have swung. I showed it to Mr. Leland and Mr. Rosemond." (Pages 72, 73.)

On cross-examination he answers the question:

"Then, as I understand it, the shovel turned over because one of the trucks was derailed and the boom swung over? That is the cause of it turning over.

"And if it had not been derailed, it would not have turned over? I did not say that; the boom might have swung without its being derailed; that casting might have given way."

This is substantially the testimony on behalf of plaintiff respecting the condition of the casting. Defendant introduced Mr. Rosemond, who raised the shovel after the derailment. He says that "it was old-style shovel." He says that he "never saw any broken casting"; that "some week or so afterwards he heard something said about a broken casting." There is evidence tending to show that the shovel had been used some four or five months before plaintiff purchased it; that it was in good condition when shipped from Lakeland, Fla.; that it was tested and found to be in good working order. Mr. Simons, secretary and treasurer of plaintiff, wrote defendant on May 9, 1906, the day of its arrival at Ft. Lawn, that the shovel was "not in the condition in which it was delivered to you at Lakeland, Fla., and, from an inspection of the same, we can see that it is not in proper working order." On May 18, 1906, Mr. Kenly, freight claim agent of defendant, acknowledged receipt of this letter, saying:

"If you will kindly file claim with this company supporting same, with the original B/L paid freight bill and claim bill, I will take pleasure in investigating the matter and will do my best to see that settlement is effected at an early date."

Although the shovel was delivered May 12, 1906, and the second derailment was on the same day, it does not appear that any answer was sent to this letter, nor does it appear that any notice was given defendant, or demand made, for the injury sustained by the second derailment until the complaint was filed herein. It does appear that, notwithstanding the statement in the letter of May 9, 1906, no inspection of the machine was in fact made by plaintiff. This action was instituted June 25, 1907. Assuming that the evidence, in regard to the condition of the shovel when delivered to defendant at Lakeland, Fla., has the same probative value as that regarding its condition when, after the repairs were made at Savannah, it was delivered to the Seaboard Air Line Railway, the case comes to this: A secondhand shovel is delivered to plaintiff at Ft. Lawn, S. C., and by its employes taken over a railroad track completed for a temporary purpose two weeks before, and while being carried over this track, as described by the witness, the trucks under the car, upon which the shovel was placed, leaves the track, causing a jar, which breaks, or causes the breaking of a pin, or casting, holding the boom in place, the boom swings around at right angles with the shovel and causes it to turn over, etc. To sustain plaintiff's contention, we must accept the statement of witnesses, made six years after the derailment, as to the appearance of the pin, or casting, and make their opinion the

basis for the conclusion, not only that it was an "old break," but that it occurred at Savannah and was overlooked by the mechanics, who swear that the injuries sustained at Savannah were thoroughly repaired; that, when necessary, new castings were supplied; that the shovel was tested and found to be as good as new. That the jar, resulting from the trucks leaving the track, was the immediate cause of the pin giving way, releasing the boom, is unquestionably true; but plaintiff insists that the jar would not have produced this result but for the fact that the pin was broken at Savannah and overlooked by those who repaired the shovel. To sustain this conclusion, it is necessary to find every controverted question of fact and every opinion of witnesses, together with every inference to be drawn therefrom as contended by plaintiff. In view of the fact that the burden of proof was upon plaintiff that its employes alone had knowledge of the circumstances, manner of, and condition under which the derailment occurred, and the further fact that although defendant's claim agent on May 18, 1906, six days after the derailment, called for a statement of plaintiff's claim for damages because the shovel was not in the same condition when it reached Ft. Lawn, S. C., as when delivered to it at Lakeland; that no claim was filed; no response made to the request; that the claim made that the derailment was caused by a break in the pin or casting is dependent upon the opinion of interested witnesses expressed six years after the event; that the testimony of plaintiff's witnesses is denied by a witness with equal opportunity for knowing the conditions under which the derailment occurred—I am brought to the conclusion that the evidence fails to sustain the finding of the master in that respect. I am of the opinion that the trucks under the steam shovel left the track of plaintiff's road because of its physical condition and not because the trucks were "out of alignment." It is clear that the breaking of the pin, or casting, holding the boom in position was caused by the jar occasioned by the trucks leaving the track. Mr. Leland says:

"The trucks left the track, and this must have jarred a good deal and caused the casting to break that was holding the boom."

Whether it would have broken without such jar is conjectural; if the testimony of Mr. Leland and Mr. Stevenson be accepted as true, the break was caused by the derailment at Savannah is also conjectural. While it is a legitimate process of reasoning to base an inference upon a fact proven, it is not safe, in the quest for truth, to base an inference upon an inference. The master says that "there is no evidence when this break occurred." This is not strictly accurate. Mr. Leland, plaintiff's witness, says that the jar caused by the truck leaving the track "caused the casting to break." He further says that the old break was "probably certainly half the value of the casting." The casting had held the boom in position during the transportation over the railroad from Lakeland to Savannah and from there to Ft. Lawn, thus showing that it was efficient for that purpose until the jar, caused by the trucks leaving the plaintiff's track, caused it to break. Plaintiff's contention is based upon two inferences, both of which must be sustained before the defendant can

be fixed with liability: First. That the break occurred at Savannah and was overlooked by defendant's workmen. Second. If it had not been broken at Savannah, the jar caused by the trucks leaving the track would not have broken or caused it to give way. The evidence leaves the question in the domain of uncertainty and doubt; it does not place the conclusion upon that plane of legal proof which enables the courts to fix liability. The defendant's exceptions from 8 to 12, inclusive, are sustained.

This finding eliminates the damages alleged to have been sustained by plaintiff by reason of injury to the shovel or delays caused after March 21, 1906, the day upon which the master finds it should have been delivered, thus confining the claim for damage alleged to have been sustained from March 21 to May 12, 1906. The master says that no damage was sustained by reason of any depreciation in the value of the shovel. He says:

[3] "The notice given to the railroad company before shipment was two-fold: (1) That the plaintiff was liable to \$50 damages a day for failure to complete the contract. (2) That the shovel was to be used for a special purpose. This penalty of \$50 a day plaintiff did not suffer; and, had the article of shipment been merely delayed and plaintiff's loss fixed at \$50 per day, the amount of special damage would be limited to these penalties; and, these not having been imposed, the railroad would not be liable to pay any damages on this account. * * * The notice stated further that the shovel was to be used on a contract which plaintiff had at Great Falls or Ft. Lawn, and that, the carrier being notified of this fact, the measure of damages for the delay and injury in carriage is the expense and detriment to the special business with reference to which the carriage was undertaken fairly attributable to the delay."

By exceptions to these findings we are brought to the inquiry: For what damage is defendant liable on account of the delay to deliver the shovel within a reasonable time, to wit, between March 21 and May 12, 1906? While there is conflicting evidence in that respect, I concur with the finding that plaintiff was prepared to use the shovel on March 21, 1906. The extent to which, and value of its use, at that time is much more uncertain and doubtful. The master says that "there was no testimony given us to any items of damage." He proceeds to ascertain the capacity of the shovel, by a system of estimation, how much dirt it would, when operated, remove a month, and this he makes the basis of his calculation of damage. Both parties except to the measure of damages applied by the master and his estimate respecting the capacity of the shovel. Plaintiff presents its contention by a number of exceptions. It is contended that by applying correct measure of damages the master should have awarded \$29,616.98. This result is reached by showing that the plaintiff, from the time it began work until it surrendered the contract to the power company, expended \$78,773.73 and received \$49,434.60, leaving a loss of \$29,339.13. This contention is based upon the theory that not only was the defendant liable for the delay but for failure of the shovel to work efficiently during the entire time that it was in use by plaintiff, and this was the cause of its failure to carry out the contract. Having found that defendant was not liable for the injury sustained by the shovel, after the delivery to plaintiff, this exception cannot be sus-

tained. The other exceptions relate to the estimate made by the master in regard to the monthly capacity of the shovel. Assuming that the plaintiff was prepared to use the shovel on the work covered by the contract on March 21, 1906, several questions arise: First. Upon the finding of the master, in regard to the notice given defendant, what damages were within the contemplation of the parties, in the event of a breach? Second. Assuming that damages, other than the penalty fixed for failure on the part of plaintiff to complete the work on the day fixed in the contract, were, by the notice, brought within the contemplation of the parties, what is the measure of such damages and how are they to be ascertained? Third. Assuming that the defendant became liable for other damages than the penalty, does the evidence sustain the finding of the master as to their character and amount? Defendant, by its exceptions 3, 4, 5, 6, and 7, presents the first and second and, by its other exception, the third question.

The principle upon which a carrier is held liable for special damages resulting from delay in the carriage and delivery of goods is well settled. The difficulty experienced by the courts is found in the application of these principles. The plaintiff cites the case of *Towles & Arnett v. A. C. L. Ry. Co.*, 83 S. C. 501, 65 S. E. 638, in which it is said:

"The rule is well settled that notice, at the time of the contract, of circumstances from which special damages may reasonably be expected to result will make the defendant liable for such damages on the ground that they are within the contemplation of the parties and therefore regarded as forming a part of the contract."

This is a clear and accurate statement of the doctrine announced in *Hadley v. Baxendale*, 9 Exch. 341 (cited by Mr. Justice Gary), and recognized to be the leading case upon the question in England and America. The reason assigned why the defendant, who breaches a contract for the delivery of an article, becomes liable for special damages is that, having notice that such damages will be sustained by the failure to perform on his part, he must be regarded as assuming such liability, or, as the courts say, contemplating such damages as resulting from a failure on his part. It is said:

"Where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may reasonably be presumed that they were within the intent and mutual understanding of both parties at the time it was entered into." *Howard v. Stillwell & B. Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147.

Assuming, therefore, that by accepting the proposition to receive and carry the shovel, within a reasonable time, with notice of the terms of the contract between the plaintiff and the Southern Power Company, as found by the master, both parties contemplated that a failure to perform on the part of defendant, resulting in a failure on the part of plaintiff to receive the stipulated premium for an anticipated completion of the contract or, the penalty for a failure to complete it on the day fixed, defendant agreed to be responsible for such result, what was the extent of its assumed liability? It will be interesting to see what construction plaintiff put on the contract in this respect. On April 2, 1906, Mr. Simons, secretary and treasurer of

plaintiff, who made the contract, wrote Mr. Renneker, agent of defendant, complaining of the delay, saying:

"We are under contract with the Southern Power Company to complete certain work at Ft. Lawn by the 1st of November. This contract provides that they are to pay us \$50 for every day that we finish before that time, and we are to pay them \$50 for every day that we take over that, and we have been ready for that shovel for some time, * * * and it has not arrived yet, and we have sustained actual damage of \$50 a day since the 21st of March, 1906, which, to this date, April 2d, amounts to \$600. This damage continues to be sustained each day we are without the use of the shovel. Of course we shall hold you responsible for all damages sustained by us through your unreasonable delay and beg herewith to file with you our claim for \$600 damages to the 2d of April, 1906."

On April 6th plaintiff again wrote defendant, saying:

"We beg to call your attention to our letter of April 2d, informing you that we are under the contract to finish this work by November 1, 1906, and every day after the 1st of November we will have to pay the Southern Power Company \$50 and every day that we get through before that time they are to pay us \$50, and to repeat what we said to you in that letter, we shall hold you for the loss of \$50 per day from the time that we were ready for that shovel (March 21st) until it is delivered to us in Ft. Lawn, S. C."

On April 25, 1906, plaintiff again writes and complains of the delay:

"As we wrote you some time back, this unnecessary and uncalled for delay on the part of your people is causing us great loss and expense, as we are under a contract, of which we already notified you, which would cause us to lose \$50 a day, if not more, by this delay of this shovel, and we shall certainly hold your people responsible for it."

On April 27, 1906, plaintiff wrote Mr. H. Walters, who holds some high position in the defendant's New York office, stating that they had shipped the shovel over the road, and saying:

"We told them that we had a contract with the Southern Power Company, under which we would have to pay a demurrage of \$50 a day for every day that we were behind after November 1, 1906, and would receive \$50 a day if we finished before November 1, 1906. * * * We desire to repeat to you the notice that we have given your representatives here that we will hold your road responsible for the damage of \$50 per day from that time until the shovel is delivered to us and also for any loss of time of our superintendent and employes, and all and whatever damages we shall sustain on account of your carelessness in this matter. We desire to notify you also that, under our contract with the Southern Power Company, they have a right to cancel this contract if, in their judgment, we are not carrying it on properly. Should anything of this kind happen, we shall have a very heavy claim against your road in the matter."

These repeated declarations on the part of plaintiff show clearly what damages were in the contemplation of Mr. Simons, its secretary and treasurer, for which defendant would be liable in the event of a breach. The contract was, by the mutual agreement of plaintiff and the Southern Power Company, taken over and the work undertaken by the latter prior to November 1, 1906. The master says:

"That an examination of the contract * * * shows clearly that there were other causes at work which caused delay and loss beside the delays and damage to the shovel."

It is manifest, therefore, that plaintiff, having surrendered the contract prior to the day fixed for its completion, cannot claim any dam-

ages from defendant on account of loss of the premiums which it never earned, nor for penalties which it never paid. The master says:

"The notice, however, stated further that the shovel was to be used on a contract which plaintiff had at Great Falls or Ft. Lawn; and, the carrier being notified of this fact, the measure of damages for delay and injury in carriage is the expense and detriment to the special business with reference to which the carriage was undertaken fairly attributable to the delay." •

[4] This conclusion fixes the defendant with liability for two different and distinct elements of damage. The parties having, by their contract, fixed the measure of compensation to be received for completion before the time, and penalty for delay after the time, and this being known to defendant, it is a fair and reasonable inference that the parties had these terms of the contract and results of its breach in contemplation when they entered into the contract of carriage. To hold that, in addition to this liability, assumed by the defendant, it further contemplated and assumed liability for the "expense and detriment to the special business, etc.," is to find in the minds of the parties and read into the contract a contemplated liability which, as a matter of fact, I cannot find was there and cannot therefore be read into the contract. The courts have carefully defined the principle upon which the liability for special damages for breach of contracts is founded. In *Tillinghast, etc., v. Cotton Mills*, 143 N. C. 272, 55 S. E. 622, it is said by Hoke, J.:

"If the plaintiff seeks to recover different and additional damages arising by reason of special circumstances, he is required to show that defendant had knowledge of these circumstances, and of a kind from which it could be fairly and reasonably inferred that the parties contemplated that they should be considered as affecting the question of damages."

See *Ashe v. De Rossett*, 50 N. C. 299, 72 Am. Dec. 552; *Davidson Development Co. v. So. Ry.*, 147 N. C. 503, 61 S. E. 381; *Harper Furniture Co. v. So. Ex. Co.*, 148 N. C. 87, 62 S. E. 145, 30 L. R. A. (N. S.) 483, 128 Am. St. Rep. 588; *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748; *Towles v. A. C. L.*, 83 S. C. 501, 65 S. E. 638.

Mr. Justice Gary in *Moore v. A. C. L. Ry. Co.*, 85 S. C. 19, 67 S. E. 11, quoting from the opinion in *Towles' Case*, supra, says:

"Special damages cannot be recovered in an action ex contractu unless the defendant had notice of the circumstances, from which they might reasonably be expected to result, at the time the parties entered into the contract, as the effect of allowing such damages would be to add to the terms of the contract another element of damages not contemplated by the parties."

Baron Alderson in *Hadley v. Baxendale*, supra, says:

"If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of the contract under these special circumstances so known and communicated."

I am of the opinion that the defendant's liability is restricted to the gain or loss of \$50 a day as fixed by the contract. In addition to the difficulty which is experienced in holding that any other damage was in contemplation of the parties, I am impressed with the uncertainty

of the basis upon which the master's calculation is made. An examination of a few of the decided cases will serve to illustrate the difficulty found in applying the rule and the care with which the courts have guarded it to prevent injustice.

In *Hadley v. Baxendale*, supra, the plaintiffs, owners of a planing mill, sent a broken iron shaft to the defendant, a common carrier, to be carried to a manufacturer to serve as a model or pattern for a new one. Defendant was notified that the mill was stopped and that the shaft should be delivered immediately. The delivery was delayed an unreasonable length of time, during which the plaintiff was unable to operate the mill, incurring a loss of profits. It was held that defendant was not liable for such loss because:

"They were not considered as such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made the contract."

In *Howard v. Stillwell, etc., Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, it appeared that defendant in error contracted to reconstruct a flour mill for plaintiff in error; the work to be completed by a fixed day. Damages for breach of the contract were claimed, etc. The Supreme Court held that there were no "special circumstances attending the transaction from which an understanding between the parties could be inferred that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery." Mr. Justice Lamar cites a number of cases sustaining the conclusion reached by the court. I have examined the cases cited by counsel for both parties decided by the Supreme Court of South Carolina and find that they adhere closely to the rule laid down in *Hadley v. Baxendale*, supra. The opinion in *Hays v. Telegraph Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731, 3 Ann. Cas. 424, reviews the cases.

If, however, it be conceded that defendant is liable "for expense and detriment to plaintiff's special business," much difficulty is found by the master in ascertaining what loss was sustained by reason of the delay. In the performance of the contract, the use of the shovel was dependent upon a number of other agencies, some of which were not efficient. There is very convincing testimony from disinterested witnesses tending to show, by reason of other conditions and causes entirely disconnected from the delay in receiving the shovel, plaintiff could not have completed the contract within the time fixed, or at all, without loss. Plaintiff's president and officers think otherwise. The courts compel payment of such damages for breach of contract as will compensate the injured party. There must, however, be such evidence both as to the character and extent of the injury as will enable the jury, or other trier of the fact, to find with a reasonable degree of certainty the amount of damages sustained. The recovery cannot be sustained upon speculation, guesses, or estimates of witnesses upon which the jury must speculate. *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244.

In *Swift v. Johnson*, 138 Fed. 867, 873, 71 C. C. A. 619, 625 (1 L. R. A. [N. S.] 1161), Judge Van Devanter says:

"The law, in confining the compensation to the pecuniary loss, does not run along the lines of the imaginary and the possible but rather along the lines of the actual and the probable, and therefore the reasonable expectation must be made to appear by the evidence. Conjecture, speculation, and fancy cannot supply the absence of evidence or avoid the effect of the evidence which is presented."

Mr. Justice Selden, in *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 719, says:

"Damages (recoverable for breach of contract) must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract (that is, must be such as might naturally be expected to follow its violation), and they must be certain, both in their nature and in respect to the cause from which they proceed. * * * These two conditions are entirely separate and independent and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary, result of the breach, and yet, if in their nature uncertain, they must be rejected."

In cases where delivery of machinery is delayed by the manufacturer, by the repairer, or by the carrier, the courts have experienced much difficulty in laying down a satisfactory and fair rule for the admeasurement of damages. Anticipated profits are usually too uncertain, subject to too many contingencies, too elusive to constitute a safe guide. Mr. Justice Miller, speaking of the variety of cases, discussing the doctrine of causation, says:

"If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." *Mutual Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65.

It is manifest that anticipated profits could not be a safe rule to adopt in this case, under any possible view of the evidence. The court has, in some cases, given to the injured party the rental value of the plant during the suspended operation caused by the defendant's delay. *New York Mining Co. v. Fraser*, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031. An interesting discussion of this line of thought is found in *Brown v. Railroad*, 154 N. C. 300, 70 S. E. 625, in which the rental value of the machine was adopted. In *Cotton Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682, the interest on the capital invested, wages paid workmen, etc., were held to be the measure of recovery for delay in delivering machinery for a cotton mill. Courts manifest a disinclination to make anticipated profits the basis of recovery. The master, in his finding, adopted an estimate based upon evidence of the capacity of the shovel before and after the delivery, and from this estimate fixed the amount of the loss. There was much conflicting evidence as to the condition under which the shovel was operated after July 1, 1906, the date adopted by the master as the basis for finding its capacity. However, I sustain the exception to the master's finding of law, because I am of the opinion that such special damages were not within the contemplation of the parties when they entered into the contract of carriage. If plaintiff had shown that it had sustained loss, the amount of which was measured by the terms of its contract with the Southern Power Company, and that the

breach of the contract by defendant was the proximate cause of such loss, it would have been entitled to recover the amount of such loss. As no damage was sustained by reason of the injury sustained at Savannah, and as upon the report, as modified, the defendant is not liable for the injury sustained by reason of the second derailment, the plaintiff will recover nominal damages. I have given to the report, the evidence, and the very full and able argument of counsel, careful examination and consideration. The evidence presents a very unusual and, in many respects, novel case. I have endeavored to put the record in a condition which, upon a review of the judgment, a final disposition of the case may be made. It is unfortunate for all parties that testimony was taken so long after the occurrence of the events.

Let a judgment be drawn in accordance with this opinion.

In re HOWARD.

(District Court, N. D. New York. August 8, 1913.)

1. INTEREST (§ 43*)—STIPULATIONS—CONSTRUCTION.

The condition of a bond secured by a mortgage provided for the payment of \$1,200 without mentioning interest, of which \$15 was to be due on the first day of each month, and further provided that such payment of \$15 was to be for interest and principal; that at the end of each year the mortgagor was to be credited for the sums actually paid, interest and principal; that should any default be made in the payment of interest, etc., the principal sum should become due. The mortgage provided that for better securing the payment of the sum mentioned in the condition of the bond, "with interest thereon," the premises described were thereby granted, and further provided that, if the mortgagor should pay the sum mentioned in the condition of the bond "and the interest thereon," the mortgage and the estate granted should cease, determine, and be void. *Held*, that the whole principal sum bore interest from the date of the instruments which the obligors promised to pay from month to month, with the monthly payments of principal; the bond and mortgage not being open to the construction contended for that interest was to be allowed on each installment for one month only, and to be deducted from the \$15 before applying the balance on the principal, since interest was plainly and repeatedly provided for and was in no way limited to interest on the installments, especially where, at the time of an assignment of the bond and mortgage, the mortgagor indorsed on the bond a stipulation as to the amount due, showing that he construed the bond as providing for interest on the whole principal sum.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 92; Dec. Dig. § 43.*]

2. INTEREST (§ 1*)—GROUNDS FOR ALLOWANCE.

Interest can be allowed only by virtue of some contract, express or implied, or by virtue of some statute, or on account of the default of the party liable to pay, when it is allowed as damages for the default.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. MORTGAGES (§ 106*)—CONSTRUCTION BY PARTIES.

The construction placed upon a bond and mortgage by the parties thereto had force so far as there was any ambiguity.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 106.*]

4. BANKRUPTCY (§ 188*)—LIEN ON PROPERTY—STIPULATIONS AS TO AMOUNT DUE—EFFECT.

A stipulation by a mortgagor who subsequently became bankrupt, indorsed on a bond at the time of an assignment of the bond and mortgage as to the amount then due, which, through an error in computation, stated a larger amount than that actually due, did not increase the lien of the mortgage as against the trustee in bankruptcy and other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286–289, 291–295; Dec. Dig. § 188.*]

5. MORTGAGES (§ 199*)—RENTS AND PROFITS—APPLICATION.

While a mortgagee who takes possession of the mortgaged property without agreement must apply the rents and profits derived therefrom entirely in reduction of the bond and mortgage, the mortgagor and mortgagee by agreement may, as against other creditors, provide for their application in part on an unsecured indebtedness due the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 513–525; Dec. Dig. § 199.*]

6. BANKRUPTCY (§ 186*)—POSSESSION OF PROPERTY—RIGHTS OF MORTGAGEE.

A mortgagee in possession of the mortgaged property when the mortgagor was adjudicated a bankrupt was entitled to retain such possession as against the trustee in bankruptcy and general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 285, 319; Dec. Dig. § 186.*]

7. BANKRUPTCY (§ 267*)—SALE OF MORTGAGED PROPERTY—COSTS.

In a bankruptcy proceeding a mortgagee of real estate, which was the only property owned by the bankrupt, claimed that more was due and unpaid on the mortgage than in fact was, while the trustee claimed that much less was due and unpaid than in fact was due, and also delayed a sale for about a year after being authorized to make one, allowing the interest to accumulate. A sale was made free from liens and incumbrances, which the referee declined to confirm, and a resale was ordered. On the resale the mortgagee and certain judgment creditors interfered with the sale, claiming that the orders of the court were improper and that whoever purchased would be compelled to pay the liens in addition. A motion was made to punish them for contempt, and the court ordered a resale, enjoining further interference. The property was sold for more than the amounts of the mortgages and judgment, thus showing that the trustee was justified in claiming that there was some equity in the property, but for less than was necessary to pay such liens, the expenses of the sales, and the expense of administering the bankrupt's estate. *Held* that, in view of the fact that both the trustee and the lienors had been more or less in the wrong, there would be allowed out of the proceeds of the sale the necessary expenses of the various sales but not the expenses of administration in the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.*]

8. BANKRUPTCY (§ 267*)—SALE OF MORTGAGED PROPERTY—COSTS.

In a bankruptcy proceeding the mortgagee and trustee stipulated that the mortgaged property might be sold by the trustee in bankruptcy free and clear of all incumbrances; the lien to attach to the proceeds, except that it should not attach to \$30 of the proceeds, which it was thereby stipulated should be allowed as the expenses of the trustee in making a sale of the property and advertising it. On a sale of the property the mortgagee, however, interfered therewith, claiming to those present and to would-be purchasers that the order of the court for a sale free and clear of the mortgage was improper and ineffectual, and that whoever purchased the property would be compelled to pay the liens, in addition to the purchase price, thus making a resale of the property neces-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sary. *Held* that, in view of the mortgagee's unwarranted interference with the sale, the expense of selling the property, allowable out of the proceeds, was not limited to the amount stipulated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.*]

9. BANKRUPTCY (§ 267*)—SALE OF MORTGAGED PROPERTY—COSTS.

The bankruptcy court cannot order mortgaged premises sold free and clear of the lien of the mortgage and use the proceeds of the sale properly applicable to the payment of the mortgage in paying the general expenses of administering the estate in bankruptcy, but may order and make such sale free and clear of the mortgage, bring the proceeds into court, ascertain the amount actually due and owing on the bond and mortgage, and make proper allowances for the necessary expenses of so doing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.*]

10. BANKRUPTCY (§ 368*)—TRUSTEE'S COMMISSIONS—PROCEEDS OF MORTGAGED PROPERTY.

Under Bankr. Act July 1, 1898, c. 541, § 48a, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 11, 32 Stat. 799 [U. S. Comp. St. Supp. 1911, p. 1501]), providing that trustees shall receive from the estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not exceeding the sum specified, commissions are allowable on moneys received and disbursed by them which were derived from the sales of mortgaged property, and which were covered by and properly applicable to the payment of the lien, in view of the amendment of 1910 (Act June 25, 1910, c. 412, § 9, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1501]) expressly providing that they shall receive such commissions on moneys disbursed to any person, including lienholders, as may be allowed, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. § 368.*]

11. BANKRUPTCY (§ 262*)—SALE OF MORTGAGED PROPERTY.

Whether property of a bankrupt, subject to mortgages or judgment liens, shall be sold free from the liens is for the determination of the bankruptcy court and not the lienors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262.*]

12. BANKRUPTCY (§ 474*)—SALE OF MORTGAGED PROPERTY—COSTS.

Where a lien asserted by a mortgagee in a bankruptcy proceeding is largely in excess of the true amount due and unpaid, or there is reasonable ground to so believe, the trustee may contest the claim and, if successful, the court may charge some portion or all of the expense, including an attorney's allowance in ascertaining the amount due, against the fund that would otherwise go to the lienors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878-884; Dec. Dig. § 474.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Daniel B. Howard, bankrupt. Application to determine claims to the proceeds of a sale of mortgaged real estate belonging to the bankrupt. Fund awarded to the owner of the mortgages, less certain payments connected with the sale.

This litigation involves the construction of the language of two bonds and mortgages as to the payment of interest and consequently the amount due thereon. And, second, the expenses, etc., properly al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lowable to the trustee and his attorney from the proceeds of the sale of the mortgaged real estate; same having been sold free and clear of all incumbrances and there being substantially no estate except such proceeds.

Vere H. Multer, of Binghamton, N. Y., for trustee.

W. H. Johnson, of Oneonta, N. Y., for George A. Howard, owner of mortgages.

RAY, District Judge. [1] On the 6th day of July, 1895, one D. B. Howard and Altheda R. Howard, his wife, executed and delivered to one Alfred C. Lewis, his executors or assigns, their joint and several bond in the penal sum of \$2,400, and which states:

"The condition of this obligation is such, that if the above-bounden D. B. Howard and Altheda, his wife, their heirs, executors, administrators, shall and do well and truly pay or cause to be paid unto the above-named Alfred C. Lewis, his certain attorney, executors, administrators or assigns, the sum of twelve hundred dollars in the manner following, viz., the sum of fifteen dollars is to be due and payable on the first day of each and every month hereafter until the full sum of principal is paid. The party of the first part is to have the privilege of paying any larger sum of principal on the first day of July or December of any year hereafter that he desires. The said payment of \$15 is to be for interest and principal and at the end of each year first party is to be credited for the sums actually paid, interest and principal, payments hereon to be made at First National Bank of Oneonta, N. Y., without fraud or delay, then this obligation to be void, otherwise to remain in full force and virtue. And it is hereby expressly agreed, that should any default be made in the payment of the said interest, or any part thereof, on any day when the same is made payable as above expressed, and should the same remain unpaid and in arrears for the space of thirty days, then, and from thenceforth, that is to say, after the lapse of the said thirty days, the aforesaid principal sum of twelve hundred dollars, with all arrearages of interest thereon, shall at the option of the obligee, his executors, administrators, or assigns, become and be due and payable immediately although the period above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in any wise notwithstanding."

The payment of the money agreed to be paid by this bond was secured by a mortgage on real estate, the proceeds of the sale of which are now in court, which contained the same condition as to payment as the bond down to and including the words "payments hereon to be made at First National Bank of Oneonta, N. Y.," and the mortgage then contains this provision:

"Now this indenture witnesseth, that the said party of the first part for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, *with interest thereon*, and also for and in consideration of one dollar paid by the party of the second part, the receipt whereof is hereby acknowledged, does hereby grant and release," etc.

Then follows a description of the real estate mortgaged. Then follows an insurance clause, and then the following:

"Provided always, that if the said party of the first part, his heirs, executors or administrators, shall pay unto the said party of the second part, his executors, administrators or assigns the said sum of money mentioned in the condition of the said bond or obligation, *and the interest thereon*, at the time and in the manner mentioned in the said condition, that then these presents,

and the estate hereby granted, shall cease, determine and be void. And the said D. B. Howard covenants with the party of the second part as follows: That the party of the first part will pay the indebtedness as hereinbefore provided," etc.

This mortgage is not signed by the wife.

July 7, 1895, Lewis assigned this bond and mortgage to Marshall Mitchell, who November 21, 1907, assigned them to George A. Howard.

On the 6th day of April, 1896, the said D. B. Howard and Altheda R. Howard executed, acknowledged, and delivered to said A. C. Lewis another bond which states that they are justly indebted to said Lewis in the sum of \$1,050, which they bind themselves to pay, and then follows this condition:

"The condition of this obligation is such that if the above-bounden D. B. Howard and Altheda R. Howard, their heirs, executors, administrators, shall and do well and truly pay, or cause to be paid unto the above-named A. C. Lewis, his certain attorney, executors, administrators or assigns, the sum of five hundred and twenty-five dollars, in manner following, viz., the sum of fifteen dollars per month to be paid each and every month of the principal and interest, with privilege of first party paying any larger sum on any payment day, interest to be paid at the rate of 6% per annum. Said payments to be continued until the principal and interest is fully paid, said payments to begin April 1st, 1896, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue."

On the same day said Howard and wife executed, acknowledged, and delivered to said Lewis a mortgage on such real estate, which contains the following:

"Whereas, the said D. B. Howard, justly indebted to the said party of the second part in the sum of five hundred twenty-five dollars, lawful money of the United States, secured to be paid by their certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of five hundred twenty-five dollars, in manner following, viz., the sum of fifteen dollars per month, to be paid each & every month of the principal and interest, with privilege of first party paying any larger sum on any payment day, interest to be paid at the rate of 6% per annum. Said payments to be continued until the principal & interest is fully paid hereon. Said payments to begin April 1, 1896. It being thereby expressly agreed, that the whole of the said principal sum shall become due after default in the payment of interest, as hereinafter provided. Now this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant and release unto the said party of the second part, and to his heirs and assigns forever."

Alfred C. Lewis died and Edson A. Hayward was appointed administrator with the will annexed of his estate, and May 17, 1900, he sold and assigned said bond and mortgage to B. W. Hoyer, who on the 16th day of December, 1907, sold and assigned same to said George A. Howard. When Hoyer assigned this bond and mortgage December 16, 1907, he covenanted in the assignment "that there is due and to become due on said bond and mortgage the sum of four hundred dollars (\$400), with interest thereon from Dec. 6th, 1907." On the same day the following indorsement was made on the bond:

"Received on the within bond \$19.96 interest and \$55.38 principal, Dec. 16, 1911."

On the same day D. B. Howard, one of the principals in the bond, signed the following statement written on the bond:

"December 16th, 1907. It is hereby stipulated and agreed the amount due and unpaid on this bond and the mortgage accompanying the same is \$400, four hundred dollars. D. B. Howard."

The indorsements on this bond, including the one mentioned, are as follows: April 14, 1898, \$31.50; May 31, 1898, \$10; June 21, 1899, \$31; May 21, 1900, \$16, "on account of interest"; December 22, 1900, \$14.90, "bal. int. to April 1, 1900"; April 20, 1901, \$30.90, "int. to April 6, 1901"; April 25, 1902, \$10, "to apply on interest due April 6, 1902"; May 20, 1902, \$10, "to apply on interest due April 6, 1902"; June 24, 1902, \$10, "to apply on int. due April 1, 1902, bal. 90c"; July 24th, "recd. bal. of interest 90c to bal. of int. to April 6, 1902"; December 20, 1902, \$10; January 23, 1903, \$5; February 20, 1903, \$5; March 20, 1903, \$5; April 21, 1903, \$5; May 25, 1903, \$5; December 16, 1908, "\$24 interest and \$80 payment on principal"; August 12, 1910, \$11.86 "interest to Aug. 14, 1910, and \$41.20 to apply on principal"; December 16, 1910, \$5.37 "int. and principal \$10.64 from Aug. 12 to Dec. 16, 1910"; and December 16, 1911, the said sums of \$14.96 interest and \$55.38 principal.

July 6, 1895, in his assignment of the bond and mortgage of that date for \$1,200, Lewis covenanted that there was due on said bond and mortgage the sum of \$1,200. This was a purchase-money mortgage. The indorsements on this bond and mortgage of July 6, 1895 (the first one), are as follows: August 29, 1895, \$15; October 31, 1895, \$30; February 25, 1897, \$12; April 2, 1897, \$15; August 25, 1897, \$72; August 23, 1898, \$60; September 23, 1898, \$12; September 2, 1899, \$45; November 21, 1899, \$27; July 24, 1901, \$20; September 29, 1901, \$40; October 23, 1901, \$12; April 26, 1902, \$10; May 21, 1902, \$10; June 25, 1902, \$10; July 24, 1902, \$10; December 21, 1902, \$10; January 22, 1903, \$20; March 24, 1903, \$15; May 29, 1903, \$10; July 23, 1903, \$15; November 19, 1903, \$20; October 22, 1905, \$30; December 14, 1905, \$20; January 4, 1906, \$50; February 5, 1907, \$10; July 5, 1907, \$20; August 7, 1907, \$10; September 27, 1907, \$10; November 21, 1908, "\$87.06, one year's interest on within bond"; "Nov. 21, 1909, received \$87.06, one year's interest on within"; August 12, 1910, \$63.12, "interest from Nov. 21, 1909, to Aug. 12, 1910"; interest from August 12 to November 21, 1910, \$23.94; "Nov. 21, 1911, received \$87.06, one year's interest on within bond." When Lewis assigned this bond and mortgage to Marshall Mitchell, the following agreement was indorsed on the bond and signed by both D. B. Howard, one of the mortgagees, and by Mitchell viz.:

"It is agreed after a careful computation that the amount due and unpaid on the within bond, at this date, Nov. 21, 1907, is fourteen hundred fifty-one (\$1,451.00) dollars.

Marshall Mitchell,
"D. B. Howard."

When Mitchell assigned to George A. Howard, this agreement was on the bond and thereafter D. B. Howard paid interest on that basis

as the indorsements show. The premises mortgaged sold for the sum of \$1,825 on the 2d day of July, 1912.

The trustee in bankruptcy contends, as to the bond and mortgage of July 6, 1895, for \$1,200, that it is payable in monthly installments, and that if the payments of \$15 had been made at the end of each month, as provided in the bond, the payment would be applicable to the liquidation of that installment of principal with the interest on such installment only and not to the payment of interest on the whole principal sum; the balance of the payment going or being applied to the reduction of the principal, leaving a new principal after each payment. This construction of the provisions of the bond and mortgage claimed would involve a computation at the end of each month to determine how much of the \$15 was applicable to the payment of interest and how much to the installment of principal to be paid. That is, the contention of the trustee is that at the end of the first month the sum of \$15 was to be paid and applied in part as interest for one month on some part of the \$15 to be ascertained by computation; the said part of such payment to be applied in reduction of the principal. Thus the question would be: What sum placed at interest at 6 per cent. will amount to \$15 in one month and that sum would be the amount to be applied as payment on the principal, assuming the full \$15 was paid when due? This contention is not warranted by the language of the bond alone or of the bond and mortgage read together. It is plain, I think, that the whole principal sum draws interest from the date of the bond and that the monthly payments were intended to apply in payment of interest and the balance to the payment of principal, making a new principal each month in case the payments were kept up. It is true that the purpose is not as plainly expressed as it might have been. The condition is that the obligors will pay to Lewis or his executors, etc., the sum of \$1,200 (no mention of interest) in the manner following, viz.:

"The sum of \$15 to be due and payable on the first day of each and every month hereafter until the full sum of principal is paid."

If the parties had stopped here, no interest would or could be allowed, but they did not and immediately continued and provided:

"The said payment of \$15 is to be *for interest and principal*, and at the end of each year first party is to be credited for the sums actually paid *interest and principal*."

Then follows the usual interest clause. Then the mortgage itself says:

"The said party of the first part for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation [evidently the \$1,200], *with interest thereon* [evidently on the \$1,200, hereby grant," etc.

Later it is provided that if the first party shall pay "the said sum (not sums) of money mentioned in the condition of the said bond or obligation [evidently the \$1,200], *and the interest thereon* [not interest on the monthly installments], at the time and in the manner," etc., then the mortgage is to become and be void. There is no lan-

guage in either the bond or the mortgages confining interest to the installments or indicating a purpose to do so. It is expressly declared in the bond that "the said payment of \$15 [monthly] is to be for *interest and principal*." Interest on what? Is it interest on the principal sum or on the installments merely? I think it very clear, reading both instruments together, that interest on the whole sum was intended and that the bond is to be so construed. There is nothing to indicate a contrary intention. The agreement to pay interest on the whole principal sum from the date of the bond, if not plainly expressed in words, is plainly implied.

[2] It is true that:

"Interest can be allowed only by virtue of some contract, express or implied, or by virtue of some statute, or on account of the default of a party liable to pay when it is allowed as damages for the default." *Woerz v. Schumacher*, 161 N. Y. 530, 56 N. E. 72, affirming 37 App. Div. 374, 56 N. Y. Supp. 8; *Forschirm v. Mechanics' & Traders' Bank*, 137 App. Div. 149, 122 N. Y. Supp. 168; *Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162, 168, 13 Sup. Ct. 54, 36 L. Ed. 925.

Here the payment of interest is plainly and repeatedly provided for and in no way is it limited to interest on the installments. I think the fair and just inference and implication from the language used and the nature of the debt and promise are that the whole principal sum was to bear interest from the date of the instruments, and that the obligors in the bond promised to pay it from month to month with the monthly payments of principal. *Redfield v. Bartels*, 139 U. S. 694, 701, 11 Sup. Ct. 683, 35 L. Ed. 310; *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 176, 3 Sup. Ct. 570, 28 L. Ed. 109.

"Where there are several agreements in writing, together constituting a single transaction, they should be construed together (here the bond and mortgage) to arrive at the true intent of the parties." *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; *United States v. Bostwick*, 94 U. S. 53, 65, 24 L. Ed. 65.

[3] It is evident from the indorsements and the agreement signed by D. B. Howard as to the computation and amount due on this mortgage that Howard construed the bond as providing for interest on the whole principal sum. True the parties could not make a new contract in that way or change the one existing, but their acts show how Howard, the obligor, understood it, and this has force so far as there is any ambiguity. From the words "and at the end of each year first party is to be credited for the sums actually paid interest and principal," it may be inferred that there was to be an application of the payments at the end of the year only (that is, interest computed for the year and added and the payments deducted), but such construction would work to the disadvantage of the obligors, as they would lose the benefit of interest on the partial payments made during the year.

[4] It is now conceded that, when Mitchell took the assignment of this \$1,200 mortgage, an error in computation was made and that the amount then due and unpaid was \$1,435.09 and not \$1,451 as stipulated. This brings up the question whether or not the trustee

in bankruptcy is estopped from asserting and showing this error, as he represents the creditors of D. B. Howard who signed the stipulation at the time it was assigned to Mitchell. It possibly may be that, if Geo. A. Howard relied on that agreement and paid his money, D. B. Howard in a litigation between himself and Geo. A. Howard would be estopped to deny that the sum of \$1,451 was then due and unpaid. There is no claim that any fraud was practiced or fraudulent representations made as to the amount due or due and to become due when Mitchell took the assignment or when Mitchell assigned to Geo. A. Howard. The indorsements were on the bond and the errors in computation did not increase the lien. The question here is the amount of the lien of Geo. A. Howard on the fund in court, and I hold that it must be determined, by computing under the rules applicable to partial payments, how much was actually due and unpaid at the time the premises were sold, July 2, 1912; that the trustee in bankruptcy is not bound or concluded by that agreement which was the result of a mutual error in computation. No such agreement made by D. B. Howard, one of the obligors in the bond, can make the lien greater than it actually is. A mortgage lien on the real estate of a bankrupt, as against his creditors, cannot be created in that way. This bond and agreement were not of record and neither of the assignments were recorded. Geo. A. Howard may have a remedy against Mitchell or a claim against the estate of D. B. Howard, but the actual lien is the true amount due and unpaid on the bond and mortgage.

[5] It seems that after November 1, 1907, when the bond and mortgage became the property of Geo. A. Howard, he received the rents of the property, and that after deducting from the rents received the amounts paid for repairs, taxes, etc., and also the amount of a note of D. B. Howard paid by Geo. A. Howard therefrom, the balance of rents was applied on the two bonds and mortgages; a certain part being applied to the one and the remainder to the other. This was done by agreement, and this they had the right to do. If Geo. A. Howard had taken possession of the premises as mortgagee without agreement, the net rents and profits derived would go entirely in reduction of the bonds and mortgages, but this was not the situation or the arrangement. The property was owned by D. B. Howard, subject to the mortgages, and when he let Geo. A. Howard into control or possession, retaining the right to have some part of the rents applied to other indebtedness, the parties were acting within their rights, and hence the objection of the trustee that it was not proper or legal to pay such note from the rents, and that the amount so paid, \$105 or \$100, must be credited on the bond or bonds, cannot be sustained. On examination of the account for rents received and expenses paid, I do not find that there was any failure to apply the net rents in reduction of the bonds and mortgages. Of course the net rents received by Geo. A. Howard after the last application of rents and down to July 2, 1912, must be applied on such bonds and mortgages. It seems from the evidence that the last application was made November 21, 1911, and that

thereafter Geo. A. Howard received of rents to apply on both bonds and not applied the following sums: December 2, 1911, \$20; January 3, 1912, \$20; February 2, 1912, \$20; March 2, 1912, \$20; April 2, 1912, \$20; May 2, 1912, \$20; June 2, 1912, \$20; and July 2, 1912, \$20—total, \$160. The expenses, repairs, taxes, etc., during the same time seem to have been \$21.83. There is some discrepancy in the exhibits and some confusion in the testimony, but I find after the best computation I am able to make on the conflicting statements and exhibits that July 2, 1912, when the premises were sold, there was due and unpaid on both bonds and mortgages the sum of \$1,-555.24.

March 30, 1907, T. W. Stevens and Chas. E. Hills obtained a judgment against said D. B. Howard for \$143.83, which was docketed in Otsego county clerk's office August 23, 1907, and became and is a lien on the premises and the proceeds of sale, and with interest to July 2, 1912, amounts to \$189.14. Total liens at that date, \$1,744.38.

[6] The voluntary petition in bankruptcy was filed on the 5th day of February, 1910, and there was an immediate adjudication, and Arthur H. Abell was duly appointed trustee and duly qualified. In his schedules attached to his petition, the bankrupt placed the value of the real estate owned by him, and mortgaged as above stated, at \$3,000. He had no other property. The trustee demanded the rents of the real estate but, finding the mortgagee in control and possession, was unable to obtain them. I hold that, as against the trustee in bankruptcy and general creditors, this possession under the agreement was rightful and that the mortgagee was entitled thereto. The question of the inchoate dower right of Mrs. D. B. Howard has been presented. As this first mortgage was a purchase-money mortgage and the second one was signed by Mrs. Howard, no such dower interest attaches to the proceeds of sale except the surplus after deducting the amount due and unpaid on the two mortgages. The trustee has eliminated this question by obtaining from the wife of D. B. Howard a release of this dower interest.

[7, 8] The referee made an order on application of the trustee authorizing a sale of this property free and clear of all incumbrances. A sale was made which the referee declined to confirm and a resale was ordered. Thereupon a stay was obtained but subsequently dissolved, and on the resale the mortgagee and judgment creditors mistakenly and improperly interfered with the sale, in effect asserting and claiming to those present and to would-be purchasers that the orders of the court were improper and ineffectual and that whoever purchased and paid his money to the trustee for a clear title would be compelled to pay the liens in addition. Thereupon a motion was made to punish for contempt, etc. The court ordered a resale and enjoined further interference. Thereupon a sale was had, the highest bid being \$1,800, but an offer of \$1,825 at private sale was made, and this was accepted, confirmed by the court, and the money paid into court. I have only briefly referred to these proceedings. The trustee was all the time claiming that the premises were worth at least \$2,-000 and that much less was due and unpaid on the two mortgages than in fact was due and unpaid, while the mortgagee Geo. A. Howard was

claiming that more was due and unpaid than in fact was. The highest offer made at any time was \$1,825, and this court has no evidence justifying a conclusion that the premises were or are worth a greater sum. Prior to any sale the mortgagee Geo. A. Howard stipulated in writing, the trustee signing same, that an order might be made for the sale of such property free and clear of all incumbrances; the liens to attach to the proceeds, "with the exception that said lien or liens shall not attach to \$30 of said proceeds, which it is hereby stipulated shall be allowed as the expense of the trustee in making the sale of said property and advertising the same."

It is now contended on the one hand that this limits and controls the allowance the court can make out of the proceeds of sale, while on the other it is contended that the court can make allowances to cover not only the actual expenses of all the sales but of ascertaining the amount due on the liens and those incident to such contempt proceedings, and also the expenses of administration in the bankruptcy court, including the referee's costs and expenses and commissions and the commissions of the trustee, and also an allowance to the attorney for the trustee for services in connection with the sales and ascertainment of the amounts due on such liens. By selling free and clear of incumbrances or liens, the owner of the mortgages has been saved the expense of foreclosure and a possible allowance to the attorney for the trustee, although no defense to such mortgages is claimed. The owners of the judgment have been saved the expense of advertising and selling on execution. The expenses of selling have been more than doubled by the unjustifiable acts of the lienors at the sale referred to, making another sale necessary. The trustee delayed a sale for about a year after being authorized to make one, allowing the interest to accumulate and absorb the proceeds of sale when made, and he has made a contention as to the construction of the bonds and as to the amount due and unpaid, which is not sustained. This controversy should end. As the result shows, the trustee was justified in asserting and claiming that there was some equity in this real estate. If the parties had got together, figured up the amount due and unpaid on the mortgages, the net amount received for rents and applicable thereto, and consented to and aided a sale on the best possible terms and at the earliest possible moment, and had submitted the construction of the bonds and mortgages to the court, a vast amount of trouble, delay, bitterness, and expense might have been saved.

This court takes the case as it finds it. All parties, both lienors and the trustee, have been more or less in the wrong, taking untenable positions, and I think that in view of all the facts, but briefly referred to, the allowances should cover the necessary expenses of selling the property, all the sales, and no more.

[9] The bankruptcy court cannot order mortgaged premises sold free and clear of the lien of the mortgage and use the proceeds of such sale, properly applicable to the payment of the mortgage, to pay the general expenses of administering the estate in bankruptcy, but I do not doubt its power to order and make a sale free and clear of the mortgage, bring the proceeds into court, ascertain the amount actually due and owing on the bond and mortgage, and make proper allowances

for the necessary expenses of so doing. It would be a perversion of justice to hold that a person may mortgage his real estate for more than its value or for substantially its full value to a mortgagee who takes and holds his lien for full value and in good faith, then go into voluntary bankruptcy, having no other assets, and have the real property sold and its proceeds applied first to the payment of the expenses of administration, thus clearing him from all his unsecured debts and the balance of the secured debts, over and above the amount of the proceeds of the mortgaged property, less such expenses, at the expense of the holder of such security. It is plain that the reasonable and necessary expenses of selling the mortgaged property of the bankrupt, when there is an equity for the bankrupt's estate, are on a different footing. If the court in bankruptcy has jurisdiction to sell the real estate free and clear of the incumbrances, as it has, and ascertain the amount of the lien, it may charge such fund with the reasonable and the necessary expenses of selling. The mortgage itself provides for a sale, and, in case the bankrupt has other assets, the owner of the bond and mortgage can prove and have allowed his claim for the deficiency. In *Re Williams' Estate*, *Anheuser-Busch Brewing Ass'n v. Harrison*, 156 Fed. 934, 84 C. C. A. 434 (C. C. A. 9th Circuit), the court held:

"The proceeds of property of a bankrupt, covered by valid liens and sold by the court of bankruptcy by request or consent of the lienholders, who subsequently filed their claims in such court, which were allowed as secured claims in an amount in excess of such proceeds, are properly chargeable with the costs of such court appropriate to the enforcement of the liens, but not with general costs of the administration of the estate, such as the general fees of the trustee and his attorney, or for the services of a receiver in carrying on the business of the bankrupt and his attorney, or for the expenses and losses of such business. * * * By coming into the bankruptcy court, therefore, the holder of a valid lien upon the estate of a bankrupt comes into an appropriate place and into a court amply able to enforce and protect his rights. By doing so the lienholder waives none of his rights. The enforcement of his lien in another court would entail upon the proceeds of the property upon which the lien exists the payment of the appropriate court costs; and so, in the enforcement of such lien in a court of bankruptcy, the proceeds of the property of the bankrupt upon which such lien exists is properly chargeable with the costs of such court appropriate to such enforcement, but with no other or further costs. They are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be should such costs equal or exceed the proceeds in cases like the present, where the aggregate amount of the valid liens exceeds the proceeds of the entire estate of the bankrupt."

In *Re Utt et al.*, *Ridgely Nat. Bank v. Matheny*, 105 Fed. 754, 45 C. C. A. 32 (C. C. A. 7th Circuit), there were two mortgages. The syllabus says:

"A decree was entered in a state court foreclosing a first and second mortgage on real estate and ordering its sale. Before the time fixed for the sale, creditors filed a petition against the mortgagors, on which they were adjudicated bankrupts. Such creditors also filed a bill in the Circuit Court of the

United States on which they obtained an injunction restraining further proceedings for the sale of the mortgaged property by the state court. Thereafter the mortgagees joined in a petition to the court of bankruptcy asking that the property be sold by the trustee for payment of their liens, and such sale was ordered and made; the proceeds received being insufficient to pay the mortgage debts. On petition of the trustee the court ordered the first mortgage paid from the proceeds but displaced the second in favor of the costs and expenses incurred in both the bankruptcy proceedings and the injunction suit, including fees allowed to counsel for the creditors and trustee. No other assets of the bankrupt came into the hands of the trustee. *Held*, that such order was erroneous, except in so far as it directed payment of the costs incurred in selling the property, including compensation to the trustee, not exceeding that to which the master in the state court would have been entitled."

To the same effect is *In re Bourlier Cornice & Roofing Co.* (D. C.) 133 Fed. 958, 963.

In *Re Prince & Walter* (D. C.) 131 Fed. 546, 552, the court said:

"A sale of the property free of liens may undoubtedly be ordered, but, if this is done, the proceeds must be applied to their satisfaction, undiminished by anything except the costs of sale, or the expenses, if any, which have been undertaken for, and result to, their benefit. They are not concerned with the bankruptcy proceedings outside of this and cannot therefore be charged with the cost of instituting them or carrying them on."

I have examined *In re Erie Lumber Co.* (D. C.) 150 Fed. 817, and *In re Tebo* (D. C.) 101 Fed. 419, and do not agree with the conclusions there reached.

In *Re Zehner* (D. C.) 193 Fed. 787, it was held:

"Where mortgaged property of a bankrupt is sold free from liens in bankruptcy proceedings, it cannot be charged with the expenses of the sale or fees of the referee in bankruptcy, but the mortgage creditor may be required to contribute to the charges and expenses of sale an amount not exceeding what he would be required to expend to foreclose his mortgage in the state courts."

It would be unjust in the extreme to permit trustees in bankruptcy to urge a sale of mortgaged premises in the bankruptcy court, there being no other property, allow him to set up and litigate all sorts of untenable claims, and then not only pay the expenses of sale but large counsel fees and the general expenses incurred from the proceeds of the mortgaged property. In this way mortgage liens could, in many cases, be annihilated. In this case it is just and proper, in view of the unlawful, improper, and unjustifiable interference with the sale, in which the holders of the judgment lien participated, that they bear some portion of the expense of the sale finally accomplished and which demonstrates that there was an equity for the estate in this property. But for the attitude taken by these lienors there would have been a sale long before it was made, and but for the attitude of the trustee there would have been an earlier distribution. If an appeal is taken and it is held that this court is wrong in holding that the bonds and mortgages draw interest from date on the full principal instead of on the installments only until the whole principal became due, there will of course be a readjustment of the whole matter, and it may be that in such event the trustee would be entitled to compensation for his attorney as against the lienors. In such an event there would be an es-

tate for distribution to general creditors wrested from the claims of the owner of the mortgage, and it might be proper to charge such owner with attorney's fees. But it is unwise to speculate on what may be.

[10] One question remains and that is whether or not the trustee and referee are entitled to commissions on and from the proceeds of such sale, \$1,825, in reduction of the amount otherwise going to the lienors.

When this bankruptcy proceeding was instituted February 5, 1910, the amendatory act of June 25, 1910, which made changes as to the compensation of trustees, was not in force, and by express provision the amendments "shall not apply to bankruptcy cases pending when this act (1910) takes effect." As amended in 1903, the act provided that referees should receive "from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee," etc. Section 40a. Section 48a, relating to the compensation of trustees, provided that trustees should receive from estates *which they have administered* "*such commissions on all moneys disbursed * * * by them, as may be allowed by the courts, not to exceed,*" etc. There was a division of opinion whether or not this gave commissions to trustees on moneys received by them and disbursed by them which were derived from the sales of mortgaged property and which moneys were covered by and properly applicable to the payment of the lien. Since the amendatory act of 1910, section 48a provides that trustees shall receive "*such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed,*" etc. This amendment settled the disputed questions as to the effect of the amendment of 1903, so far as trustees are concerned. See *Smith, as Trustee, v. Township of Au Gres*, 17 Am. Bankr. Rep. 745, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876 (C. C. A. 6th Circuit), holding one way, and *In re Cramond* (D. C.) 17 Am. Bankr. Rep. 22, 145 Fed. 966, and *In re Sandford Furniture Mfg. Co.* (D. C.) 126 Fed. 888, 11 Am. Bankr. Rep. 414, holding the other. In *1 Loveland on Bankruptcy*, 752, § 365, it is said:

"Prior to the amendment of 1903, the courts generally held that the trustee was not entitled to a commission on money paid to secured creditors but was limited to 'commissions on sums to be paid as dividends' to unsecured creditors. This rule was changed by the act of 1903, which provided for commission 'on all moneys disbursed.' This was held to authorize a commission on moneys derived from the sale of property subject to liens. That this construction is the true one is settled by the act of 1910 which inserts in section 48 the words 'or turned over to any person, including lienholders.'"

In *re Torchia* (D. C.) 185 Fed. 576, and *In re Meadows* (D. C.) 199 Fed. 304, arose and were decided subsequently to the amendment of 1910. The decision in *Smith v. Township of Au Gres*, supra, made no reference to the other cases cited; the court saying:

"The trustee complains that the consequence of the order of the District Court is that he is thereby deprived of compensation for his services. But the proceeds of the sale have left no surplus for the bankrupt's estate, and the township is not chargeable with the expenses of administering the estate. What remedy the trustee, the referee, or other officers who have rendered

services in the matter of the estate have against the petitioning creditors we are not called upon to inquire."

It will be noted that, while amending section 48a so as to insure commissions to the trustee in the discretion of the court, no amendment was made to section 40, relating to the compensation of referees. It is plain that Congress has made and intended to make a distinction between the allowance and payment of commissions to trustees in the case of distributions of moneys subject to specific liens and which come into possession of the bankruptcy court by the sale of mortgaged property free and clear of incumbrances or liens. In any event, being in a court of equity, equitable principles must be applied and govern here. The cases make a distinction between instances where the lienors consented to the sale by the court in bankruptcy and those where they did not; those where there was reasonable ground to believe there was a substantial equity for the estate and those where there was not; and those where there were honest differences and controversies over the amount due and unpaid and those where there were not. Lienors cannot equitably be required to pay expenses incurred by a trustee in an unsuccessful effort to benefit the general creditors. This subject is thoroughly discussed and was ably and intelligently considered by the Circuit Court of Appeals in the Third Circuit in *Re Vulcan Foundry & Machine Co.*, 24 Am. Bankr. Rep. 825, 180 Fed. 671, 103 C. C. A. 637, and to an extent in *Re Torchia*, 26 Am. Bankr. Rep. 579, 188 Fed. 207, 110 C. C. A. 248, on appeal from the District Court. In *Re Torchia*, 26 Am. Bankr. Rep. 579, 188 Fed. 207, 110 C. C. A. 248, the objections to allowances were overruled as the lienors made no objection to the sale by appeal or otherwise from the order directing it, and the court said:

"To use a phrase of the *Vulcan Foundry Case*, they consented by necessary implication to all that was done, and their belated objections cannot now be regarded with favor."

The syllabus in the *Vulcan Foundry & Machine Co. Case*, *supra*, is as follows:

"Property of a bankrupt, subject to two mortgages, was sold by the trustee, the order of sale providing that the second mortgage should be divested; but, if the second mortgagee became the purchaser, he should pay in \$500 in cash to be applied to any expenses that might properly be charged against the fund, the balance of the mortgage to be used on the bid. The second mortgagee purchased for the amount of his mortgage. The trustee had expended certain sums for the benefit of the general creditors in preserving the estate and paying interest on the first mortgage, but without the consent of the second mortgagee. These expenses, amounting to about \$4,000, were charged against the purchaser. *Held* that, the mortgagee having purchased in compliance with and under the protection of the order of sale, the court could not afterwards change its order at the expense of the purchaser.

"The expenses having been incurred solely for the benefit of the general creditors and without the consent of the mortgagee, the lien of the mortgagee was prior thereto."

The court said:

"It is no doubt true that the federal tribunals support the power of the District Court to sell a bankrupt's real estate discharged of liens, and to that extent the position of a lien is undoubtedly affected, but care is always

taken to protect the liens by transferring them to the fund produced by the sale, and their virtual ownership of the property is thus effectively admitted. It is also true that in some cases certain expenses have been charged against lienholders (for example, the expense of selling the incumbered property), and such a charge may no doubt be warranted under some conditions. * * * But where it is sought to charge a lienholder with the cost of preserving and administering the incumbered property, as distinguished from the cost of its sale, it becomes necessary to consider the particular situation with great care, paying due regard to the rights of those who are in equity part owners of the property, for they cannot be deprived of their valuable interest except in strict accordance with legal or equitable rules. Especially is this true when a lienholder stands upon his lawful rights and does not assent, expressly or by necessary implication, to the acts for which he is afterwards asked to pay. To make such charges a prior lien upon the fund produced by a sale in effect compels an owner to pay for what he has never ordered (may indeed have strenuously opposed) and, under the guise of protecting his interests, may perhaps impair them seriously. Bankruptcy proceedings take place in a court of equity, and it should always be remembered that holders of valid liens have a statutory right to preferred treatment. If the receiver or trustee has a reasonable belief that the property is worth substantially more than the liens, it may no doubt be his duty to preserve this equity for the general creditors. But, speaking generally, since such steps as may be taken for this purpose are in the interest of these creditors, the cost should be paid by them and not by the lienholders, whose debts, indeed, are often perfectly secure, and receive no benefit from such effort as may be made to turn the equity into cash. We do not attempt to lay down a general rule to cover all cases. This would obviously be impracticable, but we think it is safe to say that the holders of liens are ordinarily entitled to judge for themselves what their interests may require, and that these interests cannot be affected without their consent in the effort to benefit persons whose rights are inferior to their own."

[11] The case now before this court is somewhat similar. The owner of the mortgages consented to an order by the referee that the sale be made free of liens, the liens to attach to the proceeds, but with a limitation on the expenses to be deducted. This limitation is not binding as there was the unwarranted interference with the sale before referred to. I am of the decided opinion that the court and not the lienors is to decide whether the property, the title to which vests in the trustee subject to the liens, shall be sold free and clear of incumbrances, and when this is done by order of the court, as a necessary incident to the proper marshaling of the assets, the expenses of the sale must be incurred. But the expenses must be reasonable and necessary.

[12] If the lien asserted by the mortgagee is largely in excess of the true amount due and unpaid or there is reasonable ground to so believe, it stands to reason that the trustee may contest the claim. If successful he has a fund and the court may, in the exercise of its equitable powers, charge some portion or even all the expense, including attorney's allowance, in ascertaining the amount due against the fund that would otherwise go to the lienors. To say that a court of equity cannot protect the estate against the unjust claims of a lienor is to say that a court of equity, in exercising its jurisdiction, is powerless to do equity, governed of course by equitable rules and principles. On the other hand, trustees cannot experiment or litigate unsuccessfully at the expense of lienors. If they do litigate they take the chances and before entering on the enterprise should see to it that they

are indemnified for expenses in case of defeat by the creditors who are to be benefited in case of success. Here was a somewhat complicated situation and both parties to an extent went wild, so to express it. The bankrupt in the first instance exaggerated the value of the property in his schedules. Later the lienors, as stated, interfered with the trustee in the discharge of his duty in executing the lawful orders of the referee and court, not appealed from or sought to be reviewed. But at the same time the trustee took an untenable position. The referee necessarily gave some time to making orders and in taking evidence as to the true amount of the mortgage liens. The trustee and his attorney have worked hard and faithfully to sustain a position which this court holds untenable. The trustee is not entitled to any large compensation for merely receiving and paying out this fund which in equity, subject to reasonable charges, belongs to the lienors. The holders of the judgment lien must share in this expense which was made necessary by their unwarranted interference with the sale ordered by the court. Thirty dollars will be allowed to the referee, Benjamin Baker. Twenty dollars will be allowed to the trustee, Arthur H. Abell, commissions. One hundred twenty dollars and eighty-five cents will be allowed to the trustee for necessary expenses of his attorney attending court in connection with the sales and in entering orders and advertising such sales and for postage, etc., and \$75 for his attorney's services in preparing orders and notices and order to show cause and reports of sale and orders of confirmation, etc.; said sums of \$120.85 and \$75 to be paid to Vere H. Multer, his attorney, who has paid such disbursements and performed such services. The amounts thus allowed, aggregating \$245.85, will not much exceed, if they do exceed, the necessary expenses of a foreclosure and sale in the state court. Applying the equity of the estate in these proceeds, the difference between \$1,825 and \$1,744.38, the amount of the liens, or \$80.62, to the payment of these allowances leaves \$165.23 to be borne by the owner of the mortgage and the owners of the judgment, of which sum the judgment lien will be charged \$50 and the mortgage lien \$115.23.

Distribution of the proceeds of such sale will therefore be made as follows:

There will be paid to Benjamin Baker the sum of.....	\$ 30 00
To Arthur H. Abell, the sum of.....	20 00
To Arthur H. Abell or to V. H. Multer, his attorney, the sum of....	195 85
To Geo. A. Howard on his mortgages, the sum of.....	1,440 01
To T. W. Stevens and Chas. E. Hills, the sum of.....	139 14
Total	<u>\$1,825 00</u>

If such fund has earned any interest since the sale, same will be distributed to such lienors in proportion. There will be an order accordingly.

STRATTON'S INDEPENDENCE, Limited, v. HOWBERT,
Revenue Collector.

(District Court, D. Colorado. September 3, 1912.)

No. 5,781.

1. TRIAL (§ 177*)—PEREMPTORY INSTRUCTION—MOTION BY BOTH PARTIES—EFFECT.

Where, in an action tried to a jury, both parties move for a peremptory instruction, the case becomes one of law for the court and the right to a verdict by the jury is waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

2. INTERNAL REVENUE (§ 7*)—CORPORATION TAX ACT—"NET INCOME"—MINES.

The words "net income," as used in Corporation Tax Act Aug. 5, 1909, c. 6, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposing a corporation tax of 1 per cent. on the net income of corporations, do not contemplate an allowance in favor of a corporation operating a mine for ore in place extracted from the property; the net income being the value of what is extracted after deducting the cost of extraction and treatment and the cost of administering the corporation, with a reasonable reservation for contingencies.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8-10; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4779, 4780.]

3. INTERNAL REVENUE (§ 7*)—CORPORATION TAX ACT—MINES—ALLOWANCE FOR DEPRECIATION—"NET INCOME."

In determining the net income of a corporation operating a mine, on which the corporation is taxable under Corporation Tax Act Aug. 5, 1909, c. 6, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), the corporation is not entitled, under the provision authorizing a reasonable allowance for depreciation of the property, to a deduction for ore in place extracted from the property.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8-10; Dec. Dig. § 7.*]

4. INTERNAL REVENUE (§ 2*)—CORPORATION TAX—APPORTIONMENT.

Corporation Tax Act Aug. 5, 1909, c. 6, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposing a corporation tax on the net income of corporations, is not unconstitutional as imposing a direct tax not apportioned according to population, though with reference to mining companies the net income of the corporation is determined by ascertaining the value of ore extracted after deducting the cost of extraction and treatment and the cost of administering the corporation, with a reasonable reservation for contingencies, since such method of determination does not make the tax a tax on the corpus of the estate.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 2; Dec. Dig. § 2.*]

Action by Stratton's Independence, Limited, against F. W. Howbert, Collector of Internal Revenue. Judgment for plaintiff.

William V. Hodges, of Denver, Colo., for plaintiff. Harry E. Kelly and Ralph Hartzell, both of Denver, Colo., for defendant.

POPE, District Judge. [1] This case is pending at this time upon a motion for a peremptory instruction presented respectively by both

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff and defendant. This makes the case one of law for the court and leaves nothing to the jury but simply to sign such a verdict as the court shall, under the law, direct.

The limitations upon the time of the court have precluded the filing of a formal opinion upon this matter, which the court recognizes to be one of great importance. At the same time the latter consideration leads the court to the view that it would not be doing full justice to all concerned, especially in view of the very thorough argument, were it not at least to indicate the grounds upon which the conclusions presently to be announced are reached.

The case is presented to the court and to the jury upon a stipulation as to the facts. The stipulation concludes with an argument that three questions of law result from the record. The second question was waived upon the argument by counsel for the government; the third question, while not waived by counsel for the plaintiff, was not argued and is not considered to be for decision.

[2] The only question pressed at the hearing was the following:

"Is the value of the ore in place that was extracted from the mining property of the plaintiff during the years in question properly allowable as depreciation in estimating the net income of the plaintiff subject to taxation under the Act of Congress of August 5, 1909, 36 Statutes, chapter 6, pp. 11, 112-117 (U. S. Comp. St. Supp. 1911, p. 946)?"

The determination of this question involves three matters: First, the meaning of "net income" as used in this statute; second, the meaning of "a reasonable allowance for depreciation of property," as therein used; and, third, a determination of whether the contention of the government is met by any constitutional limitations.

As to what is meant by the words "net income," the relevancy of this results, of course, from the fact that the statute imposes an excise tax of one per cent. on such net income. Does "net income" as thus used contemplate an allowance in favor of the company for ore in place extracted from the property, or is it to be determined without such allowance? According to ordinary understanding it is undoubtedly true that in the operation of such corporations the ore extracted is not deemed an element to be reckoned with in determining the net income. In popular sense the net income of mining properties is the proceeds of what is extracted, after deducting the cost of extraction and treatment, and the cost of administering the company which may be conducting the operations, and finally after a reasonable reservation for contingencies. This is true not only as a matter of general understanding, but has been held uniformly by the courts to be a proper rule in determining whether or not a dividend is declarable by such companies. The doctrine as deduced from *People v. Roberts*, 156 N. Y. 585, 51 N. E. 293, *Morawetz on Private Corporations*, § 442, and other authorities, is that the net income of a mining property for the purposes of dividends does not take into account so-called waste of the property by reason of the extraction of ore in place, but that such is to be determined by a computation of the proceeds of the company, after a deduction for operation, expenses of the company, and such reasonable contingencies as may in the light of experience be ex-

pected. The following English cases, cited by the United States Attorney, are in point upon this: *The King v. Atwood*, 30 Revised Reports, 322; *Lee v. Newchatel Asphelte Co.*, 41 Chancery Div. 1; *Colt-ness Iron Co. v. Black, Assessor*, 6 Appealed Cases, p. 315; *Wilmer v. McNamara & Co., Ltd.*, 1895 Second Chancery, p. 245.

If, therefore, the net income is not affected for the purposes of dividends by the amount of ore extracted, neither should it be affected by that circumstance for the purpose of an excise tax. We conclude therefore that the words "net income" do not carry with them any contemplation of law that there shall be such a deduction as plaintiffs here claim.

[3] Coming now to the second provision of the statute and the one upon which the argument has largely been rested, does the provision requiring "a reasonable allowance for the depreciation of property" require a deduction for ore in place extracted therefrom? It is claimed by the plaintiff that this provision distinguishes the case from the American and English authorities above referred to. This contention if sustained, is of far-reaching effect. Its practical result will be to free mining companies from any substantial obligations under this statute, since the value of ore in place when extracted, plus the cost of extraction and the several other items which are properly allowable under the statute as against the proceeds therefrom, will, in practically all instances, leave little or nothing as the net income to be assessed by the government. Of course, the results of a given construction are not to be calculated with if the intent of the statute is plain, and, if the statutory intent is clear that such corporations are exempt, the result is not a matter of judicial concern. At the same time, in determining what is the meaning of a statute, the effect of a construction contended for is of some relevancy as throwing light upon the congressional intent. We have here a class of corporations which owe their possession of property at all to a very liberal system of our government, by which mining property is acquired, being simply by possession, development, and final payment of what is in many cases an insignificant amount as compared with the value of the property. We are also dealing with a class of corporations to whom the use of the corporate functions is perhaps of more value and importance than in any other branch of industry. Mining is essentially a class of activity which owes its life to aggregate contributions rather than individual enterprise. The statute, which finds its justification in the power to tax the carrying on or doing business, is peculiarly applicable to mining corporations in which the corporate function is of such value. Viewing the matter from these two standpoints, therefore—one the source from which the property comes and the other the value of the corporate life—there results an initial presumption that Congress had in mind this class of corporations, along with others, and that unless the terms of the statute otherwise demonstrate they are to be considered as included within the provisions of the act.

The ordinary definition of "depreciation" is the lessening of value. As applied to mining properties, the word carries with it, as in the case of any other business, the idea of deterioration in visible improve-

ments, such as mills and other surface structures and perhaps the underground improvements so far as they are put in by the hand of man, and therefore, speaking popularly, when we think of depreciation in mining properties, we think of a lessening in value by time, or perhaps by accident, of those physical elements which go to develop and to improve the property. Now, does this meaning, commonly entertained and accepted and which is common to every class of corporations, become enlarged in case of mining companies so as to make the extraction of ore likewise an element of depreciation? The court's view is that it does not. This conclusion is in part induced by the reasons which have been above discussed in connection with the term "net income" and in part by the peculiar nature of the mining business. This latter is *sui generis*. It lives by dying. It is a business that is intrinsically uncertain. The segregation of part of a stock of goods is a definite detraction from the whole. The excavation of a body of ore, however, may reveal other bodies and result in immeasurable increment. The taking out of ore, while in a sense depreciation from the body, very often leads to the revealing of still larger bodies, and thus results, not in a lessening of the value of the claim, but in a great increase in such value. Mining excavation, when properly conducted, is very often more a development than a waste or a detraction. As applied to this class of corporation, having as its purpose to exhaust—it may be a year hence or a hundred years hence—the body of ore for profit, the mere fact that ore may be extracted does not in my judgment make the value of such ore an element to be classed and deducted as a depreciation of the property. The court therefore holds, as to this second provision of the statute, that the extraction of ore does not constitute a credit in favor of mining companies upon the account between them and the government when this excise tax is to be assessed.

It only remains to determine whether the effect of this would be to lead to constitutional barriers, and thus either to demonstrate that Congress could not have meant what the government here contends, or, second, that if Congress did mean this, it was attempting to do that which is contrary to the supreme law of the land.

[4] It is argued very forcefully by counsel for the plaintiff that the effect of this contention of the government, if sustained, is to impose a tax upon the corpus of its estate, and thus to impose a direct tax within the prohibition of the Constitution. It is said that, if this contention be sustained, then there will be a tax of one per cent., as an excise tax for the use of the corporate functions, put upon every dollar's worth of ore taken out. It is said that Congress could not have meant this, because Congress presumably intended to legislate in view of constitutional limitations, and the Constitution does not permit a direct tax save upon the basis of population. The case of *Flint v. Stone Tracy Co.*, 220 U. S. 108, 165, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, is cited as sustaining this position. An examination of that case, however, leads to the conclusion that, rather than establishing this contention, it establishes the contrary. It shows that counsel confuse between what is selected as an object of

taxation and what is used simply as a standard by which the excise tax may be measured. In the Flint-Stone Case there was a very strong contention that the present tax could not be upheld for the reason that many of the elements of income upon which the one per cent. operates are such as had been held in the income tax case (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; *Id.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108) not to be the subject of taxation by Congress save according to population. The court, however, in *Flint v. Stone*, holds distinctly that the lawmaking power may adopt as a basis for assessing an excise tax that which, if attempted as a matter of direct taxation, would not be at all permissible. In other words, the doctrine is that the use of this nontaxable basis as a standard for an excise tax is permitted, whereas a tax directed against such property, nontaxable save under constitutional conditions not complied with, would, of course, not be permitted.

The court says, on page 165 of 220 U. S., page 354 of 31 Sup. Ct. (55 L. Ed. 389, Ann. Cas. 1912B, 1312):

"The measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed."

This case reviews the prior cases, including *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897, and demonstrates that this is a rule which the Supreme Court of the United States has consistently adhered to. It follows, therefore, that this last question must likewise be resolved against the complainant and that a verdict must go accordingly.

The effect of this rule is, of course, simply to eliminate any element of the complaint as a basis for recovery which rests upon this contention of law. However, the court is advised by counsel from the argument that there are certain items in the complaint which, independent of this, are due from the government—some matters connected with taxes and the like—and if counsel have agreed, as they intimated they would, upon this amount, the court will hand the jury a verdict finding in favor of the plaintiff for such sum confessedly due.

SARGENT LAND CO. v. VON BAUMBACH, Collector Internal Revenue.

KEARSAGE LAND CO. v. SAME. SUTTON LAND CO. v. SAME.

(District Court, D. Minnesota. July 31, 1913.)

1. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—"DOING BUSINESS."

Corporations owning land, part of which they leased for mining purposes distributing the rent and royalties among their stockholders, which had and exercised the right under the leases to inspect the work in the mines as it proceeded, made sales of real estate, sold stumpage from some of the property, leased properties and took leases from squatters in order to more easily evict them, and explored the property for ore, were "doing business" so as to subject them to the federal corporation tax,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whether the acts of inspecting and selling the property were performed through their officers or through other corporations employed by them.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

2. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—"ORGANIZED FOR PROFIT."

Corporations organized to acquire title to an estate for the purpose of liquidating it and dividing the proceeds among the owners were "organized for profit" within the corporation tax law, especially where they were first organized under the statutory provisions relative to corporations organized for profit, although they later amended their articles of incorporation to describe their purpose as being to unite in one ownership the undivided fractional interests of the various stockholders in lands, tenements, and hereditaments, to own such property, and for the convenience of their stockholders to receive and distribute among them the proceeds of any disposition of such property, since any corporation organized by private persons for their own advantage and interest and not for social, charitable, or beneficent purposes is organized for profit.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

3. CORPORATIONS (§ 439*)—POWERS—SALE OF PROPERTY.

A corporation, whose articles of incorporation provided that its general purpose was to unite in one ownership the undivided fractional interests of the various stockholders in lands, tenements, and hereditaments, to own such property, and for the convenience of its stockholders to receive and distribute among them the proceeds of any disposition of such property, had implied power to sell property as otherwise there would be no proceeds to distribute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1774; Dec. Dig. § 439.*]

4. INTERNAL REVENUE (§ 7*)—CORPORATION TAX—"INCOME."

Where numerous owners of land organized a corporation to hold the title thereto, which leased a part thereof for mining purposes, the royalties received under the lease and proceeds of sales were not "income" within the federal corporation tax law, imposing a tax on gross income, although in distributing the royalties to its stockholders it called them dividends, and although no depreciation account was carried on its books, since the ore in place was capital and a part of the real estate, and "income" other than that derived from personal exertion is something produced by capital without impairing the capital and which leaves the property intact, and anything which takes away from the property itself is not income but amounts to a sale of capital assets.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8-10; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3501-3507; vol. 8, p. 7685.]

5. INTERNAL REVENUE (§ 7*)—CORPORATION TAX—INCOME—WHAT CONSTITUTES.

Where numerous owners of mining land formed a corporation to hold the title thereto and manage the property, taking as the capital stock a mere nominal capitalization without reference to value, the difference between this capitalization and the actual value of the land did not represent profits of the corporation, and hence royalties received under leases of such property were not income taxable under the corporation tax law on the theory that they were a part of such profits, especially where the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

royalties were received under leases, all of which were made prior to January 1, 1909.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8-10; Dec. Dig. § 7.*]

Three actions by the Sargent Land Company, Kearsage Land Company, and Sutton Land Company, respectively, against Fred Von Baumbach, Collector of Internal Revenue. Judgment for plaintiff in each action.

In the early '70's George A. Pillsbury, John S. Pillsbury, and Charles A. Pillsbury, under the firm name of John S. Pillsbury & Co., each owning a one-third interest in the partnership, were engaged in the lumber business, and for that purpose bought several thousand acres of land in the northern part of the state of Minnesota. Some years later the Missabe Iron Range was discovered, and it was found that it ran through much of the lands then owned by the Pillsbury Company. Later Bennett and Longyear made explorations under an agreement by which they were to receive a deed to one-half of such lands as they might select out of the Pillsbury Company's holdings, provided they found iron; and in accordance therewith in 1892 they made a demand for and received a deed to one-half of the iron-bearing lands which were subsequently conveyed to the three plaintiff corporations, in which conveyances Bennett and Longyear joined. In the meantime between the years 1898 and 1901 the three original partners had died, leaving issue, by reason of which the titles to these lands became so much split up and divided that by 1901 the share of some of the heirs amounted to but $\frac{1}{108}$ of the whole property. In order to have the ore mined it was necessary to make leases, and leases of some of these lands were accordingly made in 1901 and 1902. They required the signature of all the owners, some of whom were minors who had to act through guardians. These leases were usually made for 50 years, but the laws of Minnesota forbid a guardian from making a lease for more than 25 years. Later on some of the minor heirs became of age, got married and had children of their own, which still further divided and complicated the titles.

In view of the difficulties in passing titles, and for other reasons, it was decided to incorporate certain of these lands consisting of more than 10,000 acres, and, as the laws of Minnesota do not allow a corporation to hold more than 5,000 acres of land, it was necessary to organize three corporations, so as to cover the 10,000 acres. In 1906 this was done by the organization of the plaintiff companies, and thereupon each member received a certificate of stock representing his exact interest in the lands taken over by the corporations. Each corporation was capitalized at \$108,000, made up of 2,160 shares of \$50 each. As soon as money was received from the lessees, it was immediately divided and distributed to the stockholders, according to their shares. It was shown that these corporations later employed another corporation to inspect the mines, as they were being operated, to see that the ore was properly extracted and that the lessors received the amounts due under the leases. They also employed another company to sell certain town lots which were part of their property, and they sold the stumpage upon some of their burned over lands.

The defendant, as collector, made a demand that these corporations pay the federal corporation tax for the years 1909, 1910, and 1911. Payment was resisted on the ground that these corporations were organized, not for profit, but merely to receive, divide, and distribute the moneys received from the lessees of the mines; that such moneys, together with what was obtained from the sales of lots and some stumpage, were all the moneys which the corporations received or handled; and further that such amounts so received were not gross income under the meaning of the act. The tax for these years, amounting with penalties to about \$27,000, was finally paid, and plaintiffs bring these actions to recover the sums thus collected.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Van Derlip & Lum and Snyder & Gale, all of Minneapolis, Minn., for plaintiffs.

C. C. Houpt, U. S. Dist. Atty., of St. Paul, Minn., for defendant.

WILLARD, District Judge (orally, at the close of the evidence). In the case of *Flint v. Stone Tracy Company*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, the court held that this is a tax upon the privilege of doing business in a corporate capacity. There are in that statement two elements: One "doing business," and the other "in a corporate capacity." That these three companies the plaintiffs here are acting in a corporate capacity is unquestioned. It was said in this same case (220 U. S. on page 162, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312) that Congress was justified in imposing an excise tax upon corporations on account of certain advantages which accrued from carrying on business in that capacity. The court said on page 161 of 220 U. S., on page 353 of 31 Sup. Ct. (55 L. Ed. 389, Ann. Cas. 1912B, 1312):

"The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed and which are not enjoyed by private firms or individuals. These advantages are obvious and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships."

All of these advantages these corporations enjoy, and the evidence in the case shows that they enjoy them to a higher degree than happens in most corporations. The large number of owners of the property, the fact that some of them were minors, and the fact that the property owned was property which could be leased most advantageously for more than 25 years, in which leases a guardian could not join, show almost a necessity that the owners of these properties should transact business in a corporate capacity. They indicate that these companies would, all other circumstances being equal, be under more obligation to pay this tax than others who did not secure so many advantages from the transaction of business in a corporate capacity. But this is immaterial, and I lay aside, for the purposes of this case, all evidence relating to the complex character of the title and the number of owners and look at the case in exactly the same way that I would look at it if Mr. Bennett, Mr. Longyear, and Mr. Snyder, being the sole owners, had organized the companies.

[1] The principal question on this branch of the case is whether these corporations are engaged in business. The definition of that phrase in *Flint v. Stone Tracy Company* has already been read by Mr. Van Derlip. The court said at page 171 of 220 U. S., on page 357 of 31 Sup. Ct. (55 L. Ed. 389, Ann. Cas. 1912B, 1312):

"It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing *People v. Commissioners of Taxes*, 23 N. Y. 242, 244. 'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, vol. 1, p. 273."

It is said that this case is identical with the case of *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428, but I see quite a marked distinction between the two cases. It is true that in this case valuable property has been leased for a number of years, and that the companies, so far as that property is concerned, received royalties. In this respect they are similar to the *Zonne Case*. But in the *Zonne Case*, so far as the report of that case shows, the owner of the land had nothing to do with the management of the business. It had no supervision over the renting of the building and had no interest in supervising it. Here the evidence shows directly the contrary. It shows that under the terms of the lease the owners of this property have the right to inspect the work in the mines as it proceeds. It not only shows that the companies have that right, but it shows that they in fact exercised it and are exercising it. It shows that they are doing that for their own advantage for the purpose of seeing that all the ore which is valuable and which the lessees are bound to take out is taken out. This appears through all the testimony. It appears in the testimony of Mr. Bennett, and it appears in the resolutions adopted to settle the differences between the Oliver Mining Company and the Kearsage Land Company, with reference to the Glen mine, showing, in fact, that the lessors, so far from remaining idle and passive and doing nothing but receiving the rent which was paid to them, exercised constant watch and care over the operations of the lessees. They did that, and they must have done it necessarily, I assume, because the testimony is that they considered it for their advantage and profit to do so. If that were all that the evidence showed, I should say that this case was radically distinguished from the *Zonne Case*, also radically distinguished from the *Nipissing Case* (D. C.) 202 Fed. 803, and from the *Minehill Case*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, because in no one of those cases did the lessor have anything whatever to do with the operation of the physical property. In all three of those cases the lessors simply received the money. They exercised no supervision over the management of the property and had no right to do so, so far as the cases show.

But that is not all. The evidence shows that these three companies during each one of the three years were engaged in selling real estate, and, so far as these sales are concerned, they were not small. The Sargent Land Company's sales amounted to \$4,624 in 1909, to \$6,629 in 1910, and in 1911 they amounted to \$3,385. That was engaging in business, to my mind; it was selling real estate. They also did other things which have been referred to as being of such a light and trivial character as not to justify the court in holding that they constituted a doing of business, such as the sale of stumpage from some of the property which had been burned over, leasing some properties at Hibbing, and taking leases from squatters in order to more easily

evict them. It is true that those matters were trivial, but they indicate that the companies were constantly supervising and caring for this property. It was their business, and in fact it was necessarily their business, because there was no one else to do it. They had to take care of that part of their property which was not leased; some one had to take care of it, and they did take care of it. There was evidence that the Kearsage Company in conducting the explorations in 1909 incurred an expense of \$990 in test-pits. I assume that that was for the purpose of exploring the property to ascertain what its value was. It was an exploration of the so-called Pearce 40 to ascertain whether or not there was any more ore there. Under the head of inspection, the Sargent Company in 1909 employed Longyear during explorations made by the Great Western Mining Company to take samples and classify them. I understand that the Great Western Mining Company was not engaged in mining operations but it was simply exploring for itself; and the Sargent Company supposed that it would be for its own benefit to know something about what was going on. All these things indicate to my mind the doing of and engaging in business. It was doing the business of handling a large property, selling lots, and seeing that the lessees lived up to their contracts. If that is not engaging in business, I do not know what is. But it is said that it was not for any gain or profit.

[2] It is said that no company comes within the operation of this act unless it is organized for profit. I do not know that it is necessary to decide exactly what that means in this case, although my present opinion is that the words "organized for profit" are used to distinguish these corporations from charitable corporations; that any corporation organized by private persons for their own advantage and interest, and not for social, charitable, or beneficent purposes, is organized for profit; and that a company organized as these companies were, to acquire title to an estate for the purpose of liquidating it and dividing the proceeds among the owners, is organized for "profit," as that term is used in the act in question. And the persons who organized these companies evidently considered it so, because when the first articles were adopted they were drawn under the provisions of the Minnesota statutes, which related to companies organized for profit.

There was considerable evidence to show that the companies themselves did not engage in the business of selling lots and did not themselves do the inspection but that such work was done and the sales were made by other companies employed by them; that the Meriden Iron Company was employed to do the inspection; and that the E. J. Longyear Company was employed to sell the lots. The fact that they employed a company to do the selling on a commission, instead of having their treasurer or manager do it, does not relieve them from the charge of doing business. The same is true with regard to this inspection work. They might have employed Warren themselves to do this work, and, if in so employing him they would be engaged in doing business, they certainly would be if they employed a company to do it. In fact, in the case of *McCoach v. Minehill & Schuyllkill*

Haven R. R. Co., which was decided on April 7, 1913, by the United States Supreme Court, the court said:

"From the facts as stated above it is entirely clear that the Minehill Company was not, during the years of 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, which was the prime object of its incorporation. This business, by the lease of 1896, it had turned over to the Reading Company. If that lease had been made without authorization of law, it may be that for some purposes, and possibly for the present purpose, the lessee might be deemed in law the agent of the lessor, or at least the lessor held estopped to deny such agency."

[3] I do not myself think that the amendment of the articles of incorporation makes any difference, so far as this case is concerned. The original articles authorized the company to engage in the business of buying and selling real estate. The amended article provides as follows:

"The general purpose of the corporation is to unite in one ownership the undivided fractional interests of its various stockholders in lands, tenements, and hereditaments, and to own such property, and, for the convenience of its stockholders, to receive and distribute among them the proceeds of any disposition of such property at such times, in such amounts, and in such manner as the board of directors may determine."

It is true that the amendment specifically mentions only receipts of the proceeds, but it authorizes the corporation to own property. The power to sell the property so that the proceeds can be received is necessarily implied by the article itself. The corporation owns the property; if it is to distribute the proceeds of a sale it must itself make the sale, for no one else can do it. This is the theory upon which the corporations have proceeded. Since the amendment the directors have taken care of the property, have sold some of it, and have done this in strict conformity with the amended article. But this question, I think, has been decided by the case of *Mitchell v. Clark Iron Company*, 220 U. S. 108, 31 Sup. Ct. 343, 55 L. Ed. 389. The bill alleged in that case in effect that the defendant iron company was the owner of the land described in the bill; that prior to the passage of the act in question it had leased the land; that it had done no business except to watch over and care for said lands and receive rents and royalties therefrom and distribute the same among the stockholders and such business as was necessary to defend the title. That was the allegation upon which the case was decided. The evidence in this case does not show it in any more favorable light for the plaintiffs. Upon that allegation the Supreme Court decided that the company was doing business within the terms of the act. I must therefore decide that these companies were so doing business.

Reported with the case of *Flint v. Stone Tracy Company* is the case of the *Fifty Associates*. On page 170 of 220 U. S., on page 357 of 31 Sup. Ct. (55 L. Ed. 389, Ann. Cas. 1912B, 1312), is said:

They "are operating under a charter to own real estate with power to build, improve, alter, pull down, and rebuild, and to manage, exchange, and dispose of the same."

That company was held to be doing business or engaged in business within the purpose of the act.

I have already referred to the case of *McCoach v. Minehill Railroad Company* and the case of *United States v. Nipissing Mines Company*. As I have said before, I think that they are not controlling authorities in this case, and I have come to the conclusion that these companies were, during all the times named, engaged in business so as to bring them within the operation of the act, and that it was their duty to make returns.

[4] But the next question, and to my mind the important question, is whether or not the sums of money which were received by the companies during these years as royalties and on the sales of lots were gross income within the meaning of the act. It appears from the evidence that the collector treated the gross receipts of the companies as "gross income." The question of what income was, or what depreciation was, was not raised in the case of *Mitchell v. Clark Iron Company*, and it was not raised in any of the cases decided at the time the case of *Flint v. Stone Tracy Company* was decided. The only question there, as I understand it, was whether the companies were bound to make returns. The word "depreciation" and what it means in this act are to my mind not vitally important here. I do not base my decision upon the meaning of that word, nor upon its use in the act, but rather upon the meaning which should be given to the words "gross income." Those are the words used in the act, together with the words "net income" and "earnings." The words "gross receipts" were not used in this act as they were in the case of the *Spreckles Sugar Refining Co. v. McClain*, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496, nor are the words used here "deposits," as was the word used in *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897. What was intended by the use of the words "gross income"? What does the word "income" mean? In ordinary speech people recognize a difference between capital and income. I believe that the ordinary meaning attached to income, when it is not derived from personal exertion, is that it is something produced by capital without impairing that capital, and which leaves the property intact, and that nothing can be called income, for the purpose of this act, which takes away from the property itself. If it does, then it ceases to be income and amounts to a sale of capital assets. This definition of the word "income" I think is deducible from what was said in *Flint v. Stone Tracy Company*, although it is not so distinctly stated. On page 146 of 220 U. S., on page 347 of 31 Sup. Ct. (55 L. Ed. 389, Ann. Cas. 1912B, 1312), the court said:

"The income is not limited to such as is received from property used in the business strictly speaking."

That necessarily means that the property itself remains in the business and continues to be used in the business, and that income was something that was derived from the use of it, leaving the property intact. On page 165 of 220 U. S., on page 354 of 31 Sup. Ct. (55 L. Ed. 389, Ann. Cas. 1912B, 1312), the court said:

"It is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable."

It is important to notice that in that connection the court was speaking of government bonds which are not taxable. Income derived from government bonds is money derived from them without impairing the capital which produced it.

It follows necessarily from the views which I have expressed that the words "gross income" do not mean "gross receipts." It is apparent to me that gross income cannot mean gross receipts. Take, for example, the case of a mercantile corporation. It has property at the beginning of the year worth \$100,000. During the year it sells at retail \$10,000 of that property at what it cost. Then in the last month of the year, in December, it sells the entire property which it has left for \$90,000, so that its gross receipts for the year are \$100,000. It cannot be possible that such a corporation is bound to pay this tax on \$100,000. Having sold \$10,000 at no profit, it ought not to be subject to any taxation on that. As to the \$90,000, that is money derived from a sale of capital assets. It is simply a change in the form of the capital; the merchandise has become money. If that \$90,000 is taxable under this act, it can only be on the theory that Congress intended to put a tax upon the transfer of property. I do not doubt the power of Congress to do that; but, when the court decided in the Flint Case that this was a tax upon the privilege of doing business in a corporate capacity, it expressly decided that it was not a tax upon the transfer of property. I will refer again to the illustration which I have given. I will modify it by assuming that the corporation sold the \$90,000 in question for \$80,000; that is, that the merchandise cost it \$90,000 and it sold it for \$80,000. That \$80,000 must figure in its gross receipts for that year. But it lost \$10,000 during the year instead of making \$90,000. It is perfectly apparent from the language of the act that it was never the intention of Congress to impose a tax upon a corporation that was not making money; it was never its intention to tax a losing business.

Coming to the regulations made by the Commissioner of Internal Revenue, it will be noticed that the words "gross receipts" are nowhere used in the act or in the regulations. On the contrary, the following statement is found in article 2, § 5:

"It will be noted from these definitions that gross income is practically the same as gross profits."

An examination of the rules given for the determination of the gross income of different kinds of corporations shows that it was never in the mind of the Commissioner to make the gross receipts the foundation for a determination of the gross income. In the same article 2, § 5, there is found the following:

"Sale of capital assets. In ascertaining income derived from the sale of capital assets, if the assets were acquired subsequent to January 1, 1909, the difference between the selling price and the buying price shall constitute an item of gross income to be added to or subtracted from gross income according to whether the selling price was greater or less than the buying price. If the capital assets were acquired prior to January 1, 1909, the amount of increment or depreciation representing the difference between the selling and buying price is to be adjusted so as to fairly determine the proportion of the loss or gain arising subsequent to January 1, 1909, and which proportion shall

be deducted from or added to the gross income for the year in which the sale was made."

This indicates that it is not money derived from capital that is to be taxed but only that part of it which can be in some manner determined to be profits.

That this ore in place is capital and is part of the real estate I think admits of no question. It is just as much a part of the real estate as trees standing on the land. Let us suppose that John S. Pillsbury & Co., when it owned this land with the timber still standing thereon, was a corporation; that in 1908 it sold the timber with the privilege of removing it within ten years; and that in 1909, 1910, and 1911 the purchaser cut the timber and during these years paid the purchase price of it. Could it be said that the purchase price so received was income within the meaning of this act? I do not think that it could. It was not income; it was the property itself; and, as I said before, the trees standing on the land are no more a part of the realty than is the ore under the surface of the land. They are both capital, and money derived from a sale thereof cannot be considered income, whether it be money received from the ore or money received from the timber.

There are two cases, and only two, to which my attention has been called that have passed upon this question; one is *United States v. Nipissing Mines Co.* (D. C.) 202 Fed. 803, where the conclusion was reached that money thus received was not income; and the other is *Stratton's Independence v. Howbert*, 207 Fed. 419, decided in the District Court of Colorado. Of the cases cited in the opinion only two had to do with questions of taxation.

In *King v. Attwood*, 6 Barn. & Cres. 277, Attwood, as the owner of a coal mine, was assessed on a rate for the relief of the poor. But the act there construed (43 Eliz. c. 2) specifically made owners of coal mines ratable. The same is true of *Coltness Iron Company v. Black*, 6 Law Rep. Appeal Cases, 315. Moreover, in that case it was said:

"The intention of the act, it is abundantly clear, was in Schedule A to tax 'property.' If a man had bought an estate, the tax was intended to be paid by him on the annual value of that estate, without reference to where he got it, or how he got it, or how much he paid for it. So if a man built a house or bought a house, he was intended to pay tax on the annual value of the house, no matter what it cost. Nor does anything turn upon the fact that the estate is a permanent and undecaying species of property while the house is a species of property of a less durable kind; he was intended to pay the tax upon it as long as it lasted. What, then, is the case of a mine? In the Schedule A, which is the schedule applicable to 'property,' a 'mine' is in express terms included as a species of 'property' and is made the subject of a tax."

I attach no importance to the fact that the company used the word "dividends" in making this distribution. If the money was not gross income, the fact that when they distributed it they called it dividends could not in any sense change the law as to what the real character of the money was. Nor do I attach any importance to the fact that upon the books the companies carried no "depreciation" account.

[5] I come now to the decision of the Commissioner which has been read by the District Attorney as a part of his argument. It seems to be based upon the theory that, when the Sargent Company, for example, was organized in 1906, it bought the property for \$108,000; that it was then worth much more than that sum; that this excess is being received annually by way of royalties; and that the portions received in 1909, 1910, and 1911 must be considered as profits and therefore income to be taxed. The Commissioner seems to have made an attempt to apply to the case that part of the regulations heretofore quoted under the heading "Sale of Capital Assets." This property was all acquired prior to January 1, 1909. In applying the rule, it is necessary for him to determine the proportion of the gain which arose subsequent to that date. There is no evidence to show what the value of this property was at any time before the incorporation or at any time since. Yet it clearly appears that there has been no gain at all, so far as these plaintiffs are concerned, since 1909. All of the leases were made prior to that date for terms of 50 years or more. The value of the property to the plaintiffs was then fixed, and it could not be changed to their advantage during the terms of the leases. In other words, the property was worth no more to them in 1909, 1910, and 1911 than it was in 1906, 1907, and 1908. The regulation relating to income from sale of capital assets is therefore by its express terms inapplicable to this case.

But the assumption that there was any profit even in 1906 is entirely unwarranted. The only basis for that assumption is the fact that the Sargent Company was organized with a capital stock of \$108,000, which it issued for the land conveyed to it, and that the land is now worth much more than that amount. It will be noticed that the amount of the capital stock was fixed at \$108,000, because the smallest interest which any owner of the property had was $\frac{1}{108}$ part of the whole. It is perfectly apparent from the evidence that \$108,000 was selected as the value of the capital without any reference whatever to the value of the property. The value of the property was not then considered, and it is apparent that it could not have been, because at that time all the leases had been made, and it was then known that the value of the property was largely in excess of \$108,000. It is evident that taking \$108,000 as the capital stock was a mere nominal capitalization, without any reference to value. It comes very near, in substance, as I thought when I heard the evidence, to a corporation with shares without par value, such as are allowed now by the laws of New York, as I understand. Take the illustration which I gave when Mr. Houpt was presenting his side of the case, a Bridge Company capitalized for \$10,000, when the property itself cost a million dollars. Manifestly it would be most unjust to say, for the purpose of taxing the company under the act, that it had made the difference between \$10,000 and the cost of the bridge simply because it had selected \$10,000 as the amount of its capital stock. That sum was selected for its own convenience, without any reference whatever to the value of the property. If the Sargent Company had selected \$108,000,000 as the amount of its

capital stock instead of \$108,000, would these receipts be taxable under this act? Evidently not, according to the theory of the Commissioner.

This case is to be decided upon what the actual facts are and not upon what they appear to be. The actual facts are that nobody has made a dollar out of these properties by these incorporations. The evidence shows that the same persons own the stock now who owned the property before the corporations were organized. The mere change of form of ownership from that of these individuals to that of a corporation owned by the same individuals cannot produce such large profits as are claimed here.

The only conclusion that I can come to on this branch of the case is that this money was never received as gross income and cannot be in any sense called income; that it was never taxable; and that the tax on it was wrongfully collected. I assume that there is no question about the amount, so that judgments can be rendered for the amounts claimed in the complaints. I do not propose to make special findings of fact. I shall make a general finding in each one of the cases for the plaintiff and will order judgment for the amount claimed. I think, Mr. Houpt, that you should make some requests for declarations of law.

Mr. Houpt: I would rather except to the ruling of the court holding that the receipt of royalties, as shown in this case, does not constitute gross income.

The Court: Note an exception.

UNITED STATES v. SOUTHERN WHOLESALE GROCERS' ASS'N et al.

(District Court, N. D. Alabama, S. D. August 4, 1913.)

No. 3,861.

1. MONOPOLIES (§ 24*)—ACTIONS—DECREE—VIOLATIONS.

Where, in a suit against an association of wholesale grocers whose constitution and by-laws stated its purpose to be the promoting of harmony between the members of the association and the manufacturers of food products, to the end that the wholesale grocers might be recognized as the economical channel of distribution of the products of the manufacturers, to restrain alleged violations of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), the decree, after enjoining certain acts, expressly provided that the association, its officers and members, were not restrained from maintaining the organization for social or other purposes than those therein prohibited, the mere maintenance of the association subsequent to the decree under the same constitution and by-laws was not a violation of the decree, since it would be presumed that the court familiarized itself with the fundamental nature of the association as set out in its constitution and by-laws, and in view of this presumption the decree was intended to mean that the court found no illegality in the framework of the association's organization but only in certain of its activities, which were expressly enjoined.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MONOPOLIES (§ 24*)—ACTIONS—DECREE—VIOLATIONS.

A decree enjoining an association of wholesale grocers from publishing any book, pamphlet, or list containing only the names of wholesale grocers who had announced their intention or agreed, directly or indirectly, expressly or impliedly, to work in harmony with the association was violated by the issuance of lists, the names in which were purposely confined to those, whether members or nonmembers or those otherwise not in sympathy with its purposes, who worked in harmony with the association in effecting its purpose of confining the sales of manufacturers to those who were exclusive wholesalers, and the addition or omission of names with intent to evade the decree did not change the situation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

3. MONOPOLIES (§ 17*)—COMBINATIONS PROHIBITED—DISCRIMINATIONS IN SALE OF GOODS.

A contract between many engaged in the same business to refrain from selling to an individual or class would be an illegal restraint of trade under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), prohibiting contracts, conspiracies, or combinations in restraint of trade, unenforceable at law and subjecting the participants to a criminal prosecution, whether the contract were express or implied or consisted of a mere combination or conspiracy to accomplish that end or without any definite form of agreement.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

4. MONOPOLIES (§ 24*)—ACTIONS—DECREE—VIOLATIONS.

Where the decree in a suit against an association of wholesale grocers to enjoin certain alleged violations of the anti-trust law, after enjoining certain acts, specifically provided that the association, its officers and members, were not restrained from maintaining the organization for social or other purposes than those therein prohibited, the exaction of a promise from prospective members not to sell direct to consumers while they remained members of the association, without requiring any oath to this effect or imposing any forfeit, fine, or penalty except ineligibility to continued membership, was not a violation of the decree, since, the membership being limited to exclusive wholesalers, the purpose of this promise was merely to convince the association that there was a reasonable expectation on the part of the applicant that he would remain eligible long enough to justify his admission to membership.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

5. MONOPOLIES (§ 24*)—ACTIONS—DECREE—VIOLATIONS.

In a suit against an association of wholesale grocers to enjoin alleged violations of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), the decree enjoined the association, its directors, officers, etc., from doing any act to hinder or prevent, by intimidation or coercion, any person, firm, or corporation from selling any commodity to any other person at any price agreed upon. The association had previously issued lists of exclusive wholesale grocers, called the "Green Book," as a means of compelling manufacturers to confine their sales to those whose names appeared on the list. Subsequent to the decree there was no express repudiation of the former policy of coercion, and the association continued to send its lists to manufacturers and on request to furnish manufacturers information as to the standing of applicants for the privilege of buying direct from manufacturers. *Held*, that these acts constituted a violation of the decree, since, considered in connection with the former policy of coercion, they constituted a deliberate utilization by the association of the influence over the manufacturers which its previous policy had gained for it, especially where subsequent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the decree it mailed to manufacturers a circular stating that it would continue to issue the "Green Book," and that none of its methods, rules of practice, or activities would be affected by the decree, difficulty continued to attend the direct buying from certain manufacturers supplied with lists unless the buyer's name appeared on the lists, and a general impression prevailed that listing was essential to direct buying privileges.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

6. MONOPOLIES (§ 12*)—COMBINATIONS—STATUTORY PROVISIONS.

An association of wholesale grocers, by addressing legitimate argument to manufacturers to procure the abandonment by manufacturers of a certain policy and the continuance of another policy, did not violate the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), prohibiting contracts, conspiracies, or combinations in restraint of trade, nor a decree enjoining violations of that act, but expressly permitting the association to continue its organization for social or other purposes than those therein prohibited.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

7. MONOPOLIES (§ 24*)—ACTIONS—DECREE—VIOLATIONS.

Where a director of an association of wholesale grocers, which, with its directors, officers, etc., had been enjoined from preventing manufacturers, by coercion or intimidation, from selling direct to retailers, made use of the association's name and his position in it as a director to prevent such direct sales by a manufacturer, the fact that as a director he had no authority to take such action, while it might exonerate the association, did not have that effect as to the director.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

8. INJUNCTION (§ 225*)—DECREE—VIOLATIONS.

Violations of an injunction decree were not excusable because those violating it did not intend to violate it or were ignorant of the meaning of its terms.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 474-477, 480-483; Dec. Dig. § 225.*]

9. CONTEMPT (§ 9*)—OBSTRUCTION OF ADMINISTRATION OF JUSTICE.

Under Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), authorizing United States courts to punish contempts of their authority, but providing that such power shall not be construed to extend to cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the writing of letters by a party enjoined from doing certain acts, criticising the government and the litigation instituted by it, resulting in the injunction, but not directly calculated to incite disobedience to the injunction decree, was not a contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 15-18; Dec. Dig. § 9.*]

Prosecution for criminal contempt against the Southern Wholesale Grocers' Association and others. The defendant named and three other defendants found guilty, and all other defendants discharged.

O. D. Street, U. S. Atty., of Birmingham, Ala.

Luke E. Wright and Caruthers Ewing, both of Memphis, Tenn., and Percy, Benners & Burr, of Birmingham, Ala., for defendants.

GRUBB, District Judge. This is a proceeding against the defendants for a criminal contempt, alleged to have been committed by them

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

through the violation of a final decree of this court entered in a cause on the equity side of its docket, in which the United States was plaintiff and the association and its officers and some of its members were defendants. The purpose of the bill in the equity cause was to restrain the defendants from the commission of certain acts alleged to be violations of the act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Law, and to have the association declared to be an illegal conspiracy in restraint of trade and dissolved for that reason. After the cause was at issue and some of the proof taken, the United States, through the Department of Justice, and the defendants came to an agreement with relation to its subject-matter, which was consummated by the entry in the cause of a final decree by the Circuit Court, with consent of the parties. The decree was entered of record October 17, 1911, and a copy of it is appended to this opinion. The decree did not dissolve the association, and it, in fact, continued its organization and at least some of its previous activities thereafter and up to the time the present proceedings were instituted against it by the United States in February, 1913.

The amended specifications of the acts on which the United States relied to show a violation of the decree are 51 in number. It is not necessary to consider them seriatim. They may all be classified into five distinct kinds and so treated. They relate: (I) To the maintenance of the organization after the date of the decree for the purposes and objects set out in its constitution and by-laws; (II) to the issuance of lists of wholesale grocers, issued after the decree, alleged to have been of the description enjoined thereby; (III) to alleged acts of the association in exacting promises from prospective members not to sell direct to consumers; (IV) to alleged undue persuasion or coercion exercised by the association, its officers and members, upon manufacturers to prevent their selling their products direct to the retailer or for the accomplishment of other objects and purposes; and (V) to acts of the association through its president or other officers and members alleged to have been obstructive of justice, in that their effect was to disparage the decree and induce disobedience thereto. The United States introduced evidence in support of each of these five classes of acts. It was not seriously controverted that they happened, if at all, in connection with interstate commerce, so as to confer jurisdiction on the court.

The issue was not so much whether the specific acts complained of by the United States were in fact done as it was whether the doing of them, under the circumstances, constituted violations of the decree of the court, and it is to this aspect of the case that this opinion will be addressed. The United States disclaims any purpose of asking punishment for any act not a violation of the act of July 2, 1890, though it might be held to be a violation of the terms of the decree. It rested its case entirely upon the first section of the act of July 2, 1890, which prohibits contracts, conspiracies, or combinations in restraint of interstate trade.

[1] I. The United States contends that an association having the declared purposes of the defendant association constitutes by its very existence a conspiracy in restraint of interstate trade and commerce,

in violation of the Sherman Anti-Trust Act. The decree does not enjoin the maintenance of the organization of the association. On the contrary, it contains the express recital:

"The said association and its officers and members are not restrained from maintaining said organization for social or other purposes than those herein prohibited."

In order to constitute an act or omission a contempt, the United States is, in view of its concession, required to establish, with the degree of certainty required in criminal cases: (1) That the act or omission is a restraint of interstate trade under the Sherman Law, and (2) that it is prohibited by the terms of the decree. No reciprocal concession was made by the defendants, having the effect of relieving the plaintiff from establishing the second proposition.

The contention of the government is that, while the decree permits the continued maintenance of the association's organization as a legal entity, it does not legalize its existence for the purposes and objects set out in its constitution and by-laws. The general tenor of the alleged objectionable purposes there set forth was the promoting of harmony between the members of the association, who were exclusive wholesale grocers doing business in 14 southern states, and the manufacturers of food products, to the end that the wholesale grocers might be recognized as the economical channel of distribution of the products of the manufacturers.

It is not necessary to determine whether an association with such a declared object would constitute an illegal restraint of trade, without reference to the character of the activities employed by it to accomplish such purposes, and therefore a violation of the Sherman Law, unless it is to be held also to constitute a violation of the terms of the decree in this cause, since both must concur to result in a conviction in this proceeding. It seems to me that the Circuit Court will be presumed to have familiarized itself with the fundamental nature of the association, as set out in its constitution and by-laws, before the decree recognizing its legality was entered, at least to the extent that would have enabled it to pass on the legality of the association, on the face of its organic laws. In view of this presumption, the declaration of the decree that the "said association, its officers and members, are not restrained from maintaining said organization" for certain purposes seems intended to mean that the court found no illegality in the framework of its organization, so far as appeared from its records, but only in certain of its activities, those which were expressly enjoined by the decree. "Said organization" referred to in the decree is the organization under the same constitution and by-laws which is now asserted to be illegal. Not only is there no expressed injunction in the decree against the maintenance of that organization, but an express disclaimer by the court, which prevents any implication of one. Hence the continued maintenance of the organization under the same constitution and by-laws, after the decree, is not a violation of the decree.

[2] II. This relates to the issuance of lists of wholesale grocers by the association since the date of the decree. The part of the decree

covering this phase of the case is contained in its first paragraph and is as follows:

"And they and each of them be and are likewise enjoined, restrained, and prohibited from publishing, causing to be published, and assisting or encouraging the publication, distribution, or circulation of any book, pamphlet, or list, wherein is contained only the names of wholesale grocers, located in the territory embraced by said organization, who have announced their intention or agreed directly or indirectly, expressly or impliedly, to work in harmony with the association."

It was conceded that the association, after the date of the decree, issued to manufacturers some of its lists that were in existence at the time of the entry of the decree, and also some that were subsequently published by it. The question was whether they were of the kind enjoined.

The association seems to have construed the words of the decree, "to work in harmony with the association," as being synonymous with "members of the association." That this was too narrow a construction is obvious. There was evidence pro and con upon the issue as to whether the list contained the names of persons or firms out of sympathy with the declared purposes of the association. It is clear that, if its names were purposely confined to those (whether members or nonmembers, or those otherwise not in sympathy with its purposes) who worked in harmony with the association in effecting its purpose of confining the sales of manufacturers to those who were exclusive wholesalers, then it answered the description of the lists that were enjoined by the decree; and the issuance, after the entry of the decree, of such lists would be a violation of it. Nor would the adding to or omission of names from the list, with the intent to evade the decree, change the situation in this respect. Whether the evidence is persuasive beyond reasonable doubt that the lists were of the description enjoined, so that the issue of them, disconnected from the circumstances under which they were issued, constituted of itself a contempt, need not be determined, in view of the difficulty, if not the impossibility, of considering it apart from all the surrounding circumstances, and in view of the decision reached by the court that their issue, considered in connection with the attendant circumstances, constituted a violation of the decree.

III. The third class of acts of the association upon which contempt is predicated relates to the promise, alleged to have been exacted of the prospective members of the association by it, as a condition to election and continuance in membership, viz., not to sell direct to consumers while they remained members of the association.

[3] It may be conceded, as contended by the plaintiff, that a contract between many engaged in the same business to refrain from selling to an individual or a class would be an illegal restraint of trade under the Sherman Act, unenforceable at law and subjecting the participants to a criminal prosecution thereunder. Such a contract might be express or implied, or consist of a mere combination or conspiracy to accomplish that end. No definite form of agreement is required. The question, in this case, is whether such a contract, combination, or conspiracy can be deduced from the facts in evidence.

[4] The membership of the association was by its constitution (which met the approval of the Circuit Court) limited to exclusive wholesale grocers. To admit one to membership, it was first essential to determine his qualifications. It was therefore necessary for the association to ascertain, concerning each applicant for membership, whether he was, at the time he sought membership, an exclusive wholesaler. It would otherwise have been impossible to maintain an association composed only of the wholesale grocers, and the decree recognizes the propriety of an organization with such a membership. It would be equally impossible to maintain a like organization if members, after admission, were free to engage in retail business and still remain members. It was therefore proper for the association to purge itself of retailers and semijobbers. A means of doing this was to investigate the business of members and drop those who might have lapsed into retailers. It would be futile to admit one to membership, unless his expectation when admitted was to remain an exclusive wholesaler for a reasonable length of time, since otherwise he would cease to be eligible to continued membership as soon as he reverted to the retail business. There could be no impropriety, for the purpose of determining present and future eligibility, to ask and receive assurances from the applicant that he expected to engage, while a member, in the exclusive wholesale business. There was no other feasible way of determining eligibility to membership in the association. No oath to refrain from selling direct to consumers was administered to the applicant, and no forfeit, fine, or penalty imposed in case the promise was broken by him. No sanction accompanied the applicant's assurance or promise, and the only liability that followed a lapse on the part of the new member was ineligibility to continued membership. If an association exclusively of wholesale grocers was to exist, it was necessary that ineligibility be visited upon any member who ceased to be a wholesale grocer. This was as true in the absence of a promise or assurance as if one had existed. The purpose of the assurance was merely to convince the association that there was a reasonable expectation on the part of the applicant to remain eligible long enough to justify admission to membership. His right to sell to consumers was not taken away or impaired for any definite time or at all. He had the option, without restriction. He could not sell direct to consumers and remain a wholesaler. He must either give up the one or the other. This, however, was not by virtue of his promise or assurance but only because the two things were incompatible with each other, as much so as are black and white.

[5] IV. The fourth class relates to alleged coercion of manufacturers exercised by the association to compel them to confine their sales to exclusive wholesalers. There is little evidence in the record of newly occurring acts of coercion of this kind, on the part of the association or its executive officers, after the date of the decree. The president is shown by the correspondence to have repeatedly disclaimed any effort on the part of the association to interfere with the policy of manufacturers in regard to distribution of their products. The disclaimers probably lose some of their force because of their iteration in stereotyped form. It is clear, however, that the record would

not sustain a conviction upon these specifications, if the association had had no previous history of coercion. The only instances of attempts even to influence manufacturers since the date of the decree, appearing in the record, relate to the matters of abolishing the practice of giving "free deals" and retaining the practice of guaranteeing manufacturers' products in the hands of wholesalers against declines in prices. Other than these, which are discussed hereafter, the transactions between the association and the manufacturers were confined to the furnishing of information to manufacturers by the association on request as to the standing of applicants for the privilege of direct buying from the factory and the sending of the lists of the association to manufacturers. If these acts are to be construed merely as offers of assistance to the manufacturers in carrying out a policy of their own voluntary adoption, sympathized with but in no way induced by the association, they would probably not constitute violations of the decree. If there had been no previous history of such coercion connected with the distribution of the lists and the answering of the inquiries by the association, no other construction would be demanded. It is conceded that at one time the association did issue the lists, then designated "Green Book," as a means of compelling the manufacturers to confine their sales to those whose names appeared on the list; and there is shown no express repudiation of the former policy of coercion, aided by such means, before the date of the decree. The former history of coercion cannot be ignored in interpreting the meaning of the continued distribution of the lists and furnishing information to manufacturers, which occurred after the decree. The association itself is charged with knowledge of all it had done in this respect, and it is difficult to conceive that its present executive officers had no actual knowledge of the previous coercion of manufacturers by the association through these means. The litigation in which the association had been involved, arising out of such acts of coercion, necessarily apprised them of it. Construing the acts of the association in issuing the lists after the date of the decree, in the light of the admittedly improper use to which the "Green Book," their predecessor, had been put before the decree, and without any express repudiation of such misuse by the association or its executive officers at any time, the inference seems a natural one that the association continued the issue of the lists and the furnishing of information in answer to inquiries with knowledge that they would have a like effect upon the manufacturers, who thereafter received them, as they had had before the decree. The issue of the lists and the responses to inquiries with this effect constituted a violation of the act of July 2, 1890 (*Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815) and of the final decree in the equity cause, which expressly enjoined attempts to coerce a manufacturer to refrain from selling retailers or whomsoever he pleased.

These acts have an added significance to that of merely assisting a manufacturer in carrying out a policy of his own voluntary adoption and maintenance and partake of the coercion which had concededly accompanied similar acts of the association before the date of the decree. They constituted a deliberate utilization by the association,

after the decree, of the influence over the manufacturers which the previous policy of coercion had gained for it, before and up to the time of the decree. It is not necessary, however, to decide whether such acts, in the absence of any misleading statements as to the effect of the decree, would constitute violations of its terms. There were such misleading statements made to the manufacturers. The association, on October 31, 1911, through its president, addressed to all manufacturers on its mailing list a circular, which purported to be a response to inquiries from certain manufacturers as to whether the association would continue to issue the "Green Book" after the decree, and which stated that it would continue to do so, and that none of the methods, rules of practice, or activities of the association would be affected by the decree. In the light of the previous history of coercion, attending the distribution of the "Green Book," this could only have meant that the manufacturer who sold to unlisted persons would still incur the displeasure of the association. A previous circular addressed to members, but also sent to manufacturers, cannot be said to have corrected the impression received from the circular of October 31, 1911. It was not addressed to manufacturers; it was not the last word of the association but was prior in point of time to that of October 31, 1911, and was not calculated by language to remove the impression naturally created by the circular of October 31, 1911, that the lists, which superseded the "Green Book," would continue to be issued by the association and with like effect as had been the "Green Book." That it was so understood by the manufacturers, members, and those desiring to become members or to be listed, so as to be entitled to direct buying privileges, appears from the evidence tending to show that after the decree, as before, though probably to a less extent, there was a difficulty attending the direct buying from certain manufacturers who were supplied with the lists by the association, unless the name of the buyer appeared upon the lists, and a general impression that being listed was essential to direct buying privileges. This seems a fair deduction from the evidence, even after making allowance for the argument that the manufacturer and his salesmen would naturally be inclined to make the association a scapegoat for their own disinclination to sell the retailer. The record also shows that the president of the association acquired knowledge that this condition of the trade continued after the date of the decree and up to the time of the commencement of this proceeding. It is true that he consistently stated it was not the function of the association to interfere with the manufacturer in his policy of distribution, yet it seems clear that these results of the issuance of the lists became known to him from the correspondence addressed to and received by him, and that he took no steps to correct the impression that had become so general in the trade.

For these reasons, I think the association and its president violated the decree in sending the lists and information to the manufacturers, under these conditions, and when chargeable with this knowledge. The secretary was also technically guilty, but the evidence shows his acts were ministerial and that he had no direction of the policy of the association.

[6] The government also contends that the association, through its president, violated the decree in writing to manufacturers with the purpose, in one instance, to persuade the manufacturer to abandon the policy of giving "free deals," and in another to persuade the manufacturer to continue the policy of guaranteeing the prices of its goods, in the hands of the jobber, against declines. I do not find it necessary to determine the merits of these policies or their effect on prices. The letters written the manufacturers by the association seem to me to contain only legitimate arguments to support the contentions of the association. They contain on their face no hint of coercion or intimidation. It is conceded that in each case they failed to persuade the manufacturer to act as the association desired. While it is true that argument, addressed by a combination to an individual, should be closely scrutinized, in order to detect any veiled threat which may be cloaked under the language of argument, I do not think that such an inference can be fairly drawn from the correspondence relating to the discussion of the policies mentioned. Unless, therefore, it be true that a combination in the form of an association is disabled for that reason from addressing fair and legitimate argument to unorganized individuals, with the purpose of redressing what it considers to be grievances, the decree has not been violated by these acts. The contention of the plaintiff is that the Sherman Act prohibits a combination from addressing even legitimate argument, which may affect interstate trade relations, to an individual engaged in trade of that character. If the principle is correct, it would work the extinction of all trade organizations except for purely social purposes. Their only other valuable function is to redress trade grievances by legal methods. If persuasion by argument, made in good faith and without coercion, express or implied, is not open to them for that purpose, their usefulness is at an end. It will not be denied that there are real advantages to be derived from a proper kind of co-operation, not obtainable by a single individual, unaided. It would be an unfortunate construction of the Sherman Law that would deprive individuals of the benefit and protection to be obtained from such co-operation. The decree permits the organization to continue to exist for other than social purposes; indeed, for all purposes other than those expressly enjoined. This impliedly recognizes that it may have other useful functions which it can legally perform. No authority has been cited that goes to the extent contended for by the government, and I am not prepared to create one.

[7, 8] There are two of the many defendants, outside of the association and its president, against whom the evidence of coercion is convincing. These are the defendants H. Lacy Hunt and L. A. Melchers. In each case the defendant attempted to prevent a manufacturer from selling a retailer direct, by a covert threat of the withdrawal of patronage of the writer and the other jobbers of the locality. In the case of Mr. Melchers there is a fair inference from his previous activities in connection with the association, from his furnishing to the manufacturer concerned the list of the association, as his guide in making sales, and from his mention of the local jobbers, that he was using the influence of the association to accomplish his

purpose. In the case of Mr. Hunt the use of the association's name and his position in it as a director, to fortify his influence as an individual, is express and unmistakable. He excuses his act by want of authority as a director to do what he stated in his letter to the manufacturer he would do. While this might exonerate the association, it cannot have that effect as to Mr. Hunt. He was a member, but not a director, when the decree was entered and testifies that he never saw or read it. The evidence of the government tends to show that copies of the decree were sent by registered mail to all members of the association. The defendant Hunt had knowledge of the fact that the association had been enjoined. Before attempting or assuming to act in his capacity as a director, as he did do, it was his duty to inform himself of the effect of the injunction, and, failing to do so, he acted at his peril. Both defendants testify that they had no intention of violating the decree in doing what they did. The decree would be valueless, if those bound by it, and who violate its terms, are permitted to purge themselves by denying the intention to do so or by pleading ignorance of the meaning of its terms.

[9] V. The last class of acts relied upon by the government as constituting contempt are based upon the idea that the association and certain of its officers and members are guilty of contempt under section 725, United States Revised Statutes (U. S. Comp. St. 1901, p. 583) in that they obstructed the administration of justice by writing disparagingly of the litigation and of the effect of the decree to those, whose duty it was to obey it, and so encouraged disobedience of it. The expressions in the letters, which are relied on by the government to sustain these specifications, are largely criticisms of the government and of the litigation instituted by it, but not directly calculated to incite disobedience to the decree, which is the only way in which this court can consider them. Some of the circulars issued by the association, after the entry of the decree, regarding it, had a tendency to mislead, but they have been given consideration, together with the circular of October 31, 1911, in connection with the specifications based on coercion of manufacturers.

My conclusion is that the defendant the Southern Wholesale Grocers' Association is guilty of contempt in violating the decree of the court, and it is adjudged to pay a fine of \$2,500 and such part of the costs as were incurred because of the issues found against it; and that the defendants J. H. McLaurin, H. Lacy Hunt, and L. A. Melchers are guilty of contempt in violating the decree of the court, and each is adjudged to pay a fine of \$1,000 and such costs as each incurred because of the issues found against them, respectively. All the other defendants are discharged, with their costs.

Decree of Injunction.

"In the Circuit Court of the United States for the Northern District of Alabama.

"The United States of America, Petitioner, v. The Southern Wholesale Grocers' Association et al., Defendants. In Equity. No. 205.

"This cause coming on to be heard before D. D. Shelby and Don A. Pardee, Circuit Judges, and Thos. G. Jones, District Judge, come the United States of America by Oliver D. Street, United States attorney for the Northern Dis-

trict of Alabama, and O. E. Harrison, Special Assistant to the Attorney General, who prosecute in this behalf, and come also the defendants, by their solicitors, Luke E. Wright and Caruthers Ewing, and petitioner moves the court for an injunction in accordance with the prayer of the bill, and by consent of all parties, in open court, it is adjudged, ordered, and decreed as follows:

"(1) That the said defendants the Southern Wholesale Grocers' Association, and all the members of said association, the Southern Wholesale Grocers' Association, a corporation, the McLester-Van Hoose Company, James A. Van Hoose, Robert McLester, the Alabama Grocery Company, S. W. Lee, Joseph H. McLaurin, L. M. Hooper, F. E. Hashagen, C. W. Bartleson, Robert Moore, Thomas C. Davis, B. B. Earnshaw, C. C. Guest, T. H. Scovell, W. T. Reeves, R. A. Morrow, J. H. C. Wulburn, J. D. Faucette, W. A. Scott, and James W. Lee, and each and all of them, their directors, officers, agents, servants, and employes, and all persons acting under, through, by, or in behalf of them or either of them, or claiming so to act, be, and they are hereby, perpetually enjoined, restrained, and prohibited from combining, conspiring, confederating, or agreeing together or with others expressly or impliedly, directly or indirectly, to prevent manufacturers or producers engaged in selling or shipping commodities among the several states and in the District of Columbia from selling such commodities to any person who is not a member of the said the Southern Wholesale Grocers' Association, or who is not listed on the so-called Green Book, published by said association, its officers, and agents, and entitled 'Official List of Wholesale Grocers in the States of Alabama, Arkansas, District of Columbia, Florida, Georgia, Indian Territory, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia,' or any book, pamphlet, or list of like character; and they and each of them be and are likewise enjoined, restrained, and prohibited from publishing, causing to be published, aiding, assisting, or encouraging the publication, distribution, or circulation of any book, pamphlet, or list wherein is contained only the names of wholesale grocers located in the territory embraced by said organization who have announced their intention or agreed, directly or indirectly, expressly or impliedly, to work in harmony with said association.

"They are also enjoined, restrained, and prohibited from publishing or distributing, or causing to be published or distributed, or aiding or assisting or encouraging in the publication or distribution of any list or lists of manufacturers or producers who have, expressly or impliedly, directly or indirectly, agreed to sell only to members of said association, or to persons, firms, or corporations listed in said Green Book, or book, pamphlet, or list of like character.

"(2) That the said defendants and each and all of them, their directors, officers, agents, servants, and employes, and all persons acting under, through, by, or in behalf of them, or either of them, or claiming to so act, be, and they are hereby enjoined, restrained, and prohibited from combining, conspiring, confederating, and agreeing together or with others to fix a price at which any commodity shall be sold, or to coerce manufacturers and producers engaged in selling and shipping commodities among the several states, and in the District of Columbia, to fix a limited selling price at which such commodities are to be sold, and to have such price printed on cards and distributed; and they are hereby enjoined, restrained, and prohibited from printing, causing to be printed, or encouraging or aiding in the printing of such cards or their distribution; and they and each of them are likewise enjoined, restrained, and prohibited from conspiring, confederating, or agreeing together or with others, expressly or impliedly, directly or indirectly, to prevent such manufacturers and producers from selling and shipping commodities to any wholesale grocer who does not maintain the price so fixed and listed; and they and each of them are likewise enjoined, restrained, and prohibited from demanding and receiving from any such manufacturer or producer any rebate, bonus, or emolument of any kind to be paid to any wholesale dealer or jobber for and on account of the fact that he has maintained the limited selling price, and are likewise enjoined, restrained, and prohibited from paying or delivering any such rebate, bonus, or emolument of any kind, directly

or indirectly, to any such wholesale grocer or jobber who has maintained such limited selling price, or demanding or receiving any fine or penalty, directly or indirectly, from any wholesale grocer or jobber engaged in commerce among the several states and in the District of Columbia for and on account of such wholesale grocer or jobber not having maintained said limited selling price.

"(3) That said defendants and each and all of them, their directors, officers, agents, servants, and employes, and all persons acting under, through, by, or in behalf of them, or either of them, or claiming so to act be and they are hereby perpetually enjoined, restrained, and prohibited from conspiring, confederating, or agreeing together or with others, expressly or impliedly, directly or indirectly, to boycott any manufacturer or producer, wholesaler, or jobber engaged in commerce among the several states and in the District of Columbia for and on account of any such manufacturer, producer, wholesaler, or jobber having sold or transported in interstate commerce any commodity to any person, firm, or corporation who is not a member of said association or who does not maintain the said limited selling price or who is not listed in the said Green Book or book, pamphlet, or list of like character, and also from combining, conspiring, confederating, and agreeing together, or with others, expressly or impliedly, directly or indirectly to prevent any person, firm, or corporation who refuses to join said association or who refuses to maintain said limited selling price or who sells commodities direct to the consumer from purchasing such commodities from manufacturers, jobbers, producers, or wholesalers engaged in commerce among the several states and in the District of Columbia, and also from conspiring, confederating, and agreeing together or with others, expressly or impliedly, directly or indirectly, to increase jobbers' profits by increasing prices at which wholesalers and jobbers shall sell any commodity in interstate commerce.

"(4) That said defendants and each and all of them, their directors, officers, agents, servants, and employes, and all persons acting under, through, by, or in behalf of them or either of them or claiming so to act be and they are hereby perpetually enjoined, restrained, and prohibited from conspiring or agreeing together or with others, expressly or impliedly, to do or to refrain from doing anything, the purpose or effect of which is to fix or maintain the price at which any commodity employed or intended to be employed in commerce among the several states and in the District of Columbia shall or should be sold by any manufacturer, jobber, wholesaler, or retailer, or the purpose or effect of which is to hinder or prevent, by intimidation or coercion, any person, firm, or corporation from buying or selling any such commodity wherever, whenever, from and to whomsoever and at whatsoever price may be then and there agreed upon by the seller and purchaser.

"(5) The Southern Wholesale Grocers' Association, its officers and members, and all who shall hereafter become officers and members of said association, are hereby perpetually enjoined and inhibited from doing, or combining or conspiring to do, either or any of said acts. The said association and its officers and members are not restrained from maintaining said organization for social or other purposes than those herein prohibited.

"(6) It is further ordered, adjudged, and decreed that petitioner have and recover of the defendants judgment for the costs in this behalf expended, for which let execution issue.

"The parties have consented to the foregoing; it is ordered entered as the decree of the court.

DON A. PARDEE, Circuit Judge.

"DAVID D. SHELBY, Circuit Judge.

"THOS. G. JONES, District Judge.

"It is agreed by all parties that the foregoing be entered as the decree of the court.

"October 17, 1911.

O. D. Street, United States Attorney for Petitioner.

"Luke E. Wright, Attorney for Defendants."

UNITED STATES v. KOSTELAK et al.

(District Court, D. Montana. August 4, 1913.)

No. 249.

1. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT—FRAUDULENT ENTRY—"MINERAL LAND."

When fraud is alleged to procure the cancellation of a patent to land entered as agricultural but claimed to be mineral land, it must be proved that at the time of final entry it was known to contain minerals in sufficient quantity to justify the expectation that it could be profitably developed and worked and that by reason thereof the land is more valuable therefor than for agricultural uses.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4515, 4516.]

2. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT—HOMESTEAD ENTRY OF MINERAL LAND.

Evidence considered, and *held* not to sustain a suit by the government for cancellation of a patent issued on a homestead entry on the ground that the land was known as coal land, it being shown that, while it had once been withdrawn from homestead entry on that ground, it was afterward restored and was several years afterward entered as a homestead in good faith by defendant who resided upon, improved, and cultivated it for the full five years before making final proof, making no effort to develop it for coal, which was done at the expenditure of considerable time and expense by a tenant to whom he gave a mining lease two years later; that while surrounding lands had been exploited for coal by men of experience and means for 20 years, but few paying mines had been found and many prospect developments had been abandoned, including one on the land in suit made 20 years before defendant's entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

3. MINES AND MINERALS (§ 2*)—MINERAL CHARACTER OF LAND—EVIDENCE.

To attach mineral character to public lands it is not sufficient to demonstrate that adjacent lands are mineral in character. Outcroppings on the land itself are more or less evidentiary, but by no means conclusive, of its mineral character, and off the land their value as evidence rapidly lessens.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2; Dec. Dig. § 2.*]

In Equity. Suit by the United States against John Kostelak and others. Decree for defendants.

J. W. Freeman, U. S. Atty., and S. C. Ford, Asst. U. S. Atty., both of Helena, Mont., and Geo. W. Wickersham, U. S. Atty. Gen.

Cooper & Stephenson, of Great Falls, Mont., for defendants.

BOURQUIN, District Judge. This is a suit to cancel a patent for 160 acres of land issued upon a homestead entry upon the ground of fraud in that, when final proof and entry were made, the land was not valuable for agricultural purposes and was mineral land chiefly valuable for the coal therein, and that to the knowledge of the entryman. The defenses are denials.

The original homestead entry was made by the defendant John Kostelak on April 1, 1901; five-year final proof and final entry were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made in June, 1906, and patent issued November 2, 1906. The bill was filed herein June 7, 1912, and the testimony taken before the court April 2, 1913. The issue of bona fide purchaser is not involved. The patentee fully performed all the conditions precedent to homestead patent.

The land is four 40-acre legal subdivisions which in form are an inverted "T." It is a fairly level "bench"; the north "forty" being penetrated from the west by a broad coulee 160 feet lower than the bench at the west line and gradually rising to the level of the bench at the east line.

In 1881 the vicinity was being first settled. An adjoining settler drove a tunnel about 75 feet long on the north 40 of said land; the mouth being about 500 feet southeasterly from the northwest corner thereof and about 40 feet above the floor of said coulee. This tunnel trended northeasterly and disclosed five or six feet of coal vein cropping in blanket form. The government's inspectors testify the croppings are about five feet thick midway of the tunnel, two or three feet thick at the face of the tunnel, with six inches of bone or slate on top, and that because of dirt on the floor of the tunnel they did not see the bottom of the coal seam. When the tunnel was driven, some of the coal was burned by the settler and some others; wood for fuel being distant 20 miles. About two years later the settler sold his claim and abandoned the tunnel and from that day to this the tunnel continued abandoned. No other work of any kind was done upon this land in suit for coal mining purposes until near two years subsequent to the aforesaid final entry of defendant Kostelak. About 1882 two tunnels trending southerly and several hundred feet in length were driven into the same bench and about three-fourths of a mile northeasterly of the land in suit. The coal disclosed therein was very poor, principally slate; some was burned by settlers; and both tunnels were abandoned and have since so continued. In 1886 the Sand Coulee main mine was opened about two miles southwest of the tunnel upon the land in suit and across a coulee, though on a bench of the same elevation, which mine was operated profitably until 1897 when it was practically worked out. In 1887 the Dean mine was opened about one-fourth mile from the said Sand Coulee mine and in the direction of the land in suit, which seems to have been and is being operated more or less continuously.

In 1885 a railway company prospected near the land in suit, sinking drill holes. One was sunk about one-fourth mile east of the northeast corner of the north 40 of the land in suit, another was sunk very close to the south line thereof, neither of which found coal, and another was sunk near the northeast corner of the east 40 and found no workable coal. No development followed. No coal croppings existed on the land in suit save in the tunnel aforesaid prior to Kostelak's final entry. Blackened earth on the surface inspired said tunnel, and the coal croppings were found therein. They were fairly typical of those found generally throughout the locality and which on development might or might not lead to good and profitable coal. The land in suit is without what mining men take to be the main coal basin, and likelihood of croppings under such circumstances leading to good and

profitable coal was and is doubted. At the time of final entry the agricultural value of the land was not great; like land being there procurable at from \$2.50 to \$8 per acre. The entryman was a cigar maker and followed his trade upon the land. He made the home of himself and family, consisting of his wife and their seven to ten children, on the land for about six years and until about six months after patent issued. His improvements, stock, cultivation, and crops were substantial. In the vicinity other lands were like improved and cultivated, and this land in suit compared favorably therewith in all agricultural respects. To briefly note the history of the land as disclosed by the records of the government land office, it appears that in 1888 the township including this land was withdrawn from agricultural entries for that a departmental special agent had reported large bodies of coal therein. In 1889 this withdrawal was revoked save as to several sections, including section 7, and within which is this land, and in 1891 the revocation was extended to all thereof. Prior to 1888 lands adjoining the land in suit on the south and east had been sold by the government as coal land, and in 1883, 1896, and 1901, lands adjoining the land in suit on the north, west, and south were sold by the government as agricultural lands.

Taking section 7 as the center of a township, about 2,500 acres thereof have been entered and patented as coal land, and about 21,000 acres thereof have been entered and patented as agricultural land. All coal entries are of bench lands, and all agricultural entries are of coulee and bench lands. Prior to defendant's entry of the land in suit, it had been entered as agricultural land and abandoned. The agricultural possibilities of the locality were in a measure unknown until a few years prior to the final entry involved but have steadily appreciated until values have increased in instances fivefold; the bench lands having proven more valuable for agriculture than the coulee or bottom lands.

At some indefinite time a profitable coal mine (Brown's new mine) has been opened about one-half mile south of this land. Likewise, at the southwest corner of this land, a tunnel has been driven in the direction of the land and practically to its south line, wherein was found some very poor coal, and the tunnel was abandoned.

The locality has had railway facilities since long prior to the final entry involved. Until within "a very few years" it was almost impossible for small coal operators "any distance from the railroad track" and because of rates and the large operators to "make any money."

Defendant Kostelak says he knew before final entry that there was a prospect hole on the land (the tunnel), but it was somewhat caved and he did not enter it and knew nothing of coal therein. (He is taken to know all that might have been known by inspection, however.) In his final proof he testified there were no indications of coal on the land. The officer before whom final proof was submitted testified at this trial that Kostelak told him that there was "an old abandoned prospect hole" on the land, and no more; so it was written in the proof that there were no indications of coal on the land. In April, 1908, 2 years after the final entry and 18 months after patent, Kos-

telak leased the land for coal mining purposes to defendant Lochray for a term of 20 years. Kostelak then conveyed the land to his wife, and she likewise leased it to Lochray for a term of 15 years. Lochray had been a coal operator in the locality from about 1886 and was familiar with the land, having been in the tunnel in 1884 and thereafter. He commenced development on the south side of the coulee, exhausted his resources, then organized a company and transferred his lease to it. It continued development, extending to both sides of said coulee, and finally opened up valuable coal in about one-half of the said north 40 and mostly on the south side of the coulee. The workings are practically confined to said north 40, though entries disclose that the coal extends into the adjoining 40 south. Many thousands tons of coal have been mined from the land. These, in brief, are the facts.

[1] The law applicable may be summarized thus: So long as public lands are on the market and so open to entry and sale, they are of but two classes, mineral lands and nonmineral lands. In the West the former can be legally entered under only the mineral land laws; the latter under only the nonmineral or what may be broadly termed the agricultural land laws. The former must measure up to a certain standard (that is, known to contain minerals in sufficient quantity to serve as the foundation of reasonable hopes and expectations that development will disclose minerals in paying quantities), and that by reason thereof the land is more valuable therefor than it is for agricultural uses. The latter have no standard. Though lands be practically valueless for agricultural uses, yet, if they do not attain the foregoing standard for mineral lands, they fall into the class of non-mineral lands and can be entered under only the agricultural land laws and by any one who will in good faith perform the conditions precedent to patent, whatever they may be. When fraud is alleged to procure the cancellation of a patent, the land alleged to be mineral land must be proven to have been known to be mineral, as above defined, at the time of final entry and sale.

A patent issued is evidence that the lands conveyed are of the class appropriate to the patent. It is a written public grant of the highest character, is solemn and high evidence of its own validity, and, out of respect for it and the necessity for stability of titles evidenced by it, it cannot be set aside for alleged fraud unless the allegations thereof are sustained by clear, strong, unequivocal, and convincing proof—proof, in quantity and quality, which commands respect and produces conviction. See *Davis, Adm'r, v. Weibbold*, 139 U. S. 522, 11 Sup. Ct. 628, 35 L. Ed. 238, and cases cited.

[2] In view of the facts and the law, the court is of the opinion that the allegations of the bill of complaint are not proven and it will be dismissed.

When the final proof and entry involved were made in 1906, the locality, not greatly noted for coal at any time, had been exploited for coal by men and organizations of means and experience and who *knew* coal for about 20 years. Upon this land was only a prospect tunnel disclosing coal croppings (the deteriorated vein or indications of a vein next to the surface of the earth), and which had been aban-

done about 24 years. The croppings poor when first exposed, from the deteriorating influences of exposure and time, must have appeared less promising from day to day. Prospecting north, east, and south and adjacent to this land had failed to find any or workable coal. No workable coal had been found, developed, or mined save at a point about two miles southwest of this land, which latter was without the main coal basin and was not considered favorable for coal. Like croppings even in a more favorable location might or might not indicate workable coal beyond them. Some adjoining land had been entered as coal land, but the record is barren of evidence of even indications of coal thereon. More adjoining land had been entered as nonmineral or agricultural land, and there is evidence of its value therefor. The government withdrew this land from agricultural entry and classified it coal land, and later and long prior to the entry involved revoked the withdrawal. No one seemed to value it for coal sufficiently to prospect it further or to seek title to it as coal land, but an earlier agricultural entry was made thereon and abandoned. It was left to Kostelak to finally labor to create it a home for a large family. His good faith, if material, is evident. He did not seek title in 14 months after original entry, as he might, but complied with the requirements of the law for full five years prior to final proof and continued residence thereon for one year thereafter. Even then there is no indication that he or any one valued it for coal. He moved away from the locality, and not until one year later and 18 months after patent is a lease for coal mining purposes made to Lochray. Lochray, an experienced coal operator, leases instead of buying, giving opportunity to develop without loss of a purchase price if development resulted in nothing.

Success did not immediately follow development. Lochray exhausted his resources and then sought aid. Later coal of value was developed and mined, and this suit filed about four months before the bar of the statute had fallen. It is safe to say that, but for this successful development by Lochray and his grantee, this suit would not have materialized. It is clearly a case of knowledge after the event. In reference to the croppings in the tunnel upon this land, they indicated the possibility of coal in the lesser half of one 40. If the tunnel on its course would soon encounter workable coal, about 14 acres of coal might lie to the north of it. There was nothing to indicate coal on the balance of the 160 acres. The best the government's inspectors can say for the croppings aforesaid is that they are what they "would call a very good crop coal; it wasn't first-class coal by any means, but still it was a coal that you could reasonably expect to burn and probably get along very nicely with it if you didn't have any other; it was very fair crop coal. * * * After you *have gone into it a little farther you could determine* as to what the coal would *probably* make; * * * a very favorable showing would warrant a man going ahead and prospecting it thoroughly." And one of them says that in his opinion the land is undoubtedly more valuable for the coal it contains than for any other purpose. All of which is true; but since they testified in the light of inspections made in 1911 and 1912, when valuable coal had been developed, and testified in present

tense, based on present conditions, it falls far short of proof that at the time of final entry in 1906, the vital time, the land was coal mineral land as hereinbefore defined. In view of the history of the locality and the land prior to final entry in 1906, then conditions, knowledge of, and experience in the locality, the prospecting upon and adjacent to the land involved and the results thereof, there then may have been a possibility but not a reasonable probability that further development would result in the discovery of workable and valuable coal deposits within this land and because of which probability the land was then more valuable therefor than for agricultural uses.

The cases of the United States v. Diamond Coal & Coke Co., 191 Fed. 786, 112 C. C. A. 272, has been urged in support of a contrary conclusion. With all due respect for the eminent court that determined said case, this court cannot accept its construction and application of the law. In said case involving many different entries and patents, it is determined that where an extensive exposure or cropping of a large and valuable blanket coal vein exists in instances as much as two miles from legal subdivision of certain lands and entirely off said land but dipping towards said lands, upon which latter are no evidence of coal, and geological conditions are said by experts to be such that in their opinion the veins continue uninterrupted on their dip and extend under said lands, the said lands, not reserved but on the market and open to entry, are coal lands, mineral in class, enterable only as such and not enterable as nonmineral or agricultural lands, and if entered and patented under nonmineral or agricultural laws the patents are unlawful and to be set aside for fraud. It is believed that this is a construction and application of the law not warranted and never before arrived at by any court nor by the land department of the United States in its practical administration of the public lands. See Davis, Adm'r, v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238, and cases cited.

[3] Outcroppings of mineral upon certain land are more or less evidentiary but by no means conclusive of its mineral character, and off the land their value as evidence rapidly lessens. The mountains of the West and the adjacent valleys and plains are ribbed with mineral vein outcroppings. They indicate possibilities or probabilities of valuable mineral deposits, but they are only indications. The country is pockmarked with prospect holes upon them. Some resolve these possibilities into realities and disclose valuable minerals, but far more fail therein, so that it is a common and truthful saying, born of costly and sad experience, that but one prospect in a thousand warrants development and unearths mineral deposits of value. Lands of great agricultural value and devoted solely to agricultural uses often contain these croppings of no value. The distance any vein may continue is notoriously uncertain, and presumptions are to be cautiously indulged. This is illustrated by Dahl v. Raunheim, 132 U. S. 263, 10 Sup. Ct. 74, 33 L. Ed. 324, wherein it is held that a vein of quartz exposed 200 or 300 feet without the boundaries of a placer claim and trending in the direction of said claim, as would appear from the record in said case, is not presumed to extend within it. Contrary to the doubt expressed in the Diamond Coal & Coke Case, nonmineral or agricultural

entries are lawful and commonly made of lands of little or no agricultural worth and adjacent to valuable operating mines but which lands are not known to contain minerals of value.

Such nonmineral or agricultural homestead entries of lands have been made and patented adjoining the world-famous Pennsylvania, Rarus, Matt, and other mines of Butte, lands towards which the veins or lodes of said mines in a measure strike and also dip, and so made and patented after the government records showed said mines patented and after the great value of said mines was common knowledge. Section 2337, R. S. (U. S. Comp. St. 1901, p. 1436), is further congressional recognition that land near but not contiguous to known veins or lodes may be nonmineral and enterable as such. If it contains no known valuable mineral deposits, it falls into the nonmineral or agricultural class, however rich in minerals are the adjacent lands. To attach mineral character to lands, it is not sufficient to demonstrate that adjacent lands are mineral in character. It is everyday practice for the land department to survey and divide a single 40-acre legal subdivision or smaller tract into mineral land, known to contain valuable deposits of mineral, and into nonmineral or agricultural land, not known to contain valuable deposits of mineral though containing croppings or other indications thereof. If presumption is to be indulged that a vein or lode extends under lands two miles distant from the outcroppings, why not five, ten, or an indefinite number of miles; where will be the limit and how and by whom will it be determined? It may be believed a vein or lode so extends, but belief is not the required knowledge.

To the argument that, unless these beliefs, speculations, presumptions are indulged, the government by nonmineral or agricultural entry may be unlawfully deprived of lands that time and development may prove to contain valuable mineral deposits may be responded that conditions at the time of entry and sale govern; that, if the lands are placed on the market, and at entry and sale are not known to contain such deposits, a nonmineral or agricultural entry is the only lawful entry that can be made thereon; it is not unlawful deprivation but lawful sale; and, if time and development should discover mineral deposits of the greatest value therein, that is the good fortune of the entryman at which the government nor any can cavil. Furthermore, if the government desires to retain to itself the possibilities of mineral deposits of value, Congress can legislate to that end that lands containing any indications of minerals shall be classed as and entered and sold as mineral lands, or that as provided by Acts June 22, 1910, c. 318, 36 Stat. 583 (U. S. Comp. St. Supp. 1911, p. 614), the surface may be entered under nonmineral laws, the coal, if any, being reserved, or the land department can withdraw such lands from nonmineral or agricultural entry, even as it did the land here involved, and, if it is believed the geological conditions are such that valuable deposits may exist therein, can maintain the withdrawal until time and development determine. Thus full protection will be afforded to the government. Undoubtedly such withdrawal should have been timely made in reference to at least some of the lands involved in the Diamond Coal & Coke Case. In weighing the decision of the court therein, however,

let it be remembered this was not done. But so long as the law is as it is, and so long as the lands are not withdrawn from but left on the market and open to entry and sale, they are legally enterable under the nonmineral or agricultural land laws, though worthless for agricultural uses, if not mineral lands as hereinbefore defined. And so entered under such circumstances, no mere mineral indications, beliefs, hopes, speculations, presumptions, no belated precaution by withdrawal from market, nor the realities of subsequent development can lawfully destroy the vested right created by such nonmineral or agricultural entry.

If the Diamond Coal & Coke Case be contemplated in reverse, it is believed present error will be apparent. Let it be supposed that the entries involved were coal mineral entries. It can be only a supposition, for, in view of the facts, the law and the land department must and would have classed the lands as nonmineral or agricultural lands, and coal mineral entries would not have been allowed therefor. Since absolutely no coal had been developed upon the lands, the proofs required precedent to coal mineral entry could not be made; and neither the law nor the land department permits such entries to be made without satisfactory evidence of the developed and known mineral character of the land merely because the land is otherwise worthless, and a would-be entryman has faith inspired by geological conditions that distant veins or lodes extend under the land, and he is willing to pay a large price therefor. The latter is a minor consideration and not an inducement, and a higher price will not legalize an entry and sale of nonmineral or agricultural lands under the mineral laws. But, if the proofs precedent to coal mineral entries had been furnished and coal mineral entries made and patents issued, the entries would unquestionably have been founded upon perjury and fraud, and the said case would still have been one to cancel the patents for fraud, not, however, to cancel nonmineral or agricultural patents for fraud in that the lands were mineral in character, but to cancel coal mineral patents for fraud in that the lands were nonmineral or agricultural in character, with decree as now for complainants. And it is a safe hazard that there would have been a busy session of the federal grand jury of the district of the lands returning true bills against the entrymen guilty of such glaring and transparent perjury, as would clearly have been involved under the facts and circumstances disclosed in said case, in making the sworn proofs required precedent to coal mineral entries of known deposits of valuable coal in said lands. It may be pointed out that, though lands have little or no agricultural value and are sought in the hope and belief that time and development will disclose valuable deposits of mineral therein and are sought for that reason and purpose, if not mineral lands as hereinbefore defined they can be lawfully entered only as nonmineral or agricultural lands and can be so entered under any of what are commonly termed "scrip" entries, of which the entries involved in the Diamond Coal & Coke Case are one variety. Such hopes, beliefs, purposes are not material to the issue of fraud alleged in cases like unto the Diamond Coal & Coke Case, at least not unless the known mineral character of the land involved at the time of final entry is otherwise proven. If lands are

mineral, the entryman's good faith will not legalize his nonmineral entry thereof; and, if they are nonmineral, his bad faith will not illegalize his nonmineral entry thereof—transform their character to that of mineral lands.

The court finds that the lands in suit were not known at the time of Kostelak's final entry to be valuable for the minerals therein and more valuable therefor than for agricultural uses, and a decree accordingly will be entered for defendants.

THE DOROTHY.

BICKNELL v. BOSTON INS. CO.

(District Court, D. Maine. August 11, 1913.)

Nos. 112, 145.

SALVAGE (§ 48*)—CONTRACT—CONSTRUCTION.

Evidence considered in relation to a contract under which libellant performed services in raising a sunken schooner, and *held* to show that the work was to be done on a salvage basis and not for a per diem pay and expenses.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 122-124; Dec. Dig. § 48.*]

In Admiralty. Suit by Charles E. Bicknell against the schooner Dorothy and same against the Boston Insurance Company. Decree for libellant in first suit and for respondent in second.

M. A. Johnson, of Rockland, Me., and Robert T. Whitehouse, of Portland, Me., for libellant.

Blodgett, Jones & Burnham, of Boston, Mass., for libelee.

HALE, District Judge. On June 25, 1909, Charles E. Bicknell filed in this court his libel for salvage against the schooner Dorothy, No. 112, alleging the schooner to be of 70 tons burden, having one Sullivan as master, and having a crew of 16 men; that on May 2, 1909, she sailed from Salem on a voyage to the fishing grounds off the Maine coast; that while proceeding on her voyage, at about 5 o'clock in the morning of May 5, 1909, she was anchored about six miles from Rockland, Maine, and was struck on the port quarter by the steamship City of Bangor, of the Eastern Steamship Company; that she was cut through the side, to and below her water line, and almost immediately sunk in ten fathoms of water; that the libellant raised the schooner from the bottom of the sea with great difficulty and large expense and by towboats, lighters, and pumps caused her to be taken to a safe place at Rockland, Me.; that, but for assistance of the libellant, the schooner would probably have been a total loss; that, by reason of the peril incurred, and the importance of the services rendered by him, in raising and saving the Dorothy, the libellant deserved to have, and therefore claimed, commensurate reward for salvage.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On July 2, 1909, on the petition of the libelant, this court granted an interlocutory order of sale of the schooner, in pursuance of which, on July 10, 1909, the schooner was sold at public auction to Charles E. Bicknell for \$825, and, after subtracting charges of sale, the balance thereof, \$768.68, was paid into this court on July 12, 1909. On March 10, 1910, Charles E. Bicknell filed his libel in this court against the Boston Insurance Company, No. 145, alleging, as in the former libel, the damage to the vessel and the salvage services of the libelant; also that the Boston Insurance Company was, at the time of the loss of the schooner, an underwriter of a policy of insurance upon her; that on or about May 5th the insurance company applied to the libelant, who is a contractor and builder and maintains a repair yard in Rockland, and entered into an agreement with him to raise the schooner from the bottom of the sea, save her, and cause her to be taken to a safe place at Rockland, and in consideration of those services agreed to pay the libelant the value of his labor and of materials furnished, and moneys paid out in performing the services, and unavoidable damage in performing them; that the libelant accepted the proposition of the insurance company, made the agreement, and undertook to perform the services, and in pursuance of same he raised the schooner from the bottom of the sea, performed the labor, furnished the materials, and expended moneys, the total value of such services and money expended being the amount of \$1,550, for which sum he files a schedule as a part of the libel, and for which sum he seeks to recover.

The issues were made up on both of these libels and testimony taken to be used as applicable to both cases.

The libelant contends that, after the schooner was run down by the Eastern Steamship Company and sunk in ten fathoms of water, he had a conference with one Norton, of the firm of Francis Cobb & Co., the agents of the insurance company; that Norton tried to get the libelant to send his fleet to raise the schooner on a "no cure no pay" basis; libelant refused and demanded day pay and expenses; that later Norton, for the insurance company, told him he could go there with his fleet at day pay and expenses and see what he could do towards raising the schooner, and that he might use up \$250; he afterwards reported to Mr. Norton that he had used up the money, and Norton told him to go ahead by day pay and expenses until he had used up \$150 more. The libelant further contends that, after using up this second amount for labor and expenses, the schooner was brought in to Holiday Beach, several miles from Rockland; and after this Capt. Eaton, on behalf of the insurance company, came down and told him to go ahead and put her in to Rockland; the company made a contract with him to complete the job of saving the schooner at a per diem rate and expenses; the whole job was performed by him at great expense and with great labor; in raising the schooner and getting her into a safe place he used his own vessels and other tugs and vessels; he worked day and night and has charged only a reasonable amount for what he did and paid; after he got her to the beach he had the schooner patched up and towed by a steam

lighter to the beach at Rockland; he rendered a bill to the insurance company; Norton was requested by his company to get from the libellant a detailed statement of his cash disbursements and time; libellant sent the company a bill of expenses; on June 3d the company wrote to Cobb & Co. to make substantially the best settlement of the salvage that could be made; and on June 16th the company wrote their agents the following letter:

"Sch. Dorothy.

"Boston, June 16, 1909.

"Messrs. Francis Cobb & Company, Rockland, Maine—Gentlemen: In view of the extensive damage to this vessel we are paying our assured a total loss. We have filed claim against the steamship company for the damage done to the vessel, but we cannot get them to agree on the extent of the damage, the value of the services rendered in salving the vessel, and the value that remains. Therefore, in order to be in a position to substantiate our claim against the steamer it is necessary that the valuation and the value of the salvage services rendered be fixed by the court. Will you kindly see Mr. Bicknell and ask him to bring libel for his salvage services, so that the vessel can be promptly sold at marshal's sale. Then when we know what the vessel sells for we will take up with him the settlement of the salvage.

"Please let us know what counsel Mr. Bicknell wishes to employ to file his libel. Mr. Littlefield is the only lawyer we know at Rockland.

"Yours truly,

William R. Hedge, Vice President."

Libellant's further contentions are: That the insurance company desired Mr. Bicknell to bring the salvage libel as a friendly matter, to accommodate them, in order that they could secure a settlement with the Eastern Steamship Company, and that the company did not intend to hold Mr. Bicknell to his rights under the salvage libel; but, in any event, they supposed the vessel would bring much more at the sale than she did bring. The libellant urges that the insurance company recognized the fact that they had a distinct understanding with him that he was working at day pay and expenses; the letters in question were written with that in mind; and he should not be limited to his salvage claim but should be allowed to prevail in his suit against the insurance company and have the sum which he properly charged them and now seeks to recover in that suit; that all the facts show that no one of the parties anticipated or intended that the original libel for salvage, brought by the libellant, was anything more than a friendly act; that such libel should be dismissed and the rights of the parties decided upon the other case.

The insurance company, by its claim and answer in the salvage suit, is also the claimant of the schooner. The company contends that the libellant is bound by his previous action in rem and is not entitled to further rights than those given in his libel against the schooner. There is a sharp conflict of testimony upon the question relating to the contract itself between the parties. The proofs are persuasive to my mind that on May 5th the company authorized its agents, Cobb & Co., to contract with Bicknell to raise the schooner on condition that the work was to be done upon a salvage basis, if Bicknell should succeed in raising and saving the schooner; and that, if the schooner was not raised and saved, Bicknell should be paid his expenses actually incurred up to a certain sum; that afterwards author-

ity was given to Cobb & Co. to increase the guaranty to another sum. There is sharp contention as to whether the final guaranty was to be \$250, as the respondent says, or \$400, as the libelant says. I do not think it necessary for me to decide which party is right in this contention. I am satisfied that the proofs do not show that the parties ever contemplated removing the matter from a salvage basis. In its letter the insurance company speaks of the value of the services rendered in "salving" the vessel. I see nothing in the letter of June 16th which tends to the conclusion that the insurance company desired the salvage suit, No. 112, brought for any colorable or fraudulent purpose. It was natural that it should wish for the amount of the salvage to be ascertained, so that the claim of the underwriters against the Eastern Steamship Company should be fixed. Much stress is laid by the libelant on the expression in the letter:

"When we know what the vessel sells for, we will take up with him the settlement of the salvage."

I cannot think that this means anything more than that the company, after the salvage claim was brought, would be ready to confer with the libelant with a view of settlement, pending the trial of the case. The suggestion that a salvage libel be filed was the natural and ordinary suggestion of parties situated as these parties were. At the sale the vessel brought much less than either party supposed it would bring; the libelant himself bidding the vessel in. But this does not affect the rights of the parties.

On the whole evidence I am satisfied that the libelant in No. 145 has not made out his claim by competent proofs.

It is the duty of the court, then, to pass upon the proofs as they relate to the salvage case, No. 112. After a careful consideration of these proofs, I am of the opinion that the libelant is entitled to an award of \$700 for salvage.

In No. 145 the judgment is that the libel be dismissed, but without costs.

In No. 112 a decree may be entered for the libelant for the sum of \$700; the libelant recovers his costs.

COREY et al. v. INDEPENDENT ICE CO. et al.

(District Court, D. Massachusetts. August 4, 1913.)

No. 324.

1. MONOPOLIES (§ 28*)—ANTI-TRUST ACT—ACTION FOR VIOLATION—SUIT BY STOCKHOLDERS.

Minority stockholders cannot maintain a suit in equity under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), to recover threefold damages in the right of the corporation for a violation of the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

2. MONOPOLIES (§ 28*)—ACTION FOR DAMAGE—PLEADING—"INTERSTATE COMMERCE."

Allegations that an ice company is engaged in cutting and harvesting ice in New Hampshire and transporting the same to Boston and selling it in Boston are not sufficient to show that the corporation is engaged in interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

3. PLEADING (§ 8*)—FACTS OR CONCLUSIONS.

General allegations in a pleading that defendants entered into a combination and conspiracy in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), *held* insufficient as pleading conclusions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

In Equity. Suit by James R. Corey and others against the Independent Ice Company and others. On demurrer to bill. Demurrer sustained.

Whipple, Sears & Ogden, of Boston, Mass., for complainants.

Stone & Stone and Boyd B. Jones, all of Boston, Mass., for defendants.

DODGE, Circuit Judge. The plaintiffs hold a minority of the voting stock of the Independent Ice Company, the first-named defendant in their bill. According to their allegations, this corporation has a claim for damages under section 7 of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stats. 209 [U. S. Comp. St. 1901, p. 3202]) against the other defendants named, who are Boston Ice Company, a Massachusetts corporation, Frank J. Bartlett, now its president, formerly its treasurer, American Ice Company, a New Jersey corporation, Wesley H. Oler, its president, George A. Taylor, treasurer and director of the defendant Independent Ice Company, who holds in trust the majority of that company's voting stock.

After setting forth acts of the other defendants from which the above claim for damages is alleged to have arisen in the Independent Company's favor, the bill alleges a demand, made by the plaintiffs as stockholders in that company, upon its president and directors for the institution of a suit in its name, under section 7 of the Anti-Trust Act, against the Boston Ice Company for the damage claim

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

alleged to exist and the failure or refusal of those directors to bring such suit. The relief prayed for is: (1) An account of the damages sustained by the Independent Company and a decree for three times the amount thereof, with costs and attorney's fee, to be paid either by the other defendants to said company or a part of said damages, in proportion to the stock owned by them, to be paid by the defendants to the plaintiffs; (2) in the alternative, the appointment of a receiver to sue for and collect such damages; (3) for other and further relief, etc.

According to the bill, the plaintiffs are Massachusetts citizens and so also are the defendants, the Boston Ice Company, George A. Taylor, the Independent Company's treasurer, and Frank J. Bartlett, the American Company's president. The bill discloses no matter in controversy, therefore, between citizens of different states and is maintainable in this court, if at all, only because it presents a matter in controversy arising under the federal statute referred to.

The bill does not ask for any preventive relief, such as it would be within the general equity jurisdiction of the court to afford, against injury resulting or to result from an unlawful combination. Of such a suit the court might have jurisdiction independently of diverse citizenship because a federal question was involved. *Chalmers, etc., Co. v. Chadeloid & Co.* (C. C.) 175 Fed. 995. On the contrary, as the plaintiffs expressly state in their brief, the suit is one "to enforce a remedy provided by the act itself; that is, a judgment for threefold damages and costs." The defendants raise the objections that the court has no jurisdiction to entertain the bill or grant the relief for which it prays, and that it has no jurisdiction to entertain any suit in equity under the act wherein any person other than the United States, by its Attorney General, is the plaintiff. These objections are first to be considered.

[1] As the plaintiffs concede, it is settled that a stockholder cannot maintain a suit at law authorized by section 7 of the act for injury to the business of his corporation whereby the value of his stock is impaired. The right of action created by this section is in the corporation alone, representing all its stockholders. *Ames v. American, etc., Co.*, 166 Fed. 820 (C. C. Mass. 1909); *Loeb v. Eastman, etc., Co.*, 183 Fed. 704, 106 C. C. A. 142 (C. C. A. 3d Circ. 1910). They are therefore obliged to contend that the act permits minority stockholders to accomplish through a bill in equity what they could not accomplish by a suit at law under section 7, jurisdiction whereof, as that section expressly provides, might be had in any district where the defendants could be found, irrespective of diverse citizenship or amount.

The Anti-Trust Act contains express provisions determining the remedies whereby and the courts wherein its provisions are to be enforced, instead of leaving them to be ascertained according to the general statutory provisions governing such matters. Section 7, regulating suits at law, has been referred to. Section 4 invests the federal courts with jurisdiction "to prevent and restrain violations of this act," but goes no further in expressly giving them jurisdiction in

equity, and by the same section it is made the duty of the law officers of the government to institute the equity proceedings authorized.

In view of these express provisions, the Court of Appeals for the Fifth Circuit has held, in *Gulf, etc., Co. v. Miami, etc., Co.*, 86 Fed. 407, 420, 421, 30 C. C. A. 142 (1898), that suits in equity or injunction suits by other than the government of the United States are not authorized by the act. And the Court of Appeals for the Second Circuit has later held, in *National, etc., Co. v. Mason, Builders, etc.*, 169 Fed. 259, 263, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148 (1909), that the injunctive remedy is available to the government only, and the individual can only sue for threefold damages. These are the only Court of Appeals decisions found regarding suits in equity under the act. The greater part of the decisions in the lower federal courts have been to the same effect. See *Blindell v. Hagan* (C. C.) 54 Fed. 40 (1893); *Pidcock v. Harrington* (C. C.) 64 Fed. 821 (1894); *Greer v. Stoller* (C. C.) 77 Fed. 2 (1896); *Southern, etc., Co. v. United States, etc., Co.* (C. C.) 88 Fed. 659, 663 (1898); *Block v. Standard, etc., Co.* (C. C.) 95 Fed. 978 (1899); *Metcalf v. American, etc., Co.* (C. C.) 108 Fed. 909 (1901), and (C. C.) 122 Fed. 115, 126 (1903). In the last-cited case, as in this, the bill was brought by a minority of stockholders and it sought not only to have a transfer of the corporation's property set aside as void under the act but also treble damages according to section 7. A view contrary to the above has been taken in *Bigelow v. Calumet, etc., Co.* (C. C.) 155 Fed. 869, 876 (1907), and *Mannington v. Hocking, etc., Co.* (C. C.) 183 Fed. 133, 140 (1910). In the first of these two cases, at least, there was diverse citizenship of the parties. I think the right construction of the act is that adopted by the two Court of Appeals decisions above cited. If, as there held, authority to sue for relief by injunction against violation of its provisions has been given by the act to the government alone, I am unable to believe that authority to sue in equity for other relief has been given by it to private parties. The plaintiffs urge that since they cannot get the damages they claim at law except through the corporation, they are without remedy unless a stockholder's bill can be maintained. But neither they nor their corporation could claim any right whatever to such damages except so far as the act has expressly given such a right, and the express provisions of the act are not of a character such as permits extending them by implication.

[2] If the above conclusion is right, the bill cannot be maintained. If not, the objections next to be considered are that the allegations of the bill fail to show the defendants to have done anything which the Anti-Trust Act declares illegal or makes a misdemeanor.

The trade or commerce which the bill charges them with combining to restrain or monopolize is described in paragraph 2. The allegations are: As to the Independent Company, that it has been engaged since its organization in 1895—

"In the business of cutting and harvesting ice, principally in the state of New Hampshire, transporting the said ice to the city of Boston in the state of Massachusetts, and there selling the same; the larger part of said ice being delivered in said Boston, but some being shipped to places outside the state.

Said defendant Independent Ice Company has thus continuously since the date of its organization been engaged in interstate commerce in ice."

As to the Boston Ice Company, the allegations are that since its organization (the date whereof is not alleged) it has been engaged—

"in the business of cutting and harvesting ice throughout the New England states, transporting the said ice to said Boston, and there selling the same. Said defendant Boston Ice Company has thus been continuously engaged in interstate commerce in ice."

The last clause in each of the two above quotations is of no effect unless the preceding allegations have made it distinctly appear that the business described was "trade or commerce among the several states." Nor, unless this is the case, do any of the later references in the bill to the business here described as interstate trade and commerce assist to bring it under that description. If the bill has charged any combination, monopoly, or attempt to monopolize obnoxious to the statute, it is only with regard to "the trade and commerce in ice between the city of Boston and the various New England states" or "the trade and commerce in ice in said territory." See paragraph 4. What is referred to by the language quoted must be taken as meaning nothing other than the trade or commerce in ice described as above in paragraph 2. The defendants contend that in paragraph 2 no trade and commerce in ice between Boston and the various New England states is described, nor any interstate trade or commerce whatever.

In this contention I think the defendants are right. The Boston Ice Company might well be engaged in cutting and harvesting ice in every New England state, transporting it to Boston, and selling it in Boston, without being engaged in interstate commerce at all. The natural import of the allegations is, not only that the ice remained the property of the Boston Ice Company from the time it was cut until they had sold it in Boston, but also that the Boston Company itself carried it to Boston after cutting and harvesting it. No combination to restrict or monopolize the transportation of ice between New England points and Boston is anywhere charged in the bill. And if the Boston Company shipped its ice, by a carrier, from such points outside of Massachusetts to itself at Boston, its subsequent sales thereof in Boston would not necessarily be transactions in interstate commerce. *Banker, etc., v. Penna.*, 222 U. S. 210, 32 Sup. Ct. 38, 56 L. Ed. 168; *Purity, etc., Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184. The plaintiffs rely upon *Addyston, etc., Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. But their allegations do not make it possible to say, as in the first case, that the Boston Company was engaged in selling and shipping the commodity manufactured by it into other states under contracts for its manufacture and sale with citizens of such other states, nor that it was engaged, as in the second case, in selling a commodity in one state procured by it from manufacturers in other states, nor that it was engaged, as in the third case, in selling its commodity in one state to dealers and consumers in others, thereafter shipping it in pursuance of such sales.

I am unable therefore to hold, on the allegations made, that the Boston Ice Company is shown to have been engaged in interstate commerce in ice. The allegations describing the Independent Company's business are the same with two additions only, not made as to the Boston Company. The first is that the Independent Company cut and harvested its ice principally in New Hampshire; the second is that, having transported its ice to Boston and there sold it, the larger part of it was delivered in Boston, but some was shipped to places outside the state. I see nothing in either of these allegations to justify a conclusion different from that arrived at regarding the allegations about the Boston Company. It is not alleged that it was the Independent Company by whom its ice was shipped to places outside the state, or that, if so, the ice was shipped to purchasers outside the state. The plaintiff has no right to expect the court to supply either of these things by inference.

[3] If the above conclusions are wrong, the objections next to be considered are that no combination or conspiracy to restrain the trade described and no monopolization thereof or attempt to monopolize it are sufficiently alleged in the bill.

The plaintiff has not, as was done in *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, upon which he relies, alleged a combination or conspiracy by the defendants to do certain specified acts, with a description of the intended acts sufficient for a determination by the court whether or not a combination or conspiracy to do such acts would or not be a combination or conspiracy to restrain or monopolize the trade or commerce which the act protects. He has, on the contrary, begun by alleging a "combination and conspiracy," which he describes as in restraint of the trade and commerce in ice in New England, entered into by the defendants after they had formed the "plan and purpose of monopolizing" such trade and commerce, and the subsequent co-operation of the defendants to carry out such plan and purpose and continue such combination and conspiracy. This is followed by allegations of subsequent acts done by the defendants, or some of them, "in pursuance of said plan and purpose and in continuation of said combination and conspiracy," and by allegations as to some of these acts that competition has been thereby prevented or destroyed, or a "monopoly," which the Boston Ice Company is assumed rather than alleged to have obtained, thereby protected, perfected, fostered, or sustained. That the acts thus characterized were the acts or among the acts contemplated by the "combination or conspiracy" as formed is left to inference; the direct allegations describing this "combination or conspiracy" not going beyond the statutory language. Conceding that the bill is not to be construed like an indictment, and without reference, therefore, to any of the decisions which have dealt with indictments under the act, and conceding, further, that "combination," "conspiracy," and "monopolizing or attempting to monopolize" need not necessarily be alleged separately and distinctly from each other, but may be indiscriminately charged, as here (*Cilley v. United, etc., Co.* [D. C.] 202 Fed. 598; *Strout v. United Shoe Mach. Co.* [D. C.] 202 Fed. 602), I am still unable to

believe that facts constituting an offense or offenses under the act have been alleged with such definiteness and certainty as makes it fair and just to require the defendants to answer the allegations.

It is true that with regard to one of the acts alleged to have been done as above, viz., the obtaining control of the management of the Independent Company by the Boston Company, in 1904, by acquisition of the beneficial interest in a majority of the Independent Company's stock, the bill avers (paragraph 5) "that said acquisition of control was in itself a contract and combination in restraint of trade and commerce in ice between * * * Boston and the various New England States," and also "an attempt to monopolize the trade and commerce in ice in said territory." But without allegations that there were no other competitors, or of the proportion of the trade and commerce referred to controlled by the two companies before 1904, I am obliged to regard the quoted averments as mere conclusions of law unsupported by any facts alleged.

The defendants object further that no injuries to the Independent Company's business or property are sufficiently alleged. In what the bill sets forth relating to injuries for which damages are claimed, the proportion of definite facts to general and indefinite charges of conduct of a kind which might tend to the Independent Company's injury in its business or property is indeed small; but, were this the only valid objection to the bill, I am not satisfied that it ought to be sustained. It seems to me, on the whole, sufficiently alleged at least that in 1906 the control by the Boston Company was so exercised as to cause acceptance by the Independent Company of a price for certain ice less than its market value and less than the Boston Company, to which it had been sold and delivered, had agreed to pay; also that the same control was so exercised in 1909 as to prevent any sale of certain ice which, but for such exercise of control, might have been profitably sold. I cannot say that these allegations do not describe an injury to the Independent Company's business or property.

Lastly the defendants object that the bill does not contain allegations meeting the requirements of equity rule 94 (rule 27 of the rules of 1912 [198 Fed. xxv, 115 C. C. A. xxv]) with regard to stockholders' bills. A letter dated July 20, 1910, is set forth, alleged to have been sent by the plaintiffs to the president and directors of the Independent Company. In one place it asks for the bringing of suits under the act against all the present defendants except Bartlett and Taylor, in another for the bringing of such a suit as is now brought against the Boston Company alone. A refusal by the directors to bring such suits is alleged, under date of September 7, 1910. The present bill was filed March 8, 1912. There are no allegations that the same president and directors continued in office from July, 1910, to March, 1912. No effort to obtain action by the stockholders independently of the directors is alleged, but it is alleged that further efforts to obtain action by either directors or shareholders would be "manifestly useless." In view of *Delaware, etc., Co. v. Albany, etc., Co.*, 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862, and of the relations disclosed in the bill between the plaintiffs and the directors and other stockholders of the Independent Company, I should be unable to sustain

this objection by itself, however much is left to be desired by those allegations of the bill which are intended to meet rule 94 (27).

I am obliged however, for the other reasons stated, to sustain the demurrer.

Demurrer sustained.

COREY v. BOSTON ICE CO.

FERRIS v. SAME.

(District Court, D. Massachusetts. August 4, 1913.)

Nos. 125, 126.

MONOPOLIES (§ 28*)—ACTIONS FOR DAMAGES—INJURY TO PROPERTY—ELECTION TO OFFICES.

Plaintiffs having no right of property in the offices of a corporation which they had previously held, the election of others thereto, even if an act unlawful, because done in pursuance and furtherance of a combination, conspiracy, or an attempt to monopolize, obnoxious to the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), does not bring them within section 7 giving a right of action to any person injured in his business or property by another by reason of anything declared to be unlawful by the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

At Law. Two actions, one by James C. Corey, the other by Jarvis W. Ferris, both against the Boston Ice Company. On demurrers to declarations. Demurrers sustained.

Whipple, Sears & Ogden, of Boston, Mass., for complainants.

Stone & Stone and Boyd B. Jones, all of Boston, Mass., for defendant.

DODGE, Circuit Judge. These two declarations differ only in details unimportant upon the questions raised by the demurrers.

Each plaintiff says that, by reason of unlawful acts of the defendant, he has been "injured in his business and property," and each claims threefold the damages so sustained. Each declaration purports to allege participation by the defendant in a combination and conspiracy in restraint of interstate trade and commerce and an attempt by it to monopolize such commerce, also that the alleged unlawful acts set forth were done in pursuance and furtherance of such combination, conspiracy, or attempt. The suits, therefore, are brought under section 7 of the Anti-Trust Act (26 Stats. 209). Each plaintiff says he owns a considerable amount of stock in the Independent Ice Company, a Maine corporation and was a director of that company from 1895 until February 12, 1908. The plaintiff Corey says that he was also treasurer from 1903 until February 13, 1908, at a yearly salary of \$2,100. The plaintiff Ferris says that he was also president from 1903 until February 13, 1908, at a yearly salary of \$2,400.

The injury alleged by each to his "business and property" is set forth as follows: According to each declaration, the defendant company acquired control of the management of the Independent Com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 207 F.—30

pany; the two corporations having previously been competitors. It obtained and exercised such control by the voting power of a majority of the Independent Company's stock held in trust, and through an election of directors, a majority of whom had been nominees and business associates of the defendant, subservient to its interests and ready to do its bidding. On February 12, 1908, a stockholders' meeting was held to choose directors and officers. The only stock represented was that held in trust as above. In the language of the declarations, "at said meeting the plaintiff failed of re-election as a director." Each declaration then described what had thus been done at the meeting in the following terms:

"And (the plaintiff) was thus dismissed and ousted from said office through the exercise of the voting power belonging to said shares."

In each declaration the plaintiff next alleges that at a subsequent directors' meeting on February 13, 1908, "he was also dismissed and ousted from his office as (treasurer or president) by the election of a new (treasurer or president)," and that "the directors and officers elected at said meeting were the nominees of the defendant."

Reference is made in the declarations throughout to the doings thus described at the meetings of February 12th and 13th as a dismissal or dismissal and ouster of the plaintiffs, respectively, from the offices above mentioned. It seems to me clear that the use of these terms is not justified by any of the facts alleged. It also seems to me clear that no injury to any business or property of either plaintiff appears from any of the facts alleged. So far as appears, the proper time for an election of corporate officers had come and the respective meetings were duly held for the purpose. The plaintiffs held their respective offices upon no other terms, so far as appears, than that they should be elected in due course. However long they had held their respective offices, or however frequently they may have been re-elected, there is nothing to show that they had any right to expect that they would be chosen again at this or any given election, nor to show any right of property in the offices mentioned or the salaries attaching thereto, or any such interest in them after the dates of the meetings in 1908 as entitled them to say that failure to elect them to those offices was an injury to their business within the meaning of section 7, whether or not the election of other persons in their places can be said to have been acts unlawful because done, as the plaintiffs say, in pursuance and furtherance of a combination, conspiracy, or in an attempt to monopolize, obnoxious to the act. That they lost the salaries they had been receiving and have not been able to get other employment or other remunerative employment since cannot therefore give them any rights against the defendant under section 7.

I am further of opinion that no facts sufficient to show that the defendant was a party to or engaged in any combination or conspiracy in restraint of interstate trade or commerce, or engaged in any attempt to monopolize such commerce, are stated in their declarations. The allegations relied on for this purpose are in all material respects similar to those made in case No. 324 Equity, a bill in equity filed by James R. Corey et al. in this court March 8, 1912 (207 Fed. 459), to

which bill a demurrer is sustained upon the date of this opinion. To the opinion this day filed in said case, reference may be had for a statement of the reasons upon which the above conclusion is reached.

The defendant's demurrer to the declaration in each of the above cases is sustained.

CONTINENTAL SECURITIES CO. v. INTERBOROUGH RAPID TRANSIT CO. et al. (two cases).

(District Court, S. D. New York. June 2, 1913.)

Nos. 2—214 and 4—5.

1. INJUNCTION (§ 22*)—RIGHT TO RELIEF—CHANGE OF CONDITIONS PENDING SUIT.

Equity acts in the present tense, and, although a bill by a stockholder against the corporation and others to enjoin the carrying out of a combination and conspiracy between them to create an illegal monopoly alleged facts which entitled complainant to the relief prayed for, an injunction will not be granted where at the time of the hearing conditions had so changed that the monopoly did not exist and was not threatened.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 20, 21; Dec. Dig. § 22.*]

2. MONOPOLIES (§ 20*)—NEW YORK STATUTE—CONSTRUCTION.

The provision of section 7 of the New York Stock Corporation Law (Laws 1890, c. 564), as amended by Laws 1892, c. 688, § 7, and Laws 1897, c. 384, § 1, which prohibits combinations between corporations or persons for the creation of a monopoly or the prevention of competition in any necessary of life, etc., as construed by the Court of Appeals of the state since the creation of the Public Service Commission, does not apply to public service corporations such as street railroad companies, which occupy streets under franchises and are subject to regulation by the commission.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 21-25, 1743; Dec. Dig. § 20.*]

3. MONOPOLIES (§ 22*)—EFFECT ON RIGHTS—MORTGAGES—VALIDITY.

That stockholders of a corporation assisted in forming an illegal combination did not affect their power to give a valid mortgage on the corporate property for a legitimate purpose having no connection with such combination.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 28, 28½; Dec. Dig. § 22.*]

4. CORPORATIONS (§ 189*)—STOCKHOLDER'S SUIT—GROUNDS.

A single stockholder cannot maintain a suit to enjoin the corporation from violating a law of the state where he shows no personal loss or damage therefrom.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. § 189.*]

5. WORDS AND PHRASES—"COMPETITOR."

"Competitors" are persons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival. Unity of object with diversity of method is the essence of competition.

In Equity. Two suits by the Continental Securities Company against the Interborough Rapid Transit Company and others. On final hearing on original and supplemental bills. Decrees for defendants.

For former opinions, see 165 Fed. 945, and 203 Fed. 521.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. Aspinwall Hodge, of New York City, for complainant.

Richard Reid Rogers, of New York City, for corporate defendants other than Morton Trust Co.

Henry L. Stimson, of New York City, for Guaranty Trust Co., as successor to Morton Trust Co.

De Lancey Nicoll and Cortland V. Anable, both of New York City, for individual defendants.

HOUGH, District Judge. Some time is saved by settling the terminology to be used in considering these causes.

Interborough Rapid Transit Company is a corporation formed in 1902 for the purpose of taking over and operating the underground railway system then building under what was known as the McDonald contract with the city of New York. It is hereinafter called "the Interborough" and its railway system the "Subway."

Manhattan Railway Company is a corporation which before and at the formation of the Interborough was in control of and operated the railway system in Manhattan and Bronx, commonly known as (and hereinafter called) the "Elevated." The corporation is hereinafter called "the Manhattan."

Metropolitan Street Railway Company is a corporation which prior to February, 1902, controlled and operated very numerous street or surface car lines in Bronx and Manhattan, commonly known as and hereinafter called the "Metropolitan System"; the company itself is hereinafter called the "Metropolitan."

Metropolitan Securities Company is a corporation (hereinafter called "Securities Company") formed principally for the purpose of holding all the stock of the New York City Railway (hereinafter called "City Company"), to which concern the Metropolitan System was leased in 1902 for a very long term.

The individual defendants are divers persons who in and just before 1906 were interested and prominently concerned in the management of the affairs of the Interborough and Metropolitan System. Of them August Belmont is averred to be the chief actor in Interborough affairs and Thomas F. Ryan to hold a like position of influence if not control in Metropolitan matters.

The Interborough-Metropolitan Company (hereinafter called the "Inter-Met") is a corporation formed in early 1906 for the purpose of aiding "financially or otherwise any corporation engaged in the transportation of passengers in the city of New York or its suburbs or territory adjacent thereto," and with the widest possible powers of acquisition, retention, and disposition of the securities of other corporations.

The Windsor Trust Company is hereinafter called "Windsor Company"; the Morton Trust Company has been absorbed in or merged with the Guaranty Trust Company; but, as these trust companies are concerned in these causes only as trustees under certain mortgages, the phrase "Morton Company" will be understood to refer as well to the original trustee as to its successor.

These shortened names cover sufficiently all the defendants in both cases.

Jurisdiction depends wholly on diversity of citizenship, and complainant is a New Jersey corporation, owned by the Venner family, and in my judgment amply proven to be but one of the names under which Mr. Clarence H. Venner conducts some branch or branches of his business.

In action No. 1 (begun April, 1908) a demurrer was argued in the following December before Ray, J., whose opinion is reported in (C. C.) 165 Fed. 945. Nothing has occurred to change the rule that such decision is the law in this case, so far as proof has sustained allegation. That is, if the facts appear on final hearing to be the same as inferred by the court from the bill of complaint, it is my duty to adopt the view of law approved on demurrer, without regard to my own opinion. Judge Ray's analysis of the bill is most exhaustive and obviates the necessity of now stating facts except in so far as the evidence requires change.

Action No. 2 admittedly presupposes success in action No. 1. As No. 1 asserts the Inter-Met to be in essence a violation of the New York "Anti-Trust" Law (Consol. Laws 1909, c. 20, §§ 340-346) and demands therefore its shackling if not destruction, so No. 2 seeks to set aside a certain mortgage made November 1, 1907, to Morton Company by Interborough under the baleful and unlawful influence of Inter-Met. If the latter company be not the illegal thing asserted in No. 1, then the mortgage complained of in No. 2 cannot be touched, but Morton Company defends not only on the ground asserted by the defendants in No. 1 but by declaring that, even if all the allegations of the bill in No. 1 be true, the property rights created by the mortgage in question are protected and the mortgage itself a valid obligation in favor of the bondholders for whom Morton Company, as trustee, defends.

By supplemental bills in No. 2, complainant seeks to prevent the consummation of the so-called "Dual-Subway" scheme, by which the city of New York has recently contracted with the Interborough and Brooklyn Rapid Transit Company to permit and assist in the creation of new underground railways. The method of attack in these supplemental bills is to try to prevent the Inter-Met from voting Interborough stock, for without such vote the enormous mortgage necessary for the "Dual-Subway" scheme and approved by the Public Service Commission, over the complainant's protest, cannot legally be executed. Complicated as are these bills, the position of complainant may be simply stated thus: *owing to the original, intentional, and inherent illegality of Inter-Met, every act done by it, or through its influence, to support and perpetuate said illegality is null and void and should now by this court, and at the single instance of one small shareholder in Interborough, be utterly set aside.* Before considering these demands of complainant, the evidence may be reviewed only so far as it varies, enlarges, or explains the *allegata* of the bill as stated by Judge Ray. At page 950 of 165 Fed., it is stated that down to the time of formation of the Inter-Met the Interborough was engaged in "actual competition" with the Metropolitan System in the business of transporting passengers. In the sense that travelers could choose whether to go to many places by one route rather than the other, this needs no proof;

it is matter of common knowledge. But competition means more than such an opportunity for selection.

[5] Competitors are persons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival. Unity of object with diversity of method is the essence of competition; but, if methods become too widely separated, competition usually disappears, because the superiority of one must be admitted. Competition between sail and steam may still exist as to freight, but there is none as to passenger traffic. In this view of the word-meaning, the record contains no proof of competition between Interborough and Metropolitan.

Under the law as quoted at page 956 of 165 Fed., defendants' doings, to be obnoxious to the statute, must amount to either an unlawful restraint of trade, the prevention of competition in a necessary of life, or a monopoly. With which of these three epithets did Judge Ray brand the Inter-Met? Plainly, I think, it was declared a monopoly (pages 956, 957 of 165 Fed.), so that my inability to find any competition to suppress, actually existing in 1906, does not change the law of this case, as imposed by the demurrer decision. But in what does the monopoly consist? Evidently (page 957 of 165 Fed.) in "practically owning all the railroad lines * * * between the Bronx and the Battery, subject only to such control as the Public Service Commission may exercise." If, however, there was no actually existing competition to suppress, why should the Inter-Met have been formed (page 953 of 165 Fed.) "with the intent and purpose of acquiring * * * a large majority of the shares of" Interborough, Metropolitan, and Securities Company? The answer to this query is in my opinion plainly found in the testimony of Messrs. Ryan and Belmont (action No. 1, Ryan, Q. 38 et seq., Belmont, especially Q. 219 et seq. and Q. 465). The Metropolitan had exhausted the possibilities of surface transportation and with its enormous fixed charges could not earn dividends; but subways were new and of unknown capacity both as money-raisers and money-earners. It was a bold and ingenious move for the Metropolitan to put forward, as a possible addition to its system, connecting subways. This was done to the detriment of Interborough, whose managers saw plainly enough that subways must be extended, if successful, not only for financial but political reasons; and to have a bold rival in any plan for such extension seemed intolerable. This is shown by the evidence as the reason for Inter-Met, not the suppression of existing competition, as alleged in the bill. What was wished was elimination of a rival in any future bargaining with the city for subway additions and extensions. Whether the threatened rivalry was real, whether there was any substance in the threat of future competition, not in operating railways, but getting the chance to build them, is immaterial. From that motive resulted the "practical ownership" of all railways between Bronx and Battery (page 957 of 165 Fed.) which must be held monopoly in this case.

The demurrer decision at page 961 of 165 Fed. considers the allegations of the bill in respect of equity rule 94. The evidence shows that after Mr. Venner and the rest of the world knew what was proposed in respect of forming Inter-Met, but before it was done, he

caused to be bought in the name of and for complainant 300 shares of Interborough. The proofs show that since suit begun the Second and Third avenue street car lines, "Belt Line," and Union Railway Company have become separated from the Metropolitan System, as well as several cross-town lines. The dropping of cross-town lines seems to me immaterial, but it is obvious that, if there was any competition between Bronx and Battery in 1905, there is a great deal more in 1913. On the other hand, the prevention of competition in building new subways in Manhattan and Bronx continues, and the recent contracts for the "Dual System," considered in connection with Mr. Belmont's testimony, seem to show that "wisdom is justified of her children," for what was planned for in 1906 seems to have arrived in 1913, but to have so arrived in consonance with legislation passed since 1906 and, with the approval of the Public Service Commission, a creation of 1907.

With respect of the Windsor Company's mortgage (Inter-Met, 4½'s), the method of bond issue is shown, and every holder of Interborough stock could do just what he pleased; he could take the 4½'s as an overwhelming majority of shareholders did or take dividends as this complainant has done. As to Morton Company's mortgage, it is plain that every dollar of proceeds was expended for benefit of Interborough alone.

The result of the demurrer decision is that in December, 1908, and from a reading of the bill in action No. 1 only, it was decided, that (page 966 of 165 Fed.) "the rights of the public and of many stockholders" had been invaded, wherefore the action would lie.

[1] Reverting now to my attempted summary of complainant's position in 1913, the first inquiry is whether the original illegality of Inter-Met has continued; is it still an obnoxious monopoly under the law of New York? This is vital, for equity acts in the present tense.

The citation of decisions such as the Trans-Missouri Case are not in point. That obnoxious association was dead, and the Supreme Court wrote its epitaph; but, if it had been alive under conditions wholly different from those obtaining when bill filed, it would have been necessary to mold the decree to actualities not history.

The only monopoly declared from the allegata was "practical ownership" of all transportation lines from Battery to Bronx; that has been broken; it no longer exists. But what the evidence shows to have been the real object of Inter-Met (i. e., a monopoly of subway building) has been attained and retained nearly as fully in 1913 as in 1908. I conclude that the corporation constituted a monopoly in both years, if it was one at the earlier date.

[2] But is such monopoly obnoxious? It was so held five years ago. Since then much has happened, and complainant insists that even if the law of New York has changed, or if it has been better ascertained, I am still bound by the demurrer decision. This doctrine is denied.

This court is foreign to the state of New York; though it is bound to take judicial cognizance of state law, yet that law remains a fact to be ascertained as carefully (though in a different way) as any other

fact in the case. The evidences of the law are not only statutes but decisions certainly of the highest state court. A new statute or a new decision is new fact evidence, and I am bound to consider it.

In my opinion *People v. Willcox*, 207 N. Y. at 98, 100 N. E. 705, is the best evidence yet available; that the Public Service Commission statutes mean what they suggest; and that in New York a monopoly regulated by law and subject to visitation is preferred in respect of public utilities over unrestricted competition. The Inter-Met therefore is not an *obnoxious* monopoly. Nor do I find *Central N. Y., etc., Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878, inconsistent with the case last cited. That relates to contracts in restraint of trade; no such question is here presented.

[3] The next query is whether even an admitted or proven infringement of the law by Inter-Met so far nullified its acts as to render void either the Windsor or Morton Company's mortgages. The Windsor Company took title to Interborough stock by the voluntary act of the several stockholders; it is well said that each shareholder took back a purchase-money mortgage on the same by accepting his $4\frac{1}{2}$ per cent. bonds. The Windsor title to the stock rests on no act of the Inter-Met, and, no matter how illegal was the object of forming that corporation, the Windsor mortgage is valid. As to the Morton mortgage, it cannot be pretended that the act of Interborough shareholders in furthering by their deposit of stock a scheme of monopoly rendered it impossible for them to mortgage their corporate property for legitimate and nonmonopolistic purposes. This they did by the Morton mortgage, so that, even if to some extent action No. 1 could prevail, the main bill in action No. 2 must fail.

[4] Finally, is there any defect in these proceedings owing to the fact that they are brought by one shareholder who has shown no personal loss, damage, or injury whatever? Much time has been devoted to picturing the evil results of monopoly, but nothing has been done toward showing that complainant has lost a dollar by exactly what Mr. Venner knew was going to be done when he caused the stock to be purchased.

Rule 94 has, I think, been complied with; and although a complainant's motives are of great moment when he asks for relief resting in grace or discretion, when he insists on a legal right, his morality or honor are not material. The demurrer decision held that the rights of the public and of stockholders had apparently been invaded. It now appears that no stockholders' pecuniary rights have been lessened. It was not held that, in the absence of pecuniary damage, a single shareholder could take upon himself the pleasure or duty of vindicating the rights of the people of the state. That such is not the rule in New York is amply held in *Thomas v. Musical, etc., Union*, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175, and intimated by the Circuit Court of Appeals, in respect of the statute here involved, in *National, etc., Co. v. Mason-Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

Because, therefore, complainant has shown no right to maintain these actions, because the existing mortgages attacked are valid hypothecations, even if assented to by the Inter-Met, and finally because the Inter-Met itself as it stands to-day is not shown to be an illegal monopoly, the bills are severally dismissed, with costs.

WOODFORD v. RICE et al.

(District Court, E. D. Oklahoma. August 11, 1913.)

1. BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFERS—ACTIONS—BURDEN OF PROOF.

The wife of a bankrupt, who purchased his stock of goods at the trustee's sale, purchased other goods, and transferred them to a corporation organized by her to carry on the business formerly carried on by the bankrupt, had the burden of showing, in a suit by the trustee, that such purchases were made out of funds derived from her own estate and not from money furnished her by the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

2. BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFERS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by a trustee in bankruptcy against the bankrupt's wife and others to recover goods purchased by the wife and transferred to a corporation organized by her to carry on the business formerly carried on by the bankrupt, evidence *held* to show that the wife purchased such goods with money furnished her by the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

3. BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFERS—ACTIONS—BURDEN OF PROOF.

Where the wife of a bankrupt purchased his stock of goods at the trustee's sale and purchased other goods, transferred the goods to a corporation organized by her to carry on the business formerly carried on by the bankrupt, and transferred part of the corporate stock to other parties, the trustee in bankruptcy, in a suit to recover the goods on the theory that they were purchased with money furnished by the bankrupt, had the burden of proving the allegations of his complaint by a preponderance of the evidence as against the corporation and the defendants other than the wife of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

4. BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFERS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by a trustee in bankruptcy to recover goods purchased by the bankrupt's wife and transferred to her by a corporation organized for the purpose of carrying on the business formerly carried on by the bankrupt, evidence *held* to show that the other stockholders in the corporation did not purchase the stock in good faith or pay therefor but that they were simply assisting the bankrupt to cover up his property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

5. BANKRUPTCY (§ 305*)—FRAUDULENT TRANSFERS—ACTIONS—RELIEF.

The wife of a bankrupt, with money furnished her by the bankrupt, purchased his stock of goods at the trustee's sale and transferred them, with other goods bought by her, to a corporation organized by her to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

carry on the business formerly carried on by the bankrupt, paying for certain of the goods so purchased with stock in the corporation. The trustee then brought suit to recover such property on the theory that it represented a fraudulent transfer by the bankrupt. *Held* that, before any of such property could be taken for the benefit of the bankrupt's creditors, the obligations of the corporation for property purchased by it should first be paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 466-468; Dec. Dig. § 305.*]

In Equity. Suit by J. W. Woodford, as trustee in bankruptcy of Benjamin Rice, against Rose Rice and others, in which defendant C. L. Stange filed an intervening petition. Decree for complainant against all of the defendants except Stange, whose intervention is allowed.

Aby & Tucker, of Tulsa, Okl., for plaintiff.

Davidson & Williams, of Tulsa, Okl., for defendants Rose Rice, Jacob Romm, Elias Romm, Abraham Shapiro, and 4 Winners Co.

Morris G. Levinson, of St. Louis, Mo., for defendant C. L. Stange.

YOUMANS, District Judge. This is a suit in equity by plaintiff, as trustee in bankruptcy of the estate of Benjamin Rice, bankrupt, against Rose Rice, Jacob Romm, Elias Romm, Abraham Shapiro, William H. Crowley, C. L. Stange, and 4 Winners Company, a corporation, to recover for the bankrupt estate a stock of goods held by the 4 Winners Company. A receiver was appointed and the property is now in his charge.

The admitted facts are that Benjamin Rice in the early part of January, 1911, was the owner of and carrying on a mercantile business in Tulsa, Okl. He had been in business at that place for three or four years prior thereto. His stock consisted of jewelry and clothing. He was adjudicated a bankrupt on the 13th of February, 1912. The stock of goods was sold by order of the referee in bankruptcy on the 29th of February, 1912, and J. H. Wimer became the purchaser for \$10,410. The purchase was made for Mrs. Rose Rice, the wife of the bankrupt. She caused the money with which the purchase was made to be placed to the credit of Wimer in a bank at Vinita, Okl. Rice was married to Rose Romm on the 1st of January, 1911, at Yonkers, N. Y. A day or two before her marriage Rose Romm conveyed to Benjamin Rice certain real estate. A day or two after her marriage she conveyed to him all the remainder of her real estate except one piece which she conveyed to her father, Jacob Romm. After their marriage Benjamin Rice and his wife came to Tulsa. Up to that time Rice carried nothing in his stock except jewelry. In May, 1911, he put in a stock of clothing also. The stock invoiced at the time of the bankruptcy sale about \$27,000. The mercantile debts amounted to \$38,000 or \$40,000. After the sale Wimer, defendant Crowley, and one Briscoe, on the 8th of March, 1911, organized a corporation, calling it the 4 Winners Company, with an authorized capital stock of \$20,000. The stock of goods was transferred to the corporation. All of the stock of the corporation was transferred to Mrs. Rice, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

certificates were delivered to her husband for her. Rice and his wife went to New York immediately after the organization of the corporation. On the 12th of March, 1912, at Yonkers, N. Y., she transferred 148 shares to Abraham Shapiro, 147 shares to Jacob Romm, and 120 shares to her brother, Elias Romm, and retained the remaining shares herself. A stockholders' meeting was held and a board of directors elected. Jacob Romm was elected president and Elias Romm was made manager of the store at Tulsa. Benjamin Rice and Elias Romm, after having bought a bill of clothing, returned to Tulsa and opened the store at that place on the 15th of March, 1912. They carried on business until the 4th of April, 1912, when the store was taken possession of by the receiver. The allegations of the bill upon the controverted facts are as follows:

"Upon information and belief plaintiff states: That the said Rose Rice obtained the money, supplied by her to the said J. H. Wimer for the purchase of said stock, from the bankrupt, Benjamin Rice, by transfers to her of sums of money by the said Benjamin Rice during the months of December, 1911, and January, 1912, prior to the filing of petition in bankruptcy herein, and within four months prior to the filing of said petition. That said transfers of money were made from time to time from the receipts of the sale of merchandise belonging to the business of said bankrupt, and said money was transferred to the said Rose Rice by the said bankrupt with intent to hinder, delay, and defraud his creditors, the said Benjamin Rice being at the time of said transfers insolvent; that is to say, the aggregate of the property of the said Benjamin Rice, exclusive of the property having been conveyed and transferred with intent to hinder, delay, and defraud his creditors, was not, at a fair valuation, sufficient in amount to pay his debts. That the sums of money so transferred during the months of December and January aforesaid, the exact dates of which transfers are unknown to this plaintiff, amounted in the aggregate to the sum of \$14,390, for which said transfers of money said bankrupt received no consideration, and of which said sum the said Rose Rice furnished to J. H. Wimer the sum of \$10,410 for the purchase of the said stock of merchandise, formerly the property of Benjamin Rice, and sold by plaintiff as aforesaid, and the remaining \$3,980 of such money was, after payment of \$500 to J. H. Wimer, forwarded to defendant Abraham Shapiro at Yonkers, N. Y., to be held by him for the said Rose Rice and Benjamin Rice and in due time delivered to them. * * * Plaintiff states: That the corporation, the 4 Winners Company, was organized by and on behalf of the said Rose Rice, Jacob Romm, Elias Romm, Abraham Shapiro, and C. L. Stange, and the said stock of merchandise of Benjamin Rice was purchased and transferred to said corporation in furtherance of the conspiracy to hinder, delay, and defraud the creditors of the said Benjamin Rice; and the said stock of merchandise purchased with the moneys held as aforesaid was the only property or thing of value exchanged by any of the stockholders for the issued capital stock of the 4 Winners Company. That the stock of merchandise held by the 4 Winners Company and purchased through the agencies aforesaid is, by reason of its purchase with the money properly belonging to the estate in bankruptcy of the said Benjamin Rice and to the plaintiff as trustee thereof, rightfully the property of the plaintiff."

These allegations are specifically denied in separate answers by Rose Rice, Jacob Romm, Elias Romm, Abraham Shapiro, and the 4 Winners Company. Defendant Crowley does not answer. Defendant Stange filed answer and intervening petition. He denies any connection with the alleged conspiracy and alleges that he sold and delivered to the 4 Winners Company merchandise consisting of jewelry of the value of \$3,008.11, and that to secure the payment of this amount there was delivered to him a certificate of 136 shares of stock

in the corporation. He prays that, in the event the receiver is ordered to sell the stock of goods, he be required to pay the above amount.

[1] By reason of being the wife of the bankrupt, whose stock of goods she purchased, Rose Rice stands in a relation to the case different from that of the other defendants.

"Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife; such purchases are so often made the cover for the debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contention between the creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof. Such has always been the rule of the common law, and the rule continued, though statutes have modified the doctrine that gave to the husband absolutely the personal property of the wife in possession, and the right to reduce into his possession and ownership all her choses in action. Authorities to this effect are very numerous." *Seitz v. Mitchell*, 94 U. S. 580, 24 L. Ed. 179.

To the same effect are the following cases: *Hershy v. Latham*, 46 Ark. 542; *Core v. Cunningham*, 27 W. Va. 206; *Heiges v. Pifer*, 224 Pa. 628, 73 Atl. 950; *Wimberly v. Montgomery Fertilizer Co.*, 132 Ala. 115, 31 South. 524; *Kahn v. Weinlander*, 39 Fla. 217, 22 South. 653; *Levi v. Rothschild*, 69 Md. 349, 14 Atl. 535; *Yates v. Law*, 86 Va. 117, 9 S. E. 508.

The rule of law thus enunciated, applied to the pleadings in this case, places the burden of proof on Mrs. Rice to show that the purchase of the stock of goods was made by her with means derived from her own estate.

[2] Her story is in substance as follows: She came when a child with her father and mother from Russia to New York City. She began to work when quite young, and learned English by attending night school. In the course of time she became an expert as a shirt waist designer and saved some money. She then went into business for herself. She first had a partner by the name of Smith. That firm went out of business, and in the division of the assets she received \$4,000. She then formed a partnership with one Kayton, using her father's name instead of her own. She afterwards bought Kayton out and continued the business herself under the name of Romm & Co. until she was burned out in 1909. She collected from the insurance companies about \$7,000, and the salvage amounted to about \$1,000 more. She had outstanding at the time of the fire \$7,000 to \$9,000 that she afterwards collected. She kept a bank account and deposited the receipts from her sales from day to day. When she bought the interest of her partner she adopted the plan of allowing herself \$100 a week, which amount she included in the check drawn on Saturday to cover the week's expenses. This amount, less her personal expenses, which were small, she kept in her safe until she had accumulated \$5,000. This amount, inclosed in sealed envelopes, she delivered to her brother-in-law, to be by him placed in his box in a safety deposit vault. This was in 1908. The sum thus deposited was added to

from time to time until, at the time of her marriage on the 1st of January, 1911, it reached an amount between \$14,000 and \$15,000. She made investments in real estate to the amount of \$12,000 or \$14,000, but the sum in the safety deposit vault was never drawn upon. She was 25 or 26 years of age at the time of her marriage. She conveyed all of her real estate to her husband, except one piece, and afterwards delivered to him the proceeds of the sale of that. She never told her husband of the money in the safety deposit vault until after her purchase of the bankrupt stock, on the 29th of February, 1912. After her marriage she carried this money on her person, first to Hot Springs, Ark., and then to Tulsa, Okl. On account of a burglary in her house at Tulsa in January, 1911, she considered it unsafe to keep the money in the house, and she asked her husband to secure for her a safety deposit box. He told her that he had such a box in the Central National Bank of Tulsa, and that she might have it. She kept this money in that box until December, 1911. On the 4th or 5th of December, on account of the neglect of her husband, she determined to leave him and go back to New York, and with that purpose in view she took the money out of the vault. When she charged her husband with neglect, he explained his conduct by telling her that he had been robbed of diamonds of the value of \$18,000 or \$19,000, and that on account of such robbery he was insolvent. After the institution of bankruptcy proceedings she determined, without communicating her purpose to her husband, to buy the stock at bankrupt sale. She consulted with Mr. Orr, cashier of the Colonial Trust Company, of Tulsa, and requested him to issue cashier's checks in the name of some one else besides herself and cause them to be indorsed by the payee and delivered to her. This was done and cashier's checks to the amount of \$14,500 then came into her hands, for which she paid out of the money which she had taken from the vault. Mr. Orr also procured Mr. Wimer, of Vinita, Okl., to bid for the stock of goods at the sale in his own name. For that purpose the cashier's checks above referred to were placed to his credit in the bank at Vinita. Wimer bought the stock for \$10,410, and paid for it out of the amount placed to his credit, and the balance was returned to Mrs. Rice. This was not made known to her husband until March 1, 1912. After the purchase, Wimer, Crowley, and Briscoe organized a corporation at Vinita and called it the 4 Winners Company. The capital stock was \$20,000. The stock of goods purchased by Wimer was transferred to the corporation. All the stock of the corporation was transferred to Mrs. Rice, and she and her husband went at once to New York. On the 12th of March, 1912, she paid to Abraham Shapiro \$2,332.40 for furniture bought by her just prior to her marriage. On the same day Shapiro bought from her 148 shares of the stock of the 4 Winners Company, for which he paid her \$2,300 in cash and gave her a note for \$975 payable in nine months. She also sold her father 147 shares and took his note for \$3,675. She sold her brother Elias Romm 120 shares for \$3,000 cash. The meeting of the stockholders was held on the 12th of March, 1911. The board of directors elected Jacob Romm as president, and Elias Romm was elected secretary and manager. Rice was employed at a salary of \$25 a week. The proceeds of sales, less ex-

penses, were to be sent to the president to be turned over to Mrs. Rice until she had received \$8,000 or \$9,000. Under this arrangement \$4,-500 were sent to her prior to the appointment of the receiver.

In all things pertaining to the management of her business and the purchase of real estate, Mrs. Rice is fully corroborated. With regard to placing the money in the bank vault, she is corroborated by her brother-in-law to the extent that he placed in the box for her envelopes which she said contained money. He saw no money in such envelopes. She is further corroborated by her husband to the extent that he turned over to her a key for a safety deposit box in the Central National Bank, of Tulsa. He placed nothing in the bank and knew nothing of her having this sum of money. With these two exceptions, Mrs. Rice's story stands uncorroborated. She possesses energy, aggressiveness, and business ability. She deposited regularly in the bank and drew checks for what she expended. Her balance ran from \$1,000 to \$5,000. Why she should accumulate a large amount and not deposit it in bank is explained by her statement that, on account of the panic of 1907, she distrusted the banks. If she were unaccustomed to banks, such a course might not be considered strange. Her acquisitive faculty was highly developed. She was a money maker. No explanation is given why she kept so large an amount of money in a vault where it was earning nothing. Her confidence in her husband that led her to convey to him all of her real estate contrasts strangely with her distrust of him in not only refraining from turning over to him this large sum of money, but also in keeping from him the knowledge that she possessed it. In July, 1911, her husband executed to her notes for the value of all the real estate conveyed by her to him. At the time of the conveyance to him, nothing was said about the payment to her for the property. In consideration of \$1,550 collected by her, he assigned to her his lease on the house in which he was doing business. From her testimony the inference is that all the cashier's checks were purchased by her at one time. She also testified that the amount of the cashier's checks was \$14,500. She did not purchase all the checks at one time, and the amount exceeded the sum stated by her. The testimony of the cashier showed that the dates of issuance and the amounts were as follows

December 5, 1911.....	\$ 3,900 00
December 7, 1911.....	2,100 00
December 8, 1911.....	2,490 00
December 11, 1911.....	990 00
December 12, 1911.....	1,110 00
December 13, 1911.....	1,000 00
December 15, 1911.....	600 00
December 16, 1911.....	500 00
December 18, 1911.....	2,000 00
December 22, 1911.....	1,700 00
December 26, 1911.....	1,600 00
Total	\$17,990 00

This amount exceeds the amount stated by her, \$3,490. She does not undertake to explain this discrepancy in her testimony. Her testimony that she had not told her husband that she had this sum of

money in her possession and that she intended to buy the stock is contradicted by the fact that Orr sent Rice to Wimer with a letter of introduction. The letter is as follows:

"February 28th, 1912.

"Mr. J. H. Wimer, Vinita, Oklahoma—Dear Jim: This will introduce to you Mr. Ben Rice, a clothing man here in town who has come down to stay in the store for you to-morrow so that you can come down here. Please come down on the first train in the morning, or to-night if you can, as I would like to talk to you and would rather that you come down to-night. Mr. Rice will explain to you something about what I wish you to do here, and you may talk to him just as you would to me. You may call me up after Mr. Rice talks to you this evening and let me know when you can come. If you can catch that 8 o'clock to-night and get here about 10:50 that would be the best. Notify me that you are coming to-night, and call me up anyway."

Rice took Wimer's place in the latter's store while he went to Tulsa to bid in the property for Mrs. Rice. She testified that she paid Wimer \$500 for his services. Wimer testified that he received that amount, but states that it was paid to him by the 4 Winners Company. The result is that the testimony of Mrs. Rice with regard to accumulating a large sum of money in a safety deposit vault and keeping its existence hidden from her husband, carrying it on her person to Tulsa, placing it again in the safety vault, buying cashier's checks therewith, and using them in the purchase of the stock of goods, cannot be believed. The manner in which the cashier's checks were issued sustains the allegation that the checks were bought with funds derived from the sale of the bankrupt's goods. Not only has she failed to produce affirmative proof showing that the money with which she purchased the stock of goods belonged to her, but the testimony in the case is sufficient to show that her connection with the transaction was fraudulent and was an effort to withdraw her husband's assets from the reach of his creditors.

[3, 4] With regard to the remaining defendants, the law imposes the burden of proof upon the plaintiff to make out the allegations of his complaint by a preponderance of the evidence. With regard to Shapiro, he and Mrs. Rice testify that she paid him on the 12th day of March, 1912, for furniture bought by her in December, 1910, before her marriage, the sum of \$2,332.40. The bill was introduced in evidence and purports to have been made out on the day on which it was paid. The date on which the articles were purchased is not given. Shapiro testified that he did not sell goods on credit; yet, if his story is to be believed, these goods were sold in December, 1910, and were not paid for until March, 1912, during all of which time Mrs. Rice, according to her story, had in her possession nearly \$15,000 in cash. Shapiro paid her for stock \$2,300 in cash, a few dollars less than the amount she had paid him on the morning of the same day. Shapiro states that he bought the stock upon the statement made to him that the goods invoiced \$27,000, and he regarded the stock as worth more than par, yet he was present at a meeting at which it was agreed that Mrs. Rice was to be paid out of the proceeds of the first sales the difference between the par value of the stock in the corporation and the invoice value of the goods. Benjamin Rice and his wife were introduced as witnesses for the plaintiff. Shapiro tes-

tified for himself. The facts surrounding the case warrant the conclusion that the stock was not purchased by Shapiro in good faith; that he actually paid no money for it; that it was not intended that his note should be paid; and that he was simply assisting Rice to cover up his property. The same may be said with regard to Jacob Romm and Elias Romm. The latter claims to have paid Mrs. Rice \$3,000 for 120 shares of stock. He testified that a part of that money was carried by him on his person, and that the remainder was in the possession of another sister. He was a chauffeur and said that he sometimes sold automobiles on commission. The facts surrounding the transaction, so far as he is concerned, convince me that his connection with it was not in good faith, and that he, in fact, did not pay anything for the stock transferred to him.

Jacob Romm testified that he gave his note for the purchase price of the stock transferred to him. He further testified that in July following he paid \$2,000 on that note. At that time the stock of goods was in the hands of the receiver and this suit was pending. He was a man of small means. He owned two tenement houses. The circumstances surrounding his connection with the transaction convince me that he did not make the purchase of the stock in good faith, and that he did not pay anything on the note. He was simply used by his daughter and son-in-law.

[5] Upon the issue raised by the answer and intervention of Stange, I am convinced from the testimony that Stange sold to the 4 Winners Company the bill of goods referred to in his answer, and that the 4 Winners Company owes him a balance thereon. All of the obligations of the 4 Winners Company should be first paid before any of its property is taken for the benefit of the creditors of Benjamin Rice.

A decree will be entered sustaining the prayer of the complaint as to all of the defendants except Stange, whose intervention will be allowed.

NEW YORK LIFE INS. CO. v. MOATS.†

(Circuit Court of Appeals, Ninth Circuit. August 4, 1913.)

No. 2,228.

1. INSURANCE (§ 256*)—AVOIDANCE FOR MISREPRESENTATION—HEALTH OF INSURED—EFFECT OF MEDICAL EXAMINATION.

Where the medical examiner of an insurance company was required to examine an applicant to see if he was suffering from certain named diseases, and also to report very fully to the company all matters observed by him, so as to give the home office a pen picture of the applicant as he presented himself to the examiner, the risk was determined by the company mainly upon such examination, and not upon the answers made by the applicant to the medical examiner as to his physical condition.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. § 256.*]

2. INSURANCE (§ 668*)—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE—MISREPRESENTATIONS AS TO HEALTH.

In an action on a life insurance policy, evidence *held* not to show by uncontradicted testimony that the insured knowingly made false and fraudulent answers to the medical examiner, and therefore to require the submission of that question to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

3. INSURANCE (§ 265*)—AVOIDANCE OF POLICY—DISTINCTION BETWEEN WARRANTY AND REPRESENTATION.

Answers to questions concerning previous diseases of an applicant for insurance were under the facts of this case representations and not warranties, and nothing more is required of him than that he answer in good faith.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. § 265.*]

4. INSURANCE (§ 668*)—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE—MISREPRESENTATIONS AS TO MEDICAL ATTENDANCE.

In an action upon a life insurance policy, evidence *held* to raise a question for the jury whether representations by insured in his application that he had consulted a physician concerning himself only once in five years were false.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

5. INSURANCE (§ 669*)—ACTIONS ON POLICY—INSTRUCTIONS—MEDICAL ATTENDANCE.

In such a case, an instruction that consulting a physician about some slight immaterial ailment would not necessarily make a statement that he had not consulted one fraudulent was correct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.*]

6. INSURANCE (§ 136*)—DELIVERY OF POLICY—CHANGE OF HEALTH.

Where an application for a life insurance policy stipulated that it should not take effect until the premium was paid and the policy delivered, but then it should relate back to the date of the application, and the policy provided that it should take effect as of the date of the application, upon payment of the premium and delivery, and neither the application nor the policy contained a provision that the insured should be in sound health when the policy was delivered, the fact that insured

*For other cases, see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 20, 1913.

did not, of his own volition, without inquiry from the company, inform it when the policy was delivered that he had been confined in a sanitarium since his application was made was not a fraud upon the company which would vitiate the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.*]

7. INSURANCE (§ 136*)—DELIVERY OF POLICY—CHANGE OF HEALTH.

A change in the health of insured under such policy between the time of the application and the receipt of the policy did not avoid the policy, since the company had assumed the risk for that time, and had been paid therefor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.*]

8. INSURANCE (§ 304*)—AVOIDANCE FOR MISREPRESENTATION—CONTINUING REPRESENTATIONS.

Representations made by an applicant for life insurance as to his good health are not continuing representations covering the period between the date of the application and the delivery of the policy, where the policy does not provide that the insured shall be in good health at the date of delivery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 698; Dec. Dig. § 304.*]

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Consolidated actions by Ida M. Moats, individually, and as guardian of George A. Moats, against the New York Life Insurance Company. Judgment for plaintiffs, in each action, and defendant brings error. Affirmed.

On the 16th day of March, 1911, George S. Moats, husband of the defendant in error, Ida M. Moats, and father of the minor, George A. Moats, made application to the New York Life Insurance Company for two policies of insurance on his life, in the sum of \$5,000 each; one in favor of George A. Moats, the minor son, and the other in favor of Ida M. Moats, the wife of the insured. In and by the applications it was provided that the insurance thereby applied for should not take effect unless the first premium was paid, and the policies delivered to and received by the applicant during his lifetime, and that, unless otherwise agreed in writing, the policies should then relate back to and take effect as of the date of the applications. The first premium on the two policies was paid on the 16th day of March, 1911. On or about the 6th day of April, 1911, and during the lifetime of the applicant, the policies of insurance were delivered to and received by him; the policies being executed by the company and dated March 25, 1911. In and by the policies of insurance thus issued, the insurance company agreed to pay to George A. Moats, son of the insured, and to Ida M. Moats, the wife of the insured, the beneficiaries named therein, the sum of \$5,000 each, upon receipt at the home office of the company of due proof of the death of the insured, George S. Moats, during the continuance of the contract. The contracts of insurance were made in consideration of the first premium of \$134.15 on each policy (receipt of which was acknowledged in each policy), constituting payment for the period terminating on the 16th day of March, 1912, and the payment of a like sum on each policy on the last-mentioned date, and on the 16th day of March in every year thereafter during the continuance of the policy, and until the death of the insured. The policies also provided that after their delivery to the insured, they should take effect as of the 16th day of March, 1911, that being the date of the applications made by the insured, and the date of the payment of the first premium on each policy. On the 14th day of June, 1911, the insured, George S. Moats, died, and on or about the 15th

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

day of July, 1911, due proof of his death was received by the insurance company, at its home office in the city and state of New York.

As the two cases are alike in all material matters, and present the same issues for determination, and were consolidated for trial, the further statement and discussion will be with respect to the case of Ida M. Moats, guardian of the person and estate of George A. Moats, a minor.

On the 25th day of August, 1911, the insurance company undertook to rescind the contract of insurance, and refused to pay the amount alleged to be due thereunder; the rescission and refusal being based on the following grounds:

(1) That at the time of making application for the policy of insurance set forth in the complaint, and on the same day, to wit, the 16th day of March, 1911, the applicant, George S. Moats, appeared before one Dr. H. L. Underwood, the medical examiner of the insurance company, and that at that time, in response to certain questions asked the applicant by the medical examiner, the applicant made false and fraudulent answers and representations, that such false and fraudulent answers and representations were made for the purpose of deceiving the defendant, and that the policy of insurance executed by the insurance company to the insured was executed in reliance upon such fraudulent and false answers and representations.

(2) That subsequent to the making of the application for insurance, pending negotiations therefor, and prior to delivery to the insured of the policy, the applicant, George S. Moats, became insane, and his physical health irreparably impaired, which facts had been concealed from the insurance company.

On the 20th day of June, 1911, the defendant in error, Ida M. Moats, was appointed guardian of the minor, George A. Moats, and ever since that time has been, and at the time of the commencement of this suit was, the duly appointed, qualified, and acting guardian of said minor, and as such guardian instituted this action to enforce payment of the amount alleged to be due and owing to said minor, under and by virtue of the contract of insurance contained in the policy of insurance set forth in the complaint.

The suit was instituted, and the complaint filed, in the circuit court of the state of Oregon, in and for the county of Union. Upon petition of the defendant, the cause was subsequently removed for trial to the Circuit Court of the United States for the District of Oregon. The case was tried before a jury. At the close of the evidence the defendant moved for a directed verdict in its favor, which motion was based upon the following grounds: That no evidence had been introduced by the plaintiff sufficient to support a verdict in her favor; that the uncontradicted evidence in the case established the fact that the insured consulted physicians prior to March 16, 1911; that it affirmatively appeared from the evidence that the beneficiary had knowledge of these consultations; that the uncontradicted evidence in the case showed that the representations which were made were material to the risk, and that the application would not have been accepted by the defendant had the truth regarding such representations been made known to the company; that the uncontradicted evidence in the case established the fact that the beneficiary accepted the policy after the insured had been committed to the sanitarium conducted for mental and nervous diseases; and that the uncontradicted evidence in the case established the fact that on the date of his confinement to the sanitarium, the insured was insane. The motion for a directed verdict was denied. The jury returned a verdict in favor of the plaintiff in the sum of \$5,000, and judgment was entered against the defendant and in favor of the plaintiff for that amount. The defendant thereupon moved the court for judgment against the plaintiff, and in favor of the defendant, non obstante veredicto, upon the ground that it appeared from the uncontradicted evidence upon the trial of the case that the alleged policy of insurance, introduced in evidence by the plaintiff, was not delivered to the insured, his beneficiary or agent, until the 6th day of April, 1911; that it further appeared from the uncontradicted evidence introduced upon the trial of the case that the insured was, on the 21st day of March, 1911, confined in a sanitarium, and was, at the time of such confinement, insane; and that it further appeared from the

uncontradicted evidence introduced upon the trial of the case that the policy of insurance was not to take effect until the date of delivery. The motion for judgment non obstante veredicto was also denied. From the judgment entered upon the verdict of the jury the defendant prosecutes this writ of error.

Platt & Platt and Hugh Montgomery, all of Portland, Or., for plaintiff in error.

C. E. Cochran, of Portland, Or., and Geo. T. Cochran, of La Grande, Or., for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge (after stating the facts as above). The defendant denies its liability on the two insurance policies for \$5,000 each, issued to the plaintiffs as beneficiaries, on the life of George S. Moats, on two grounds:

(1) It is charged in defendant's answer that at the time of making application for such insurance, George S. Moats, the insured, made false and fraudulent answers and representations to two certain questions asked him by Dr. H. L. Underwood, the medical examiner of the insurance company, such answers and representations being material to the risk, and known to be false and fraudulent by both the insured and the beneficiaries. The two questions and answers charged to have been false and fraudulent were preceded by the following general question:

"9. Have you ever had or suffered from any of the following diseases? Answer 'Yes' or 'No' to each part of this query below. (Give explicit answers and particulars in each case—the medical examiner should satisfy himself that the applicant gives full and careful answers to this question).

"'Yes' or 'No'; name of disease; No. of attacks; date; duration; severity; results.

"(First question). A. Of the brain or nervous system?

"Ans. No. * * *

"(Second question). 11. A. Have you been under the care of or consulted a physician concerning yourself for any cause within five years?

"A. Once 3 yrs. ago.

"B. If so, for what ailment; name and address of physician?

"Ans. A pain in the back. N. Molitor, La Grande."

If either of these answers was false and fraudulent, it may be assumed that the insurance company had no knowledge of their false and fraudulent character at the time of the delivery of the policies of insurance, and that the answers were material to the risk.

(2) It is also alleged in defendant's answer that the policies of insurance were not to take effect until delivery to the applicant; that subsequent to making application for the policies of insurance on the 16th day of March, 1911, and prior to their delivery to the applicant on April 6, 1911, and pending negotiations for a contract of insurance, the applicant became insane; that the insurance company had no knowledge of any change in the physical or mental condition or health of the applicant at the time of the delivery of the policies; that a knowledge of such change in the physical or mental condition and health of the applicant was material to the risk, and had the insurance

company known of such change, it would not have made, executed, and delivered its policies to the applicant.

[1] With respect to the defendant's denial of liability on the ground of alleged false and fraudulent answers to the questions asked by the medical examiner of the company, it will be noticed that in the first general question, as to whether the applicant had suffered from certain mentioned diseases, there is the parenthetical instruction to the medical examiner that he should satisfy himself that the applicant gives full and careful answers to the questions, and in pursuance of this instruction the medical examiner is required to make an examination of the applicant and an independent report to the home office as to his physical condition, and whether the applicant has given full and true information in all respects. Such a report was made out by Dr. Underwood, the medical examiner in this case, and was transmitted to the home office of the insurance company, with the application. In this report the medical examiner was required to answer:

"Do you find after careful inquiry and physical examination, any evidence of past or present diseases (if so give full details)."

Then followed the direct and specific question (previously asked the applicant): "Of the brain or nervous system," to which the medical examiner replied, "No." Then followed a number of questions relating to certain signs and symptoms of disease, from which the skilled physician and examiner would be able to make a diagnosis of the applicant's condition of health, or lack of it. These signs and symptoms, as reported by the medical examiner, appeared to have been satisfactory. But in addition to this report in detail, the medical examiner was required to state whether there was anything about the applicant's character, residence, mode of life, or occupation, which would render the risk in any way undesirable. His answer to this question was, "No." He was further required to state whether he had reviewed all of the answers in his report, and also to state whether he was sure they were clear and complete. His answer to this question was, "Yes." He was further required to report:

"Do you believe that the applicant has given full and true information in all respects?"

His answer to this question was, "Yes." He was further requested to send direct to the home office of the company any information which for any reason he preferred not to embody in his report; that every endeavor should be made by the examiner to make his report as complete and precise as possible, the object being to give the home office a pen picture of the applicant as he presented himself to the examiner; and, if in addition the examiner knew of any fact or had any impression not expressed in the preceding part of his report that in his judgment would probably influence the home office in its estimate of the risk, he was required to note it under the head of "additional remarks." Nothing appeared in the report under that head; from which it may be inferred that the medical examiner, after having made a careful examination of the applicant, as a representative of the company skilled in the detection of disorder, found no sign or evidence of derangement of the brain or nervous system; that nothing

in the appearance, speech, or manner of the applicant gave to the medical examiner any impression not before expressed in his report, or which might influence the home office in its estimate of the risk. In other words, he had, as an expert representative of the company, and as required by his instructions, given in his report a pen picture of the applicant as he presented himself to the examiner, and this pen picture was favorable to the applicant as an insurable risk.

It was plainly upon the examination and report of this skilled expert of the company that the character of the risk was finally and mainly determined by the company, and not wholly upon the answers and representations of the applicant himself; and particularly must this be so where the inquiry relates to the brain or nervous system of the applicant, wherein a physician and skilled examiner and observer is often a better judge of the physical and mental condition of the applicant than the applicant himself. Dr. Underwood, the medical examiner, whose report we are now considering, was called as a witness in behalf of the defendant, and testified on cross-examination, among other things, that from his examination of the applicant, and the conversation which he had with him, he found nothing out of the normal. He found him a good risk so far as the examination revealed his condition. He had no ailment that the witness detected, and the witness was there as the representative of the company to find out if there was anything. The competency of this witness to so testify was not questioned.

[2] It appears from the evidence that on March 21, 1911, or five days after George M. Moats had made application for insurance, he was admitted to a sanitarium for treatment for a nervous condition; that he remained in the sanitarium until March 27, 1911; that he returned to the sanitarium on April 11, 1911, and on April 18, 1911, was removed to an insane asylum, where he remained until May 2, 1911, when he was discharged cured; that he was again committed to the asylum on June 4, 1911, and on June 14, 1911, he died. The type of insanity which the deceased had was designated by Dr. Tamiesie, the attending physician, and a witness on behalf of the defendant, as maniacal depressive insanity. This witness was of the opinion that the deceased was insane on and prior to March 16, 1911. Dr. Nicholas Molitor, a witness for the defendant, saw the deceased on March 3, 1911, and again on March 14, 1911. He was of the opinion that the deceased was at that time suffering from neurasthenia, but would not say that it was at that time an incipient form of insanity. Dr. James W. Laughlin, a witness for the defendant, testified that he saw the deceased on March 16, 1911 (we shall see later that there is a dispute as to this date), and again on March 20, 1911; that the deceased was in a highly nervous condition, which, upon inquiry, the witness associated with a religious revival, and the witness was of the opinion that the condition of the deceased when he saw him was a form of dementia. Dr. Charles Henry Upton, a witness on behalf of the defendant, testified that he saw the deceased in the early part of the year 1911; that he complained of nervousness and sleeplessness; that the witness was of the opinion that it was a case of neuras-

thenia. The witness was informed of the medical examination on March 16, 1911, and was asked if there later developed a mental condition of the applicant which required him to be confined in the asylum; was it possible that such condition might have sprung up after March 16, 1911? The witness answered in the affirmative, and stated that mania could occur in a very short time; that a person might become a raving maniac inside of 24 hours without any previous lesion noticeable; that the fact that the applicant was confined in an insane asylum on the 18th of April, 1911, would not necessarily be positive proof that any maniacal condition existed earlier. Upon being asked a hypothetical question, stating the various stages of the deceased's condition culminating in his death, he was asked if it was possible, under such a state of facts, for the mental condition of the deceased to have begun, developed, and culminated subsequent to March 16, 1911. His answer was in the affirmative. Dr. W. T. Williamson, a witness for the defendant, who conducted the sanitarium where the deceased was at first treated, testified that probably the neurasthenia which the deceased had on March 16, 1911, was an incipient form of the insanity from which he died; but on cross-examination, in answer to a hypothetical question stating the various stages of the deceased's condition, the witness stated that the cause of insanity could have happened after March 16, 1911. Dr. George W. Zimmerman, an osteopathist, a witness on behalf of the defendant, testified that the deceased came to him on March 18, 1911, and consulted him as to his physical condition; that the deceased said he was very nervous and could not sleep, and wanted a general physical examination to see if any cause could be found for his sleeplessness and nervousness. The witness found the deceased suffering from neurasthenia, and was of the opinion that this condition was a growth lasting over a considerable period of time. William R. Chattin, a neighbor and an intimate acquaintance of the deceased, testified on behalf of the plaintiff that the deceased was a very stout-looking man, and was gentlemanly in his conduct and upright in every respect so far as the witness could see or learn in regard to him; that the deceased was superintendent of a Sunday school, and on Sunday, March 12, 1911, he was present at the school and was all right. The witness testified that the general reputation and character of the deceased in the community where he lived was good. Other friends and neighbors testified to the same effect.

[3] We do not think that this evidence established the defense, by uncontradicted testimony, that the deceased made false and fraudulent answers to the inquiry whether he had suffered from a disease of the brain or nervous system, and that the deceased knew at the time that such answers were false and fraudulent. We think the condition of the deceased on the day he made application for insurance, and his knowledge of his own condition on that day, were questions of fact for the jury, and were properly submitted to the jury for determination. The answer to the question was a representation, and not a warranty, and nothing more was required of the applicant than good faith.

As said by the Supreme Court of the United States in *Moulou v. American Life Insurance Co.*, 111 U. S. 335, 343, 4 Sup. Ct. 466, 470 (28 L. Ed. 447):

"Looking into the application upon the faith of which the policy was issued and accepted, we find much justifying the conclusion that the company did not require the insured to do more, when applying for insurance, than observe the utmost good faith, and deal fairly and honestly with it, in respect of all material facts about which inquiry is made, and as to which he had or should be presumed to have knowledge or information. * * * If it be said that an individual could not be afflicted with the diseases specified in the application, without being cognizant of the fact, the answer is that the jury would, in that case, have no serious difficulty in finding that he had failed to communicate to the company what he knew or should have known was material to the risk, and that, consequently, for the want of 'fair and true answers,' the policy was, by its terms, null and void. But, whether a disease is of such a character that its existence must have been known to the individual afflicted with it, and, therefore, whether an answer denying its existence was or not a fair and true answer, is a matter which should have been submitted to the jury."

[4] With respect to the question, "Have you been under the care of or consulted a physician concerning yourself for any cause within five years?" and the answer thereto, "Once three years ago," and the further question, "If so, for what ailment; name and address of physician?" and the answer thereto, "A pain in the back. N. Molitor, La Grande"—the defendant introduced the testimony of several physicians, whom it was alleged the deceased had consulted for a disease of the nerves within five years prior to the date of the application for insurance. Dr. Nicholas Molitor testified that the deceased came to the office of the witness, with his wife, on March 3, 1911; that on that occasion Mrs. Moats had come to consult him; that at that time the doctor also had a conversation with the deceased; that he believed the consultation that was paid for was the consultation for Mrs. Moats, and that the other was only incidental; that he had made a short examination of the deceased at that time; that as near as the witness could remember the deceased had on that occasion complained of restlessness and weakness; that he thought he at that time prescribed some remedy for restlessness, or told him what to do; that he was then satisfied in his own mind that the deceased was at that time suffering from neurasthenia; that he thought he had advised the deceased not to work so hard, and to make a change and take a rest. Dr. Molitor also testified that both Mrs. Moats and the deceased were at his office on the 14th day of March, 1911, but did not remember that the deceased had consulted him particularly at that time; that he and the deceased had just had an ordinary conversation; that he could not recall the character of that conversation; that the deceased had made no statement to him at that time regarding his physical condition; but that he was of the opinion at that time that the deceased was then suffering from neurasthenia, or that he was suffering from overwork of some kind. On cross-examination this witness testified that he gave very little attention to the condition of the deceased, and that the real consultation as he recalled it was for Mrs. Moats.

Dr. James W. Laughlin testified that on March 16, 1911, between 10 and 11 o'clock in the morning, the deceased came to consult him about his condition; that his wife came with him; that the deceased told him that he was suffering from sleeplessness, and that he was nervous and did not feel good generally; that he examined him and found that his physical condition appeared to be all right, but discovered that he was in a highly nervous state, and had been taking part in a religious revival and was unduly excited; that he had advised him to take a trip to Portland; and that he gave him a nerve sedative.

Dr. Charles Henry Upton testified that the deceased had called to see him some time during the spring of 1911; that he had made no record of the consultation and could not recall the exact date; that he could not recall whether it was before or after the 16th day of March; that the deceased was accompanied by his wife; that he had on that occasion complained of nervousness and sleeplessness; that he examined him and advised him to go to a lower altitude and consult a physician there; that he at that time had considered it a case of neurasthenia.

The two visits to Dr. Molitor, the first on the 3d of March, 1911, and the second on the 14th of March, 1911, the visit to Dr. Laughlin on the morning of the 16th of March, 1911, and the visit to Dr. Upton some time in the spring of 1911, are the only instances in which it is claimed that the deceased consulted physicians, at any time within five years prior to the date of his application for insurance, with the exception of a former visit to Dr. Molitor about three years before that time, which visit was admitted and set forth in the medical statement signed by the deceased at the time of applying for insurance.

It is contended by the insurance company that the deceased consulted the physicians above named within five years prior to applying for insurance, that such consultations were for a disease of the brain or nerves, and that the statements, answers, and representations made by him at the time of applying for insurance, to the effect that except on one occasion he had not consulted a physician for any cause whatever, within five years prior to the date of the application, and that he had never been treated for any disease of the brain or nerves, amounted to a deception and a fraud upon the insurance company.

But there was a material conflict as to whether the deceased did, in fact, consult either Dr. Molitor or Dr. Upton, except as admitted with respect to Dr. Molitor. Concerning the two alleged consultations of the deceased with Dr. Molitor, at which the latter testified that Mrs. Moats was present, she testified that some time in the spring of 1911, the exact date of which she could not remember, she had gone to consult Dr. Molitor, and that the deceased had gone with her; that he had not gone to consult the doctor concerning himself; that the only conversation between Dr. Molitor and the deceased on that occasion was that Dr. Molitor said something about his stomach being out of order; that that was the only time the deceased had seen Dr. Molitor in her presence, except once about three years before that time, when he had consulted Dr. Molitor for a pain across his back.

Concerning the alleged consultation with Dr. Upton, at which consultation Dr. Upton testified that Mrs. Moats was present, and which took place some time in the spring of 1911, Mrs. Moats testified that she and the deceased had called upon Dr. Upton on the same day that she had consulted Dr. Molitor; that she had heard that Dr. Upton was an eye specialist; that the deceased had been having trouble with one of his eyes for about a week or two; that Dr. Upton had on that occasion removed a lump from the eye of the deceased; that no mention was made on that occasion of sleeplessness, or about her husband's condition; that the doctor did not examine the deceased, and did not speak of nervousness; and that that was the only occasion on which they had ever called upon Dr. Upton.

Concerning the alleged consultation with Dr. Laughlin, on the morning of March 16, 1911, at which consultation Dr. Laughlin testified that Mrs. Moats was present, she testified that she and the deceased had not visited Dr. Laughlin on that date; that they had visited him one day some time after that date; that she thought that the date on which she and the deceased had called on Dr. Laughlin was March 21, 1911.

[5] Whether the applicant had in fact been under the care of or had consulted a physician concerning himself for any cause within five years other than as stated in the application was clearly a question of fact for the jury to determine, and this question was submitted to the jury by the court in a clear and appropriate instruction as follows:

"Now, then, I do not understand that consulting a physician about some slight ailment or indisposition—failure of an applicant, for insurance, to state that he had consulted a physician about some slight or immaterial ailment—would be necessarily a fraudulent statement within the meaning of this policy, but it must be something substantial, something of some import or serious character. It is the duty of an applicant to be honest, fair, conscientious, state the facts as he understands them, so that the company may determine for itself whether it will issue the policy or not. These are proper questions of fact for you to determine from the testimony in the case."

[6] The remaining question relates to the date when the policies of insurance took effect. The defendant contends that they did not take effect until their delivery to the applicant, and that subsequent to making application for insurance on March 16, 1911, and prior to the delivery of the policies to him on April 6, 1911, there occurred a change in the physical and mental health and condition of the applicant, which change was not communicated to the insurance company; that a knowledge of such change in the physical and mental condition and health of the applicant was material to the risk. The evidence on this point was to the effect that, subsequent to making application for insurance, and on the 21st day of March, 1911, the deceased was committed to the Mountain View Sanitarium, at Portland, Or.; that he was treated at the sanitarium for a disease of the nerves; that he was confined there for six days, at the end of which time he was discharged from the sanitarium; that on April 11, 1911, he was again committed to the Mountain View Sanitarium; that he remained there on that occasion for seven days, during which time he was treated for a disease of the nerves; that at the end of that period he was again

discharged; that on April 18, 1911, he was committed to the Oregon State Insane Asylum, at which time, upon examination, he was found to be insane; that he was discharged from the Oregon State Insane Asylum some time later, at which time he was recorded on the books of the asylum as having fully recovered his mental health; that on the 4th day of June, 1911, he was again committed to the Oregon State Insane Asylum; that his condition on the last-mentioned date was almost a reduplication of his condition at the time he was first committed to the asylum, on April 18, 1911, with the exception that the symptoms appeared to be more intense; that he died in the Oregon State Insane Asylum on June 14, 1911. The policy of insurance, dated March 25, 1911, was mailed from the home office of the insurance company, in New York City, to its agent, in La Grande, Or., on the 27th day of March, 1911, and was delivered to the insured on April 6, 1911. The second confinement of the deceased in the Mountain View Sanitarium and the two confinements in the Oregon State Insane Asylum have no bearing upon the question under consideration, for the reason that these confinements occurred subsequent to the delivery to and receipt by the deceased of the policy of insurance.

It is not contended that there were any false representations made by the deceased at any time after applying for insurance and before receipt of the policy by him, nor is it contended that there were any affirmative acts of deception on his part. But it is contended that the failure of the deceased to inform the insurance company, or its agent, at the time of the delivery of the policy to him, that he had been confined in the Mountain View Sanitarium between the dates of March 21, and March 27, 1911, amounted to a deception and a fraud upon the insurance company.

The only conditions subsequent stipulated in the application signed by the deceased, concerning the delivery of the policy, were that the first premium be paid and the policy delivered to and received by the deceased during his lifetime, and that the policy when so delivered should then relate back to and take effect as of the date of the application. And in the policy itself it was expressly provided that after its delivery to the deceased it should take effect as of the 16th day of March, 1911. There was no proviso, in either the application or the policy itself, that the policy should take effect only if delivered to and received by the deceased during good health and insurable condition, although, in fact, at the time of receipt of the policy by the deceased he was apparently in good health and physical condition, having been discharged from the Mountain View Sanitarium about 10 days prior to that time.

The first year's premium had been paid by the deceased at the time of making application for insurance on March 16, 1911. The premium, amounting in each case to the sum of \$134.15, was the amount of the first premium provided for in each policy, and constituted payment for the period of one year, from March 16, 1911, to March 16, 1912. All the time subsequent to making application for insurance and payment of the first year's premium, up to the time of the death of the deceased, was part of the period covered by that premium, which was the payment for the risk assumed during that period.

How, then, can it be seriously contended that, because the deceased did not inform the insurance company that he had been confined in a sanitarium for a disease of the nerves for six days after making application for insurance, and prior to delivery of the policy by the agent of the company to him, he thereby perpetrated such fraud and deception upon the company as would vitiate the policy? The company had been paid by the deceased for the risk which it assumed during that period. Subsequent to the making of application for insurance by the deceased, and up to and including the day on which the policy was delivered to the deceased by the agent of the company, neither the agent nor the insurance company made any inquiry concerning the condition of the health of the deceased; nor did either of them make any inquiry as to whether there had been any change in his physical condition subsequent to making application for insurance. But the contention of the insurance company is that it was incumbent upon the deceased, of his own volition, and without inquiry on their part, to inform it, before accepting the policy of insurance, that he had been confined six days in a sanitarium for a disease of the nerves, subsequent to making application to the insurance company for the insurance covered by the policy.

[7] The express proviso in the application that upon payment of the first premium, and upon delivery to and receipt by the deceased of the policy during his lifetime, the policy should then relate back to and take effect as of the 16th day of March, 1911, and the express proviso in the policy itself that upon such delivery and receipt it should take effect as of the 16th day of March, 1911, are sufficient to firmly establish the terms of the contract that, those conditions being complied with, it was the intention of the parties that the policy was to take effect as of the 16th day of March, 1911. A change in the health of the insured, in the absence of any proviso in the policy, or in the application therefor, that such change would avoid the policy, cannot vitiate it, nor divest the beneficiary of his rights thereunder. That risk was one which the company had assumed by its contract, and for which it had been paid in the first premium.

[8] Nor can we agree with counsel for the insurance company that the representations contained in the application for insurance were continuing representations, and were intended to cover the period between the date of the application and the date of the delivery to and receipt by the deceased of the policy. We think that the doctrine of continuing representations is eliminated from this case by the express provisos contained in the application for insurance, and in the policy, that upon payment of the first premium, and upon delivery to and receipt by the deceased of the policy during his lifetime, the policy should then relate back to and take effect as of the date of the application.

The case of *Cable v. United States Life Insurance Company*, 111 Fed. 19, 49 C. C. A. 216, relied upon by counsel for the insurance company in support of the doctrine of continuing representations, and which the insurance company asserts is decisive of the issues in this case, is very different from the case at bar. In that case the policy of insurance provided that it should take effect only upon payment

of the first premium and delivery of the policy during the lifetime, sound health, and insurable condition of the applicant; and the court accordingly held that, if there had been a change in the health of the applicant between the date of the application and the date of delivery of the policy, the company was entitled to know of it, and to be fully informed concerning it, that it might determine whether, notwithstanding such change, it would consummate the agreement and deliver its policy.

The case of *Equitable Life Assurance Society v. McElroy*, 83 Fed. 631, 28 C. C. A. 365, to which we are referred by counsel for the insurance company, also presents an entirely different state of facts from those contained in the present case. In that case the insured, McElroy, had allowed a policy of insurance to lapse and be forfeited on account of nonpayment of premium. Subsequently negotiations were had between him and the society with a view of securing reinsurance; and during these negotiations he became seriously ill with appendicitis. On the morning of June 28, 1894, the surgeons decided that his situation was grave, and that an operation offered the only chance for recovery. McElroy then called his secretary to his room, delivered to her some blank checks signed by him, and told her to get the policy of insurance from the society and to pay the premium therefor, but not to tell the officers of the society that he was ill. With full knowledge of McElroy's serious illness, and that he was about to be operated on, his secretary went to the offices of the society, told the employes with whom she talked that her employer, McElroy, was away on business, paid the premium on the insurance policy, and secured the policy. The testimony showed that McElroy was dead at the time the policy was delivered to his secretary, although she was not aware of this fact. The basis of the court's decision in that case was that the evidence was undisputed, and that it seemed to show that there was no contract to insure, and no intention to make any such contract, until the premium was paid. The court, therefore, held that the failure of the insured, or of his secretary, to disclose to the society the condition of his health at the time of the payment of the premium by and delivery of the policy to the secretary was a fraud upon the society which vitiated the contract of insurance.

That the doctrine of continuing representations is inapplicable to the facts as disclosed in this case is fully sustained by the decision of the Supreme Court of the United States in the case of *Insurance Co. v. Higginbotham*, 95 U. S. 380, 383, 24 L. Ed. 499. The facts in that case were very similar to those in the case now before the court. The policy in that case was for life, and was dated the 16th day of July, 1869. It stipulated for the payment of the annual premium on or before 12 o'clock on the 16th day of July in every year, and provided that in case the premium should not be paid at the times mentioned, the policy should cease and determine. The first premium was duly paid, but when the next premium became due, on July 16, 1870, it was not paid, and the policy lapsed. In the following October the insured made application to the company for reinstatement of the policy, and the company agreed to reinstate it upon the conditions and in the man-

ner following: On the 1st of October, 1870, the insured, Dr. Day, paid the premium to the agent of the company, and received a receipt for the same. At that time he gave to the agent his certificate of health, and the physician of the company signed his certificate of examination, which was forwarded to the home office of the company. The policy was renewed, and the renewal receipt was sent by the company to its agent, on October 12, 1870. The receipt as dated July 16, 1870, and was given to Day on the 14th of October, 1870. On the 22d day of January following, the insured, Day, died. It was contended by the insurance company that between the time of thus making and presenting his certificate to the agent and the date (14 days later) on which the agent delivered to him the receipt by which his insurance policy was continued in force until July 16, 1871, there had been a change in the health of the insured, and that the failure to make known such change of health was a fraud upon the company which invalidated the policy thus renewed or continued. It was also contended that the representations made on the 1st of October, concerning the condition of the health of the insured, was a continuing one from the time it was made until the delivery of the renewal receipt on the 14th of October, and that, if not true at the latter date, the contract was avoided. Justice Hunt, delivering the opinion of the Supreme Court of the United States, said:

"The facts referred to, we think, show that although actually completed on the 14th of October, the jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relation as of the 1st of the month. The money was paid to the agent at Washington on that day. The full amount of the premium for one year was paid by the applicant, viz., \$137.50. The company cut off the insured from 2½ months of his policy when they issued it on the 1st of October, and dated it as of July 16th, although taking payment of the premium for a year. We think that they did not necessarily intend to cut off an additional 14 days, but may have meant it to be as of the date when the insured paid his money and presented a risk that they were willing to take, and of the time that it would have taken effect if they had responded without a delay of two weeks. Had it been otherwise, we cannot see how the sagacious business men who control this company would have assented to the delivery of the policy without inquiry as to the intermediate time. More than three months elapsed before Day's death, monthly returns being made by the agent; and the company must have known and assented to the delivery of the renewal receipt not only, but to the fact that there had been no inquiry or information as to Day's health after October 1st. The jury might account for it on the theory that the whole contract was intended to be and was as of October 1st, and that it spoke from that date. There is every indication that Day thus relied upon that contract, nor is there any reason to believe that he intended to deceive or to conceal. The company made inquiries to its own satisfaction, so far, in such direction, upon such points, and within such periods, as it thought proper. It was not for him to advise the company of what it should do, or to volunteer information which it did not seek. He paid his money, delivered his certificate, received the renewal when the company chose to give it, found upon examination that it covered the whole period from the July preceding. He lived in the same town with the agent, and received no suggestion from him that anything further was expected, and was warranted in assuming that his contract was intended to take effect from an earlier period than its actual delivery. He probably died in the honest belief that he had thus provided for his widow. It would be far from good faith to his representatives should it now be held otherwise."

We are of opinion that the insurance policies in this consolidated case took effect on March 16, 1911, and covered the entire period from that date up to the death of the insured, and that whatever change, if change there was, in the health and physical condition of the insured prior to the delivery of the policies to the insured on April 16, 1911, was a risk within the terms of the policies, and that the insurance company is liable on its contracts.

The judgment and decree of the lower court is affirmed.

TURNER et al. v. METROPOLITAN TRUST CO. OF CITY OF NEW YORK.

In re WESTERN STEEL CORPORATION.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1913.)

No. 2,257.

1. PLEDGES (§ 56*)—SALE OF PLEDGE—RIGHTS OF PLEDGEE AS PURCHASER—BONDS OF PLEDGOR CORPORATION.

That a corporation as collateral to its note pledges its own mortgage bonds does not change the rights of the pledgee under the contract, and where on default the pledgee becomes the purchaser of the bonds at public auction in good faith and strictly as authorized by the contract, it is entitled to enforce the same to their full face value as it might the obligation of a third person, although it exceeds the amount of the debt.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152-183; Dec. Dig. § 56.*]

2. BANKRUPTCY (§ 316*)—PROVABLE CLAIMS—CORPORATIONS.—BONDS PURCHASED BY PLEDGEE.

The bankrupt corporation borrowed \$600,000 from claimant trust company and to secure its note therefor, which was dated and made payable in New York City, pledged an entire issue of \$2,000,000 of its own mortgage bonds. The contract authorized claimant on default to sell the securities at any broker's board or public or private sale without advertisement or notice, which were expressly waived, and further provided that if the sale were at public auction claimant might become the purchaser. Bankrupt made default and was notified by claimant that, unless payment made before, the bonds would be sold at public auction in New York City 30 days after the note matured. Payment not being made, they were sold on the day fixed, after notice by publication the preceding evening and morning in the three papers most generally used for such purpose, and notice by mail to investors in such securities, and were bought by claimant for \$25,000. The sale was made at the place designated for such sales by rule of the New York courts and at the regular weekly auction of such securities. The property of the bankrupt consisted chiefly of a steel plant in the state of Washington, which had been operated unsuccessfully, and of undeveloped mining lands in Washington, Nevada, and British Columbia, largely incumbered. The property covered by the mortgage was appraised at more than \$350,000 in the bankruptcy proceeding, but its value was speculative and the estimate made largely on hearsay. *Held*, that there was nothing in the circumstances of the sale to impeach the good faith of claimant, nor was the amount bid under all the facts so inadequate as to render it invalid, and that claimant was entitled to prove the bonds against the estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 474-477; Dec. Dig. § 316.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Clinton W. Howard, Judge.

In the matter of the Western Steel Corporation, bankrupt. Appeal by Lester Turner, Sutcliffe Baxter, and Edgar Ames, trustees, from an order allowing the claim of the Metropolitan Trust Company of the city of New York. Affirmed.

This is an appeal by the trustees in bankruptcy of the Western Steel Corporation, a bankrupt, from an order of the District Court, Western District of Washington, Northern Division, reversing an order of the referee in bankruptcy in so far as it rejects and disallows the claims of the Metropolitan Trust Company, appellee herein, upon the bonds and note of the Western Steel Corporation. The effect of the order of the District Court is to allow the claims of the trust company in full. As appears by an agreed statement of facts, these claims arose as follows:

In January, 1911, the Western Steel Corporation borrowed \$300,000 from the Metropolitan Trust Company, pledging as security therefore \$1,800,000 par value of its total issue of \$2,000,000 of mortgage bonds. On April 1, 1911, the steel corporation borrowed \$300,000 additional, executing a note in the trust company's favor for \$600,000, dated April 1, 1911, due August 1, 1911, and pledging the remainder of the bond issue, as well as the \$1,800,000 previously pledged, as security for the first \$300,000 borrowed. On this note James A. Moore, then president and a very large stockholder in the Western Steel Corporation, became guarantor. By the terms of the note, which was dated and made payable in New York City, the trust company, as pledgee, possessed the right upon nonpayment of the note at maturity to sell the collateral bonds at public or private sale, with or without notice, and the right to become a purchaser if the bonds were sold at a public sale. This power of sale and right to purchase were given in the following language: "The said company is hereby authorized, upon the nonpayment of any of the liabilities above mentioned when due, to sell, assign and deliver the whole of the said securities, or any part thereof, * * * at any broker's board or at public or private sale, at the option of the said company, without either advertisement or notice, which are hereby expressly waived. If such securities or property are sold at public sale, the said company may itself purchase the whole or any part thereof, free from any right of redemption on the part of the undersigned which is hereby waived and released."

On August 1, 1911, the date of maturity of the note, the trust company sent the following letter to Mr. James A. Moore, president of the Western Steel Corporation, Seattle, Wash.: "I beg to call your attention to the fact that the note of your company for \$600,000, of which you are the guarantor, which became due and payable to-day, was not paid. I am instructed to notify you that if the same shall not be paid on or before Monday, August 28, 1911, the securities therefor will be sold at public auction in this city, on Wednesday, August 30, 1911, and that in case there shall be a deficiency, this company will look to you to make good any loss."

Mr. Moore, as president of the Western Steel Corporation, on August 11, 1911, replied to the above letter as follows: "Your favor of the 1st inst. to hand, advising me of the extension of time on the note of Western Steel to August 28th. I expect between now and that time to complete arrangements that will take up the note in full."

No part of the note was paid, and the trust company caused the bonds to be advertised in the New York Evening Post on August 29, 1911, and in the New York Times and Wall Street Journal on the morning of August 30th for sale by public auctioneers at half past 12 o'clock of that day in the city of New York, and caused notices of such sale to be mailed to the principal bond buyers, banking and financial corporations, firms, and individuals in the financial district of New York City. The sale was held as advertised, and the trust company became the purchaser of the bonds, as the highest and best bidder, for the sum of \$25,000. This amount, less the expenses of sale, it

credited upon the note for \$600,000. The bonds had never been listed as standard securities, and, concerning their value and the properties which they covered, no definite information was possessed by the commercial world.

The properties of the bankrupt consisted of a number of undeveloped mines and iron ore, limestone, and other minerals in British Columbia, Washington, and Nevada, the values of which properties were highly uncertain. In the course of the bankruptcy proceedings the Nevada iron properties were appraised at \$25,000, but there was a claim for a vendor's lien thereon in the sum of about \$100,000, for which claim proceedings in foreclosure were pending at the time of the institution of these proceedings. There was a steel manufacturing plant and blast furnace in the state of Washington which had been operated intermittently and unsuccessfully but under unfavorable conditions of management. It is agreed that the manufacture of steel is conceded to have been an experimental industry on Puget Sound, "and the suitability of the plant's location, the adequacy and suitability of its construction and equipment, and the possibility of its profitable operation were then in doubt and dispute both in the commercial world generally and in New York, as well as in Seattle and in the state of Washington." Another estate was a tract of land on Graham Island in British Columbia. The interest of the Western Steel Corporation in this tract was this: The steel corporation owned seven-eighths of the stock of a Canadian corporation called the Western Coal & Iron Corporation. This Canadian corporation did not own the land but had an option upon it held in escrow in British Columbia. When the securities of the Western Steel Corporation were sold in New York, and when bankruptcy proceedings were instituted, there was due and payable upon these lands, under pain of forfeiture of the escrows, \$250,000, and there had been paid upon the lands about \$150,000. The escrow agreements called for annual payments of \$50,000, with interest payable semiannually, and provided for absolute forfeiture of all past payments and cancellation of the option in case of 20 days' default in payment of principal or interest. The shares of stock of the Western Steel Corporation in the Western Coal & Iron Corporation were, at the time of the sale of the bonds in New York and at the time of the bankruptcy proceedings, deposited with the trust company as an asset correctly described in the trust deed as held for the security of the bondholders. The right of James A. Moore and the Western Steel Corporation to the shares of stock in the Western Coal & Iron Corporation were, however, at the time of the sale of the bonds in New York and at the time of the bankruptcy proceedings, in litigation in the courts of British Columbia. When the bonds were sold in New York, the Graham Island lands were known to contain a deposit of coal and certain timber; the coal had never been exploited but the timber was reported to be worth a good share of the purchase price remaining unpaid.

When the bonds were sold in New York, about \$25,000 was due to laborers employed upon the steel plant, and this sum constituted a lien upon the plant prior to the mortgage securing the bonds held by the trust company. The appraisers in bankruptcy found that the interest of the bankrupt in the Graham Island property, as represented in the stock of the Western Coal & Iron Corporation, was worth about the sum of \$200,000, although the appraisers stated that they believed that the value of the property, if developed in connection with the operation of the steel plant as a going concern, would be greatly above the figures named.

The appraisers valued the steel plant, blast furnace works, and plant site, with all machinery and equipment used in connection therewith, at \$99,035 on the basis of a quick sale for cash but with the explanation that, valued as a going concern properly financed, the same property with certain material and supplies would be worth \$399,942. The valuation placed upon the estates of the steel corporation, both under and outside the mortgage, amounted to \$458,141, estimated upon the basis of a quick sale for cash; but the same properties were found by the appraisers to be worth much more than this sum if operated as a going concern adequately financed.

It further appears that the estates of the bankrupt corporation were sold after repeated advertisements in the Seattle and another Washington paper.

and also in newspapers published in British Columbia and Nevada. The Metropolitan Trust Company bought the property in for the sum of \$720,000, making payment in bonds to the extent of \$647,010 and in cash to the extent of \$72,990. This sale was confirmed by the District Court sitting in bankruptcy.

The newspapers in New York, in which the sale of the bonds was advertised, are generally considered in the city of New York to be the best media for reaching bidders and buyers of stocks, bonds, and financial securities generally; one of them being the paper designated by the United States District Court in Bankruptcy for the Southern District of New York for the publication of auction sales. The place of the sale was the place designated by the general rules of practice of the Supreme Court of the state of New York for public auction sales and is the usual and proper place for conducting such sales. The bonds were sold at a regular auction held weekly at the time and place for the sale of stocks, bonds, and financial securities and was largely attended by buyers of financial securities. It is agreed that the proceedings for the sale of these securities, the notice given, and the manner in which the sale was advertised and conducted were such as are customary, regular, and usual in the sale of listed or known stocks, bonds, and financial securities marketable in the city of New York. No attack on the sale was made by the steel corporation, and no question as to the validity of the sale was ever raised until after bankruptcy proceedings were instituted against the corporation.

On October 26, 1911, the steel corporation was adjudged a bankrupt in the United States District Court, and the trust company as an unsecured creditor presented its claim in bankruptcy for the amount of the unpaid balance of the note for \$600,000. It did not at that time present any claim for the bonds but did at all times assert its ownership of the bonds as separate obligations of the bankrupt. The bonds were of a total issue of \$2,000,000 face value, secured by general trust deed upon the properties of the bankrupt, with Carnegie Trust Company and Lawrence A. Ramage as trustees for the bondholders. For these two trustees the Metropolitan Trust Company and James F. McNamara had become substitutes before and at the time of the loan of \$600,000 and were the trustees for the bondholders at the time of the proceedings in bankruptcy. The trust deed purported to cover all the properties of the bankrupt but, in so far as personality was concerned, was defective because it lacked the chattel mortgage affidavit required by laws of the state of Washington, and as to personal property, save the shares of stock actually delivered in pledge thereunder, was not binding.

The trust company filed proof of claim on the issue of \$2,000,000 of bonds, together with the entire issue of bonds and the mortgage securing the same, and prayed that, after crediting the amount for which the same should be used in paying for the properties covered by the mortgage and purchased at the bankruptcy sale, it be allowed as a general claim against the estate.

The trustee and referee allowed the claims for the amounts actually advanced by the trust company, with interest, but rejected the balance of the claims on the ground that the trust company acquired no title to the bonds by reason of the sale above mentioned. In due course the district court reversed the action of the referee and held that the sale, being subject to the laws of New York and having been conducted in the usual and customary manner and in accordance with the laws of that state, was valid; that mere inadequacy of price was insufficient to justify the setting aside of the sale; and that in any event the schedule and report of the appraisers showed that the properties owned by the bankrupt corporation were widely scattered, incumbered, and to a great extent unpaid for.

Munn & Brackett, of Seattle, Wash., for appellants.

Frederick Bausman, Daniel Kelleher, Robert P. Oldham, and Robert C. Goodale, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The contract between the corporation and the trust company, like many contracts of pledge, was entered into in consideration of a cash loan by the pledgee to the pledgor. The loan was made in reliance upon the collateral and on the pledgor's contract that the collateral might be sold and the pledge relationship ended at the time and in the mode expressly set forth in the contract of pledge; that upon nonpayment of the note for \$600,000 the trust company was authorized to sell, assign, and deliver the whole of the securities or any part thereof "at any broker's board or at public or private sale, at the option of the said company, without either advertisement or notice which are hereby expressly waived." We need not dwell at length upon the validity of the general features of such a contract, because the appellants say in their brief that a provision in a contract of pledge that the pledgee may sell the collateral without notice to the pledgor is valid and binding; they admit that where a pledge agreement provides that the collateral may be sold at private rather than public sale the stipulation is valid; and they concede that a provision that a pledgee may become the purchaser at a public sale if the sale is conducted in strict good faith and in accordance with the terms of the contract is valid. Nevertheless they say that this case is distinguishable because the trust company was not merely trustee for the pledgor but for a pledgor which had placed itself entirely in the power of the pledgee by the waiver of all the common-law safeguards in that the pledgee had power to sell without notice or advertisement at public or private sale, and at the public sale was authorized to become the purchaser of the pledgor's obligation. In their argument that these bonds were never out of the possession of the trust company pledgee, that no new consideration passed, and that no public sale held on the advertisement given could be valid, appellants make these contentions:

First. That, where the pledged collateral consists of an obligation of the pledgor in a greater amount than is due and the collateral is purchased by the pledgee, he cannot enforce it against the pledgor in an amount greater than the sum originally loaned.

Second. That the intent of the pledgee in making a sale on less than 24 hours' notice must be held to have been to acquire title to the collateral by bare literal compliance with the power of sale or wantonly to sacrifice the equity of the pledgor.

Third. That a sale without notice to the public is not a public sale, and that a just construction of the pledge agreement in the present case is that advertisement was waived by the pledgor only in case of private sale.

Fourth. That the duty of the pledgee was to obtain the highest cash value out of the collateral, and that, if it failed to act fairly in the conduct of the sale with such purpose in view, the sale must be held invalid without regard to the terms of the pledge agreement.

Fifth. That under the facts of the present case inadequacy of price is so great as to constitute conclusive proof of lack of good faith on the part of the pledgee in the conduct of the sale.

[1] The attempt to make a distinction between the rule which gov-

erns contracts of pledge, where the pledgor prefers to pledge its own mortgage bonds as collateral, and that which governs such contracts, where the pledgor pledges the bonds of another corporation, is not well founded. The contract measures the rights of the parties; and where the expressed intention is that in case of foreclosure the bonds deposited may be sold as existing securities, and the pledgee is given the right to become the purchaser, why should there be any less good title conveyed to such purchaser than if he were selling the bonds of another corporation? The reason for permitting the pledgee to become a purchaser is to permit him to buy the bonds, if he should wish to do so, at a price higher than any one else will pay for them. Granting that under such a contract the relationship of a pledgee to the bonds may offer temptation to sacrifice the rights of the pledgor, still, if upon close scrutiny it appears that a sale has been fairly made and the right to become a purchaser has been specifically given to the pledgee by the agreement between the parties, the exercise of such a right must be upheld and its attendant advantages, whatever they may be, must be accorded to the purchaser. To hold otherwise would be to say that the courts can make a contract which will materially change the relationships of the parties by depriving one of them, in case of default by the other, of the right to acquire full legal title to the thing pledged. The essential characteristic by which a pledge is distinguished from a common-law lien is that the article pledged may be sold by the pledgee upon the nonperformance of the pledgor's obligation. A sale divests the title of the pledgor and gives to the purchaser a good title to the property pledged; the pledgee selling both his own interest and all the right which the pledgor could have empowered him to sell at the time the contract of pledge was made.

The facts here fail to show the features of a mortgage. The transaction was a mere lien with respect to bonds of a corporation. There was no conveyance of legal title upon an express condition subsequent but delivery of personal property by a debtor, in security for a debt, accompanied by a written agreement whereby the debtor agreed that, if he did not pay the debt by a certain time, the creditor might dispose of the property to pay the debt. *Jones on Collateral Securities* (3d Ed.) § 8. A corporation which has issued its bonds frequently pledges them as collateral security for a debt. Nor is it unusual that in suits for foreclosure the bonds pledged are offered at public sale and are purchased by the pledgee, who is entitled to the full face value of the bonds. Cases where this rule has been recognized by the courts are *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 54 Fed. 759, 4 C. C. A. 561; *Gilchrist Transportation Co. v. Phoenix Ins. Co.*, 170 Fed. 279, 95 C. C. A. 475; *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.* (C. C.) 86 Fed. 975; and *Bush v. Adams* (C. C.) 165 Fed. 802.

In *re Woods' Estate*, 52 Md. 520, decided in 1879, is a learned discussion of the attitude of a creditor who held under a pledge agreement notes of his debtor of a face value largely in excess of the sum loaned to the debtor; such notes being delivered as collateral security for the actual debt of the debtor. The court, among other things, said:

"It is true the effect of carrying out these contracts by a sale of the notes was to increase the general indebtedness of the firm, but it did not increase the debt then due the Garretts for which the notes were pledged as security. But this increase of general indebtedness is exactly what the contracts contemplated and what the parties intended in case a sale was made, so that the question comes back at last to the validity of the contracts in this respect. Now, if instead of giving these notes, in the form in which they were drawn, to the Garretts as collateral security, the firm had placed them in the hands of a broker for sale, and he had sold them to the same parties and for the same price the Garretts obtained for them, and the firm had received the proceeds and applied them to this debt, exactly the same result would have followed. There would have been the same increase of the general indebtedness of the firm and the same diminution of the Garrett debt which was effected by the sale under the contracts, and in the case supposed it will hardly be contended that the purchasers would not have had a valid claim against the firm for the full amount of the notes. Such notes are constantly sold on the streets in all the large commercial cities of the country, and it is not uncommon for merchants to resort to this mode of raising money. However hazardous it may be, there is nothing unlawful in it, and it cannot be doubted but that the purchasers acquire a good title to such paper. It is apparent to my mind that it was in view of this recognized practice, and the acknowledged rights of purchasers in such cases, that these contracts were made and the notes sold thereunder."

Appellant cites *Peacock v. Phillips*, 247 Ill. 467, 93 N. E. 415, 32 L. R. A. (N. S.) 42, as sustaining a contrary contention. The court there seems to have followed the settled law of the Illinois jurisdiction and interpreted the power of sale given in the contract in the case as merely enabling the bank to do an act to obtain payment which could not otherwise be done, but not as conferring a power to bestow a greater right upon the purchaser with full notice of the facts and circumstances and the extent to which the bank could enforce the obligation than the bank would have had in case of foreclosure. The case loses much strength as an authority herein because it expressly recognizes that corporate bonds are upon a different footing from promissory notes, secured by trust deeds, given as collateral.

[2] Inasmuch as the contract involved herein was not in itself invalid, its provisions became enforceable unless it appears that, in the manner of enforcement, some wrong was done to the steel corporation. Of course the power of sale must have been fairly exercised; but, if it was pursued under the letter as well as the true spirit of the contract, there can be no conclusion of unfairness or of sacrifice of the equity of the pledgor. The terms of an agreement of pledge may be severe; but, if they are complied with, it is but carrying out the intention of the parties. The notice sent on August 1, 1911, by the Metropolitan Trust Company to the Western Steel Corporation made it perfectly plain that unless the note of the corporation was paid on or before Monday, August 28th, the securities would be sold at public auction on Wednesday, August 30th. This gave the steel corporation more than three weeks' time within which to perfect an expected "arrangement" whereby they would take up the note in full before sale of the securities. But they failed to do anything. Then the pledgee, as authorized by the contract, proceeded to sell at public sale after notice published in those New York papers customarily used by pledgees in New York to give notice of sales of pledged col-

lateral. The sale was made at a regular weekly auction in salesrooms in New York where buyers of securities congregate; the auctioneers who conducted the sale were well known as carrying on a large business in selling stocks and bonds; the salesrooms were those designated by the rules of practice of the Supreme Court of the state of New York for the sale of real estate; and the sale was made to the persons who made the highest bid.

Thus far we can find no prejudice to the rights of the steel corporation. That the notice of sale was published for only one day before the sale and upon the day of the sale is not evidence of wrongdoing, for the contract expressly authorized a sale, public or private, "without either advertisement or notice" which were expressly waived. The contract was not unusual, nor was the notice for less time than is customarily given. The pledgor itself had had ample notice that a sale would be made, yet made no objection to the contemplated step. Moreover, the trustees offer no evidence to the effect that, if longer advertisement had been had, better bids would probably have been made. Indeed, they presented no testimony whatever of an affirmative character which would warrant this court in reversing the decision of the court below. The argument of inadequacy of price paid for the bonds is pressed with much earnestness. Reiterating the elementary rule that if there were any evidence of wanton disregard of the rights of the pledgor, or any such gross inadequacy of price as to raise a presumption of fraud, the sale should be set aside, nevertheless we find nothing in the record to show that the price paid or the circumstances surrounding the sale indicate fraud or lack of good faith. It is true that the appraisal in bankruptcy, which was made several months after the sale, showed that the whole property covered by the bond issue was worth at least \$366,035, and much more as a going concern properly financed; but the estimates of value put upon the mineral claims were based largely upon hearsay and apparently in some instances were not made with full information of the state of the liens pending against certain of the property appraised. The appraisers reported that the coal properties required development work before it would be possible to realize upon them; foreclosure would have to be made in several matters where liens existed; and liens for labor would have to be satisfied. The steel plant had never been operated successfully, nor did the pledgor when it pledged its bonds put any estimated value upon them in the contract of pledge, although in the body of the contract there was a description of the bonds and a space in which to insert an "estimated market value of \$——."

In the light of all these circumstances, there is ample support for the decision of the court below holding that neither gross inadequacy of price nor fraud was established or could be presumed. As said by the court in its opinion:

"The schedule and the report of the appraisers show that the properties owned by the bankrupt corporation are widely scattered, incumbered, and largely unpaid for. Their value is uncertain and highly problematic at best. Suffice it to say on this branch of the case that no such inadequacy of price is shown as would shock the conscience or raise a presumption of fraud where it is conceded that no fraud was practiced or existed."

Muhlenberg v. Tacoma, 25 Wash. 36, 64 Pac. 925, cited by appellants, is not directly pertinent because the court found that the sale of the pledge was with the object of getting title to the property. Perkins v. Applegate (Ky.) 85 S. W. 723, was a case where the facts disclosed false statements and positive deception and improper conduct.

As sustaining a sale made where the procedure was much like that pursued in the present case, the following cases are relevant: Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co., supra; Morris & Whitehead v. East Side Ry., 104 Fed. 409, 43 C. C. A. 605; Wheelwright v. St. Louis, N. O. & O. C. T. Co. (C. C.) 56 Fed. 164; Fidelity Insurance Co. v. Roanoke Iron Co. (C. C.) 81 Fed. 439; Farmers' National Bank v. Venner, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690; In re Mertens, 144 Fed. 818, 75 C. C. A. 548; Hiscock v. Varick Bank of New York, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945.

We think that these views sufficiently meet the main points of appellants' case. We have given very careful consideration to the arguments, and our conclusion is that the contract was valid and that there is no sufficient reason advanced for setting aside the sale made thereunder and denying to the appellee the full benefit of its securities.

Decree affirmed.

CITY WATER CO. OF CHILLICOTHE v. CITY OF CHILLICOTHE, MO.

(Circuit Court of Appeals, Eighth Circuit. July 24, 1913.)

No. 3,914.

1. WATERS AND WATER COURSES (§ 188*)—WATER COMPANIES—MUNICIPAL GRANTS AND CONTRACTS.

Where a city ordinance, entering into a contract with and granting a franchise to a water company, specifies a definite term for its duration, the rights of the company and the obligation of the city under its contract terminate on the expiration of such term, and cannot be enlarged by implication.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 287, 288; Dec. Dig. § 188.*]

2. WATERS AND WATER COURSES (§ 200*)—WATER COMPANIES—CONTRACT WITH CITY—DURATION.

Such an ordinance limited the franchise of the company to 20 years and bound the city to pay hydrant rentals for "the full term as hereinbefore specified." *Held*, that the obligation of the city to pay such rentals terminated at the end of 20 years, and the contract was not extended by the fact that the city permitted the company to occupy the streets with its pipes thereafter.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

3. WATERS AND WATER COURSES (§ 200*)—WATER COMPANIES—LIABILITY OF CITY FOR HYDRANT RENTALS—IMPLIED CONTRACT.

Under Rev. St. Mo. 1909, § 2778, which provides that no city or town shall make any contract, except in writing, etc., as construed by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Supreme Court of the state, a city cannot be held liable to a water company for hydrant rentals, after the expiration of the written contract between them, on the ground of holding over as lessee or any other ground of implied contract.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 274; Dec. Dig. § 200.*]

4. **WATERS AND WATER COURSES (§ 200*)—WATER COMPANIES—LIABILITY OF CITY FOR WATER—CONVERSION.**

A city cannot be held liable in tort for the conversion of water, which it used from fire hydrants of a water company without any contract therefor, where it appears that such use was with the company's knowledge and consent.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 274; Dec. Dig. § 200.*]

In Error to the District Court of the United States for the Western District of Missouri; John C. Pollock and Arba S. Van Valkenburg, Judges.

Action at law by the City Water Company of Chillicothe against the City of Chillicothe, Mo. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 196 Fed. 234.

Clifford Histed, of Kansas City, Mo. (James Harkless, of Kansas City, Mo., on the brief), for plaintiff in error.

Lewis A. Chapman and B. B. Gill, both of Chillicothe, Mo. (John H. Taylor and Forrest M. Gill, both of Chillicothe, Mo., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. The City Water Company, which was the plaintiff below, brought this action to recover of the defendant \$22,154, so-called hydrant rental, from October 16, 1906, to September 30, 1911. The city defended on the ground that the contract under which it agreed to pay for the water expired on October 16, 1906. The court directed a verdict for the defendant.

In the first count of the petition the company sought to recover upon an express contract, which contract is found in the ordinance of October 16, 1886, under which the system of waterworks was constructed. The ordinance commences as follows:

"Sec. 1. Be it ordained by the mayor and city council of the city of Chillicothe, Missouri, that in consideration of the premises and the contract herein-after set out there is hereby granted to Henry C. Comegys and Jared E. Lewis, of the city of New York, and their assigns and successors, the rights, privileges, and franchises herein contained, and the contract heretofore entered into by and between the mayor of the city of Chillicothe, Missouri, on behalf of said city, and the said Comegys & Lewis, is hereby ratified and confirmed."

The contract is then set out in full. Such portions of it as are material are as follows:

"(10) The said Comegys & Lewis, their assigns and successors, in addition to said fire hydrants, agree to furnish, free from any additional charge or expense, water for four public drinking fountains, one in each ward of said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

city, for man and beast, and one spray fountain in the city park, and for city and public school buildings, fire, drill, and engine house, and for flushing gutters and sewers."

"(11) The said Comegys & Lewis, their assigns and successors, further agree to sell the aforesaid waterworks to the city of Chillicothe, if said city shall so elect, at the expiration of ten years from the date of the contract, and every five years thereafter, * * * and should the said city elect not to purchase and own the said works in the manner and time aforesaid, then all the rights and privileges of this contract granted to said Comegys & Lewis, their assigns and successors, shall continue in full force and effect until this contract shall expire by limitation, or as may be otherwise hereinafter provided."

"And in consideration of the fulfillment of all the foregoing agreements and obligations entered into by said Comegys & Lewis, their assigns and successors, the city of Chillicothe, through its board of mayor and city council, hereby agrees and stipulates as follows:

"(1) To grant to Comegys & Lewis, their assigns and successors, the right and franchise to construct, maintain, and operate waterworks in said city of Chillicothe for public and private supply of water within said city for the period of twenty years."

"(3) The said city of Chillicothe, Missouri, agrees to pay the said Comegys & Lewis, their assigns and successors, an annual rental of thirty-five dollars for each of said first ninety hydrants set, erected and put in use as aforesaid, and further agrees to pay an annual rental of thirty dollars for each hydrant placed and put in use upon the extension of mains which may be ordered laid by said city of Chillicothe, said extension to be at the rate of ten (10) fire hydrants to each mile of said pipes so laid, and located at such points as the city authorities may determine; all of the said rental to be paid in equal semi-annual payments in the full term as hereinbefore specified."

The second section of the ordinance is as follows:

"Sec. 2. For the purpose of meeting and paying the said hydrant rental as provided in this ordinance, there is hereby set apart during the continuance of this contract out of the annual levy for city purposes not exceeding five mills on the dollar of the assessed annual valuation of all taxable property in the city, which, when collected, shall be paid into a special fund known as the 'Water Expense' Fund, which shall not be used or applied to any other purpose whatever than the payment of the expense provided for in this ordinance; provided that any surplus in said water expense fund may be applied to any other lawful purpose."

As said in the case of the City and County of Denver v. New York Trust Company, 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101, decided by the United States Supreme Court, May 26, 1913:

"The word 'contract' is used here, as elsewhere in the ordinance, as inclusive of the franchise to occupy and use the streets."

[1] There is nothing in the ordinance indicating what the rights of the parties should be at the expiration of the 20 years named therein, but this fact does not authorize a court to enlarge by implication the rights of the parties as fixed by the contract. In *Detroit United Railway v. City of Detroit*, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056, decided by the Supreme Court on May 26, 1913, it is said:

"Nor do we find more force in the claim of an implied contract to permit the railway to remain in the streets under such reasonable arrangements for public service as the situation might require. The right to grant the use of the streets was in the city. It had exercised it, had fixed by agreement with the railway the definite period at which such rights should end. At their expiration the rights thus definitely granted terminated by force of the terms of the instrument of grant. The railway took the several grants with knowledge of their duration, and has accepted and acted upon them with that fact clear-

ly and distinctly evidenced by written contract. The rights of the parties were thus fixed, and cannot be enlarged by implication. *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296 [22 C. C. A. 334]; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234 [91 N. W. 1081]; *Scott County Road Company v. Hines*, 215 U. S. 336 [30 Sup. Ct. 110, 54 L. Ed. 221]; *Turnpike Company v. Illinois*, 96 U. S. 63 [24 L. Ed. 651]."

[2] The time during which the city bound itself to pay the hydrant rental was expressed in paragraph 3, by saying that it should be for "the full term as hereinbefore specified." The only term specified in the contract, either before or after this provision, is the term of 20 years found in the first of the clauses which state the obligations of the city. That the term of 20 years is "the full term as hereinbefore specified" admits of no doubt. The same construction must be placed upon this clause in the contract as if, instead of saying "for the full term hereinbefore specified," it had said "for the full term of twenty years." This period of 20 years expired on the 16th day of October, 1906. All the rentals accrued prior to that date have been paid by the city. Those here sought to be recovered are for periods after that date.

The theory of the plaintiff is that the provision which requires the company to furnish water contains no limitation as to the time during which it was to furnish it; that therefore it was bound to furnish it, even after the expiration of the 20 years, if the defendant allowed it still to occupy the streets with its mains and hydrants; and that, being bound to furnish it, the city was bound to pay for it. The contract, however, expressly limited the period during which the city was bound to pay to 20 years. The obligations of the company and the city in this respect were reciprocal. When the city agreed to pay for 20 years only, it necessarily followed that the company was bound to furnish water for 20 years only. The theory that the obligation upon the company to furnish water was unlimited as to time cannot therefore be maintained.

The contention of the plaintiff is that the limitation of 20 years applied only to the franchise or right to occupy the streets of the city for the purpose of its business, and that the city might waive it. That the city might waive this limitation and allow the company to stay in the streets is one thing; but to say that this mere waiver extended the period during which the city was bound to take the water and to pay the hydrant rentals named in the ordinance is quite another thing. If this were true, the result would be that the city would be bound to pay during the extended period, whether it used the water or not. If it established a system of its own, or took water from a system established by another company, it would still be obliged to pay the plaintiff if it allowed it to stay in the streets. In other words, the only way by which the city could have relieved itself of the obligation to pay the rental was by, immediately on the expiration of the 20 years, ordering the plaintiff to move its pipes from the streets. The contract admits of no such construction.

Does the fact that the city used the water after October 16, 1906, enable the plaintiff to recover upon the original contract? Under that contract the city was unquestionably bound to pay the hydrant rental

during the period of 20 years, whether it used the water or not. If sued during that period, the fact that it had not used the water would have constituted no defense. How, then, can the mere fact that the city after that period used the water create an obligation under the contract, when that fact during the existence of the contract was not necessary to create such obligation?

[3] It is further claimed by the plaintiff that the relation established by the ordinance between the parties is that of landlord and tenant, that the company leased the hydrants to the city for a period of 20 years, that upon the expiration of that period there was a holding over, and that thereby the contract was converted into a leasing from year to year. The case principally relied upon by the plaintiff to support this theory is *Appleton Waterworks Company v. City of Appleton*, 132 Wis. 563, 113 N. W. 44. In that case, after the period named in the ordinance had expired, the company undertook by notice to increase the hydrant rental over the amount named in the ordinance. A judgment in its favor in the court below was reversed, and the case would have been dismissed, had it not been apparently for an agreement by the city that it was liable for the amount named in the ordinance. It is thus seen that the point at issue in the case at bar was not litigated nor decided in that case. It appeared, moreover, that after the period named in the ordinance had expired the city paid and the company received the amount named therein, that the city was willing to continue payment of such amount for the future, and had appropriated money therefor. It further appeared that after the expiration of the term mentioned in the ordinance, and prior to the notice increasing the hydrant rental, the contract had been continued from year to year by mutual consent. In the case here it appears that nothing of that kind took place. The defendant has insistently refused to recognize the existence of any contract between itself and the plaintiff since October 16, 1906. It has refused to pay any rental as provided in the ordinance, and it seems that the plaintiff to some extent has assented to the theory that the original contract was not in force during the period elapsing since October 16, 1906. By the terms of the ordinance the company was bound to furnish water to the City Hall, yet after the expiration of the contract it furnished water to a rest room in the City Hall, charged the city for it, and the city paid the bill. This would not have been done, had the plaintiff considered that the original contract was continued in force from year to year. Moreover, the ordinance of June 15, 1908, by which the parties settled a claim for rental accruing prior to the expiration of the contract, contained this provision:

"It is understood by both parties to this contract and ordinance that since the date of the expiration of the water company's franchise with the city, viz., October 16, 1906, there has been no agreement or contract between the city and the said company by the terms of which the city is to pay for water furnished the city by the company."

The evidence shows that since October, 1906, the parties to this suit have had negotiations and dealings concerning their relation to each other, that the company has occupied the streets during that time and has sold water to private consumers, and that during this time the city

has never in any way recognized the original contract as being so far in force as to compel it to pay any hydrant rental.

In the application of the doctrine of landlord and tenant to this case there is, moreover, a difficulty in pointing out any particular authorized act of an agent of the city which would constitute such a use of the water immediately after October 16, 1906, as to indicate an intention to hold over. There is evidence that water was used on the occasion of certain fires in the city, but when these fires occurred does not appear. But, in any event, the theory that the relation of landlord and tenant existed between the parties cannot be applied to any case arising in Missouri, by reason of the statutory provisions hereinafter referred to. The plaintiff's claim must rest upon the theory that after 1906 there was a contract from year to year and for each year. This would, however, be a new contract, or a series of new contracts, and would not be the contract of 1886. Such a contract, if it existed, would be an implied contract, and not an express one. The authorities cited by plaintiff indicate that the contract between a landlord and tenant resulting from a holding over after the expiration of the term named in the original lease is an implied contract. When articles furnished are consumed, the law implies a contract to pay for the articles. When a tenant holds over, the law implies a contract to pay rent. In both cases there is an implied contract, but no express one. In one case the implication is that there will be paid what the article is reasonably worth; in the other, that there will be paid the same amount as has been paid. The fact that such an amount appears in some written document does not make an express contract out of an implied contract. The contract resulting from a holding over by a tenant being then an implied one, it falls under the condemnation of the Missouri statute hereinafter referred to. There can be no recovery on the first count of the petition.

This brings us to the consideration of the second count of the petition, which, so far as here material, is as follows:

"Plaintiff, further complaining, says: That continuously from the 16th day of October, 1906, to and including the 30th day of September, 1911, plaintiff was the owner of a system of waterworks duly located, installed, and in operation in the city of Chillicothe. That there were and are upon said system one hundred thirty-four (134) fire hydrants, and that during all of the time herein referred to the plaintiff continued to and did operate said waterworks system, and furnish through the same to the said fire hydrants a constant supply of water. That during all of said times the city of Chillicothe had and maintained an apparatus and equipment for the extinguishment of fires, and was in control and possession of the said fire hydrants. That from the 16th day of October, 1906, down to and including the said 30th day of September, 1911, the said one hundred thirty-four (134) fire hydrants still remaining intact and under the control of the defendant, and the defendant having access thereto, the said defendant did, during all of said time, use said hydrants and the water therefrom for the purpose of extinguishing fires, for fire, drill, and engine houses, and for flushing sewers and gutters, and other public uses. That thereby the said defendant became liable to the plaintiff for the reasonable value of the water and the use of said fire hydrants."

The demurrer to this count was sustained on the ground that a recovery thereunder was prohibited by section 2778 of the Revised Statutes of Missouri of 1909, which section is as follows:

"Section 2778. Contracts—Execution of by Counties, Towns, etc.—Form of Contract.—No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

The decisions of the Supreme Court of Missouri upon the effect of this statute are numerous and uniform. They hold that no liability can be imposed upon a city to pay the reasonable value of articles which it has accepted and used, when section 2778 has not been complied with. They hold, therefore, that a city cannot be made liable upon an implied contract. *Woolfolk v. Randolph County*, 83 Mo. 501; *Anderson v. Ripley County*, 181 Mo. 46, 80 S. W. 263; *Phillips v. Butler County*, 187 Mo. 698, 86 S. W. 231; *Morrow v. Pike County*, 189 Mo. 610, 88 S. W. 99; *Miller v. Douglas County*, 204 Mo. 194, 102 S. W. 996; *State ex rel. v. Dierkes*, 214 Mo. 578, 113 S. W. 1077.

A perusal of the statute above quoted and of these decisions will show that the theory of landlord and tenant advanced by the plaintiff cannot help it. The only written contract in the case expired on October 16, 1906. If the defendant is liable in this action, it must be by reason of something done by it after that date, and the act then done by it must have in legal effect produced a contract between it and the water company. But by the terms of section 2778 that contract was required to be in writing, was required to bear date after October 16, 1906, and was required to bear the signature of the mayor. No such writing was ever executed.

[4] It thus appears that if the plaintiff claims to recover upon this count upon the theory that it has furnished water and the city has used it, or upon any theory involving a contractual relation between the parties, the claim cannot be sustained. This the plaintiff seems to admit, as it says in its brief:

"Therefore, in the cases in which such recovery has been denied on implied contract, cited by Judge Pollock, and elsewhere appearing in the Reports, it would have amounted to a plain and palpable evasion of the statute to uphold the right of recovery. Manifestly, under those decisions, it would nullify the entire purpose of the act if the municipality, and those dealing with it, could evade the terms of the statute, and purposely make a void contract, and thereby create a valid obligation."

And in its brief it disclaims any such intention. It says:

"This relation, whatever its nature, was not the result of or in pursuance of agreement, and hence was not a subject-matter that could have been reduced to writing, for the very pointed reason that no arrangements had ever been made, or attempted to be had, between the city and the plaintiff, which could have been reduced to writing. It is not a case of the application of the doctrine of liability growing out of obligation assumed by or at the special instance or request of another, nor a service performed at the instance and request of the city, but it was a taking and appropriation of the property and use in the absence of any arrangement, either general or special, and without any negotiation or understanding of any kind."

It does, however, seek to sustain this count on the theory that it is to recover damages for a tort. The count, however, is wanting in all the allegations essential to such an action. It contains no allegation of any wrongdoing on the part of the defendant. It does not allege that the defendant unlawfully and without the knowledge of the plaintiff took water from the hydrants. It does not allege that this was done without the consent of the plaintiff. On the contrary, it negatives any such idea by alleging that the plaintiff furnished to the hydrants a constant supply of water.

There can be no conversion where the taking is with the consent of the owner. If the complaint had alleged that the plaintiff had turned the water off from the hydrants, disconnected them from its mains, and that the defendant had unlawfully connected them and used the water, without the knowledge or consent of the plaintiff, a different case would have been presented from that now before the court. The cases cited from the Supreme Court of Missouri to show that municipalities are liable for torts committed by them have no application to this case. The demurrer to the second count was properly sustained. In *Boise Artesian Hot & Cold Water Company, Ltd., v. Boise City*, 230 U. S. 84, 33 Sup. Ct. 997, 57 L. Ed. 1400, decided by the Supreme Court of the United States on June 16, 1913, and since this case was argued, the statutory provisions of Idaho and the facts in the case were so different from the statutory provisions of Missouri and the facts in this case that the holding in that case that the city was liable for water rent furnishes no authority for a similar holding in this case.

The judgment of the court below is affirmed.

AMERICAN-HAWAIIAN S. S. CO. v. BENNETT & GOODALL et al. †
 BENNETT & GOODALL v. AMERICAN-HAWAIIAN S. S. CO. et al.
 (Circuit Court of Appeals, Ninth Circuit. August 18, 1913.)

No. 2,230.

1. SHIPPING (§ 54*)—CHARTERS—LIMITATION OF LIABILITY OF CHARTERER.

Where a vessel is insured by the owner, a charter of the same, which is a demise of the vessel, may lawfully limit the liability of the charterer to such loss or injury as is not covered by the policies of insurance, even though the vessel is without motive power and must be towed.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. § 54.*]

Liability for loss of or injuries to chartered vessel, see note to *Salem Brick & Lumber Co. v. Donald & Taylor*, 116 C. C. A. 508.]

2. INSURANCE (§ 403*)—CAUSE OF LOSS—MARINE INSURANCE—NEGLIGENCE OF OWNER, MASTER, OR CREW—"PERILS OF THE SEA."

A policy of insurance against perils of the sea covers a loss by stranding or collision although arising from the negligence of the insured or of the master or crew.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1091; Dec. Dig. § 403.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5295-5301.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 29, 1913.

3. INSURANCE (§ 403*)—CAUSE OF LOSS—MARINE INSURANCE—"PERIL OF THE SEA."

The striking and stranding of a lighter while being towed in the usual manner in Napa creek, which is a tidal tributary of San Francisco Bay, was due to a peril of the sea within the terms of an insurance policy thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1091; Dec. Dig. § 403.*

Appeal and Cross-Appeal from the District Court of the United States for the First Division of the Northern District of California; John J. De Haven, Judge.

Suit in admiralty by the American-Hawaiian Steamship Company against Bennett & Goodall, a corporation, respondent, and the Napa Gravel & Material Company and the American Bonding Company of Baltimore brought in by petition of respondent under admiralty rule 59. From the decree libellant and respondent appeal. Affirmed.

Louis T. Hengstler, of San Francisco, Cal., for American-Hawaiian S. S. Co.

Jesse W. Lilienthal and Albert Raymond, both of San Francisco, Cal., for American Bonding Co., of Baltimore.

Edwin T. Cooper, William Denman, and Denman & Arnold, all of San Francisco, Cal., for Bennett & Goodall.

Theodore A. Bell, of San Francisco, Cal., for Napa Gravel & Material Co.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. These appeals grow out of a libel filed in the court below by the American-Hawaiian Steamship Company against Bennett & Goodall to recover the value of a certain lighter belonging to the libellant and by it chartered, together with another one, to Bennett & Goodall, and which lighters were subsequently sub-chartered, with the consent of the libellant, to the Napa Gravel & Material Company, the performance of which contract with Bennett & Goodall was secured by a bond executed by the American Bonding Company of Baltimore. The subcharterer and its bonding company were made parties to the proceeding on petition of the respondent Bennett & Goodall, to the end that the entire controversy might be settled in the one action. One of the provisions of the subcharter was as follows:

"The entire barges are hereby let and surrendered to the said (Napa Gravel & Material Company) who shall have exclusive control thereof."

And another of its provisions made the subcharterer "fully responsible for and" liable "to pay on demand any and all damages and deterioration to said barges and to each and both of them not directly due to ordinary wear and tear or not included in and covered by the insurance policies now or hereafter in existence insuring said barges."

The bonding company bound itself in a certain stated sum of money for the faithful performance of all of the obligations of the subcharterer, "provided, however, that the surety shall not in any event be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

liable for the payment of any damage or loss coverable by policies of insurance insuring said barges against damage or loss by accident or fire." As a matter of course, if, upon the record, the respondent corporation Bennett & Goodall is not liable for the loss of the vessel in question, the action will likewise be ended as respects the subcharterer and the bonding company. The charter to Bennett & Goodall consisted of a letter from the libelant, the terms and conditions of which were accepted by Bennett & Goodall, the pertinent portions of which are as follows:

"You [Bennett & Goodall] are to be responsible for these lighters and whatever gear is on them when you take them, and are to return them in as good order and condition as when you got them, reasonable wear and tear and happenings covered by their present policies of insurance excepted. You are particularly not to permit anything to be loaded on them or unloaded from them in a manner that will twist or strain them, and if they are lost through any cause that will permit our underwriters to make a successful defense against paying the face of the policies, you are to be responsible. We are to keep the lighters insured as they are now insured," etc.

Notwithstanding the foregoing express provisions of the charter party, the libel alleged it to be as follows:

"That on or about the 18th day of March, A. D. 1907, the libelant was the owner of the lighter called 'No. 1'; that on or about said 18th day of March, A. D. 1907, the libelant and respondent made an agreement in writing by the terms of which libelant chartered and hired said lighter 'No. 1' to respondent for a monthly rental then and there agreed upon; that among other things it was then and there agreed between libelant and respondent that respondent should be responsible to libelant for said lighter, and in particular for the loss thereof, and should return said lighter to libelant in as good order and condition as when received; and that in case respondent should lose or fail to return the said lighter the agreed value thereof to be paid by respondent to libelant should be the sum of \$7,500."

It is plain that the contract as alleged in the libel is not the charter party actually made.

The record shows that the libelant had shortly before chartering the lighters insured them for their full value, the policy covering "adventures and perils * * * of the seas, * * * barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage to said vessel or any part thereof," which policy was in force at the time of the execution of the charter party in question. Turning to it, it is seen that the responsibility of Bennett & Goodall in respect to the care and return of the lighters is therein specifically stated in two places. In the first instance they are expressly required to return them in as good order and condition as they were in when they got them, "reasonable wear and tear and happenings covered by their present policies of insurance excepted"; this provision being supplemented by the subsequent express clause that, "if they are lost through any cause that will permit our underwriters to make a successful defense against paying the face of the policies, you are to be responsible," following which is the provision that "we are to keep the lighters insured as they are now insured." We agree with the court below that the clear meaning of this language is to exempt the respondent Bennett & Goodall cor-

poration from liability for any loss caused by a happening covered by the policy of insurance.

The trial court found in effect that that company took possession of the lighters under the terms and conditions of the charter party and performed all of its agreements with respect thereto up to the time of its rechartering them, with the consent of the libelant, to the Napa Gravel & Material Company, which latter company was operating the lighter here in question, at the time it was wrecked and lost, in the transportation of gravel down Napa creek, which the evidence shows without dispute is a tidal tributary of San Francisco Bay. The court further found that during the times in question the libelant had a policy of insurance issued to it by the Sea Insurance Company, Limited, of Liverpool, which policy did, during all of the said times, insure the libelant against all happenings to the said lighter by reason of perils of the sea and barratry, and that:

"The said lighter was lost through a cause that would not permit and did not permit the said Sea Insurance Company to make a successful defense against the payment of the said policy, the said cause being a happening to the said lighter, to wit, a peril of the sea, to wit, the wrecking of the said vessel by striking upon the bank of Napa creek whereby she was caused to collapse and be utterly destroyed; that said lighter was not lost by reason of any willful misconduct or neglect or willful act of any kind by the libelant or of any of the respondents."

[1] Having protected itself by insurance against certain losses, it cannot be doubted that the owner had the right to stipulate in the charter party that the charterer should not be liable for any loss caused by anything covered by the policy. There is nothing contrary to public policy or in any respect wrong in such a stipulation. Even a common carrier, who has obtained insurance against the loss of goods by means of the usual perils, though occasioned by his own negligence, "may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter." *Phoenix Insurance Co. v. Erie Transportation Co.*, 117 U. S. 312, 325, 6 Sup. Ct. 1176, 29 L. Ed. 873.

The proctor for the libelant and appellant contends that the obligations imposed upon Bennett & Goodall by the charter party were substantially the same as those imposed by law upon a tug under a towage contract, and cites numerous authorities to the effect that a towing vessel cannot relieve itself by contract from liability for failure to exercise reasonable care and skill in the performance of the service and for the safety of the tow.

We are unable to see that the obligations resting upon Bennett & Goodall under the facts in this case are to be measured by those applicable to towage contracts. It is true that the lighter in question was without motive power and, if operated at all, had necessarily to be moved by independent means to be employed by the charterer or by such other party as might acquire the right to use it. In this instance that right passed, by the consent of the owner of the vessel, by sub-charter to a third party, the Napa Gravel & Material Company, under express stipulation that it should "have exclusive control" of the lighter. The record shows that the gravel and material company took

such exclusive control of it and operated it in the tide waters of Napa creek by means of a gasoline launch and was so operating it when it struck one of the banks of the creek, resulting in its destruction.

[2] The trial judge found from the evidence, most of which was heard by him in open court, that it was not lost by reason of any willful misconduct or neglect or willful act of any kind by any one. The evidence shows without dispute that at the time of the accident the lighter was being operated in the usual way that such vessels are operated in the waters of Napa creek, to wit, by means of a gasoline launch at the time in charge of an employé of the Napa Gravel & Material Company, named Lattimore, and much of the oral testimony tends strongly to show that there was no negligence on either his part or that of his employer; but assuming that there was such negligence, and that Lattimore could be regarded as the employé of the Bennett & Goodall corporation, it was, we think, clearly a loss against which the owner was insured by the policy held by it.

"A policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or the crew, because the assurer assumes to indemnify the assured against losses by particular perils, and the assured does not warrant that his servants will use due care to avoid them." *Liverpool, etc., Co. v. Insurance Co.*, 129 U. S. 397, 428, 9 Sup. Ct. 469 (32 L. Ed. 788).

In 26 Cyc. 660, it is said:

"The general rule is that where the immediate cause of a loss is a peril of the sea insured against, the underwriters are liable notwithstanding such loss would not have occurred except for the negligence of the insured or that of the master, crew, or other agents or servants"—citing a large number of cases.

[3] That the unexpected striking and stranding of a vessel in tidal waters is a peril of the sea does not admit of question. *Fletcher v. Inglis*, 2 B. & Ald. 315; *Letchford v. Oldham*, 5 Q. B. D. 538.

The loss here involved being covered by the insurance and being expressly excepted from the obligations imposed upon Bennett & Goodall by the charter party, it results that the judgment must be and is affirmed.

G. & C. MERRIAM CO. v. SYNDICATE PUB. CO.

(Circuit Court of Appeals, Second Circuit. June 18, 1913.)

No. 210.

1. TRADE-MARKS AND TRADE-NAMES (§ 73*)—UNFAIR COMPETITION—WEBSTER'S DICTIONARIES.

Any publisher of a dictionary which is an abridgment of or a revision or compilation based on the original Noah Webster dictionaries has the right to use the name "Webster" as a descriptive part of its title; the direct successor of the publisher of the original Webster, whose present day publications are of precisely the same character in their relation to the original, having no exclusive right to the name or to require more than that other and later publishers shall clearly distinguish their works from its own.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

2. EVIDENCE (§ 318*)—HEARSAY—EXCEPTIONS TO RULE EXCLUDING.

A statement by the compiler in the preface to a dictionary published in 1850 that he had adopted Webster's dictionary as the basis for his own, correcting and adding to the same to bring it down to the date of publication, is admissible in evidence as within an exception to the rule which excludes hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the G. & C. Merriam Company against the Syndicate Publishing Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the decree and opinion of Hand, District Judge, in the trial court:

[1] The complainant has never succeeded in getting from any court a decree which would forbid the publication of a "genuine" Webster dictionary in the form in which the defendants were selling theirs at the time these suits were started. The defendants had not only conformed in every way to the terms of the decree in the case of Merriam v. Ogilvie (C. C.) 149 Fed. 858, as it was finally entered, but they had advised the complainant of their submission to the law as there laid down and of their purpose in future to adhere to it.

The complainant brings this suit upon the theory that the book published (for the two books are nearly identical in content) is in fact not based upon Webster's dictionary at all; that it has no right to be called Webster's Dictionary in any sense; and that it is a fraud to call it such. Indeed, they do not concede that any one has any right but themselves to use the word "Webster's" upon a dictionary, unless it be one of the original dictionaries published by Webster himself, and even in that case they insist that it must be distinguished by the statement that it is one of the original Webster's dictionaries, a fact which would probably destroy any possibility of its sale anyway. Their pretension extends even to the point of forbidding the sale of any dictionary honestly compiled upon Webster's original sources, since they assert that the name "Webster," when applied to any such compilation

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or abridgment, necessarily implies their own responsible supervision and authorship. I have not, however, the least doubt at the outset in overruling so extreme an assertion as this. It is quite clear that any honest compilation or abridgment at the present time of Webster's work is entitled to describe itself as such, and that the most which the complainant's supposed right could in any case do would be adequately to indicate that a work so described was not a compilation or abridgment by the original publishers of Webster's Dictionary or their successors. Indeed, it is a preposterous assertion to say that the name "Webster's," as at present used by the complainants themselves, does not indicate to the public mind that their work has some connection with Webster's original work other than that they choose to publish it, or that it need not be the result of a legitimate literary descent from his original. In other words, even though the word indicates *prima facie* that the book is the complainant's compilation, it also still indicates that it is a compilation with Webster as its original source, and it is in this sense that Judge Coxe spoke when he said that the word had two meanings, a proprietary and a descriptive. Nor is there any inconsistency in such a dual meaning; the word may mean "Merriam's Compilation from Webster" quite as well as "Merriam's Compilation." If it does, it must as well answer to one part of its definition as to another; in short, it must be a compilation from Webster or it is a fraud. I pay not the least attention to those witnesses who say that it means only "Merriam's Compilation." If the name "Webster" has this descriptive significance, it is quite clear that it will also honestly describe any actual compilation from any one of Webster's dictionaries, provided that some suffix be added to distinguish the compilation from Merriam's. The word need not by any means be confined to the original work of Webster himself. Indeed, the only authority which has ever independently given the complainant any trade rights in the name "Webster" itself refused absolutely to forbid the defendant from using the name upon what was in every sense a compilation.

In *Merriam v. Ogilvie* (C. C.) 149 Fed. 860, Judge Colt says that Ogilvie's work was an enlarged and revised edition of the Webster of 1847. Now the edition of 1847 was not by any means a shonon-pure Webster, for its title page asserts that, although it contained the whole vocabulary of the first edition in two volumes, the entire corrections and improvements of the second edition (both by Noah Webster), it had been revised and enlarged by Chauncey A. Goodrich. Just what the abridgment from two volumes to one involved and just what was the revision and enlargement of Goodrich which accompanied the abridgment added does not appear, but it does appear that the work which the Circuit Court of Appeals of the First Circuit permitted to bear the name "Webster" had passed through two revisions of one sort or another, (and this is enough to dispose of the assertion that the only work which may be called "Webster" is some book just as it left the hands of Noah Webster.

The first question, therefore, which arises is whether the dictionary in question was based upon Webster's original work in such sense that it is entitled to be known by that name. In the solution of this question I am not disposed to enter into any nice considerations of a literary character, such, for example, as Professor Peck suggests, as to what creates a Webster's dictionary. For it is quite clear that, whatever scholars may think, the public generally (and it is the public with whom we are now concerned) mean something else by the words in question. What is it that they do mean, either by a Webster's dictionary or a dictionary based upon Webster's? It seems to me that they mean the way the book has been made up more than its present contents, its history rather than its present identity with its source. The word at least denotes what I should call literary descent from Webster's original books (that is, that each book in the series, of which this is the last, was made up by its author with its predecessor before him, only changing the spelling, definition, vocabulary, and the rest as his opinions and learning indicated to him that changes were required to adapt the book to the present); and that this succession goes back without break to some work by Webster himself. Nor is it indeed possible for the complainants to take any other position than this without putting themselves in the position of foisting upon

the public a spurious work. Their own last edition (that of 1909) is a book of almost totally different literary contents from any book with which Noah Webster had anything to do. They have the alternative of accepting the definition of "Webster" as indicating this kind of descent or of maintaining that "Webster" means any work of theirs and has no descriptive significance whatever. Otherwise they are within the rule in the California Fig Syrup Case. Of course, a "Webster" dictionary must own Webster as its father originally; and in the case at bar, although the heredity of the complainants' 1909 Webster is all that gives it its character as a Webster, yet it still has that character, remote now as the content may be. The complainant is in no position to deny a purely descriptive use of the word to any other dictionary which is as legitimate as its own. The constant iteration that all such are "bogus" or not "genuine" is merely a childish extravagance.

Now, does the defendants' book answer this description as well as the complainant's? The complainant has established beyond any question, in my judgment, that the immediate basis of the Crown Dictionary was the British Empire Dictionary, which has been put in evidence in this case, and which was edited by the Rev. E. D. Price, F. G. S. The proof of this consists in the identity of the literary matter between the two, which is so great as to be substantially identical. The parties in taking testimony have proceeded upon the assumption that the kinship between dictionaries may be ascertained by examining the verbal identities in the contents. Thus, at what must have been an appalling labor they have each prepared tables showing the identity of subject-matter between the defendants' book and others. It so happens under the complainant's table that, of all those examined, the closest in content to the British Empire Dictionary is Ogilvie's Imperial Dictionary of 1883. The similarity of contents extends to 70 per cent. of literal identity; that is to say, 70 per cent. of the contents of the British Empire Dictionary appears verbatim in the Imperial. The identity in the case of the Concise Oxford is only 28 per cent., and of what I am tempted to call the non-Websterian group ranges from there to about 40 per cent. Considering the difference in time of their appearance, this identity with the Imperial is adequate prima facie proof that the former is the literary descendant of the other and, in the absence of contradiction, justifies me in so assuming, when compared with the extremely low percentages of the other more or less contemporaneous works. Certainly one who advertises that work as a Webster which has scarcely any of Webster's matter within its covers cannot afford to be too meticulous. It also so happens that the first edition of the Imperial Dictionary published in 1850 is in evidence written by the well-known lexicographer, John Ogilvie. The title page of this work says that it is "on the basis of Webster's English Dictionary," while the preface, dated December, 1849, more fully states the sources. Thus, on page iii of this preface appears the following: "In adopting Webster's dictionary as the basis of the Imperial dictionary, the great object of the editor in preparing the latter has been to correct what was wrong and to supply what was wanting in Webster in order to adapt the new work to the present state of literature, science, and art. Accordingly, every page of Webster has been subjected to careful examination, numerous alterations and emendations have been made, a vast number of articles have been rewritten, very many of Webster's explanations of important terms have been enlarged, and many new and correct definitions of others given; new senses have been added to old words where they were found wanting, and a multitude of new words and terms have been introduced, especially in the scientific and technological departments, so that, to Webster's addition of 12,000 to Todd's Johnson, a further addition has been made of at least 15,000 words and terms."

Now that is exactly what I think the public means by a "Webster" brought up to the time of its publication, and it is in exactly this sense, and only in this sense, that the complainant has any right to continue to call its present dictionaries "Webster's," whether or not it indicates the complainant's own compilations when not accompanied by any suffix. Certainly Ogilvie could have called the Imperial Dictionary either "Ogilvie's Webster" or the "Imperial Webster," or any other kind of "Webster" that he wished. The successive editions certainly were Webster dictionaries, and so were any smaller

works, derived from those editions, whether abridgments, condensations, or the like. Nor does it seem to me to matter that the intermediate sources did not go by the name Webster. Here, for example, is a work which comes down by precisely the same kind of line of descent from Webster that the complainant's present abridgments come; each individual in the line being formed from its predecessor by some accretion, some elimination, some amendment, till one reaches the work of Webster himself. When the public uses "Webster," does it understand that all the intermediate steps shall have been so named? I hardly think so. Rather, it seems to me, it is the fact of its unbroken descent that the word implies. Rolfe, a concededly fair witness, was asked his opinion upon this question, and, while I should not feel in the least bound by it, I should be very glad to give it weight, if I could understand what he meant by his answers. He says it would justify the use of the title "Webster's Dictionary" if the book were taken from Ogilvie (that is, if Ogilvie could be called an English Webster); but that though justifiable it was not a natural thing to do, and that he personally, from a literary point of view, should not use it. So far as this means anything, it is that in the witness' opinion the name could honestly be used. Therefore I believe that the defendants have shown that their dictionary is really a Webster entitled to be so called quite as much as the Ogilvie's in the suit of Merriam v. Ogilvie. Are the statements in Ogilvie's preface competent as evidence?

[2] Ogilvie's preface is of course an unsworn statement, and as such only hearsay testimony, which may be admitted only as an exception to the general rule. The question is whether there is such an exception. I have been unable to find any express authority in point and must decide the question upon principle. In the first place, I think it fair to insist that to reject such a statement is to refuse evidence about the truth of which no reasonable person should have any doubt whatever, because it fulfills both the requisites of an exception of the hearsay rule, necessity and circumstantial guaranty of trustworthiness. Wigmore, §§ 1421, 1422, 1690. As to necessity, it is a statement made by a man now dead about his own conduct in the compilation of his own work. I say he is dead because he had completed a large dictionary some 63 years ago, and it is a fair presumption that he was at least 37 years old when the work appeared. Moreover, the Dictionary of National Biography, which is certainly the standard work upon the subject, gives the date of his death as 1867. Besides Ogilvie, everyone else is dead who ever knew anything about the matter and could intelligently tell us what the fact is. It is true that internal evidence remains, but this very case shows that it is hard to be certain in one's inferences from it. If this be not evidence I can see no way of getting any better, and the fact cannot be established at all. Surely the law is not so unreasonable as that.

As to the trustworthiness of the testimony, it has the guaranty of the occasion, at which there was no motive for fabrication. A claim of originality might be suspicious, but one of obligation is not. Whether Ogilvie claimed as his source Johnson or Webster was not a matter which he would be likely to misstate. Ogilvie was a lexicographer of note and the "Imperial Dictionary" was for long one of the standards of English speech, and there is in reason every ground for accepting as presumptively true a statement of this kind made at this time and place. The evidence is not conclusive as matter of law, a circumstance which many judges seem to forget in discussing the dangers of unsworn testimony. Ogilvie may of course have been a malingerer; he may have been employed by unscrupulous publishers to assert a derivation which was untrue; but such considerations would operate to exclude nearly all testimony ever given in a court of law.

In spite of these considerations, however, if there be any absolute rule of law that forbids such proof, I may not regard it, whether or not I like the results. Now it is perfectly well settled that courts will use dictionaries and other reliable works of reference as occasion may require. *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Nix v. Hedden*, 149 U. S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745; *Western Assurance Co. v. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561 (C. C. A. 2d Cir.); *Koechl v. United States*, 84 Fed. 448, 28 C. C. A. 458 (C. C. A. 2d Cir.). They are accepted because the circumstances attending their preparations guarantee their reliability, but

they remain none the less unsworn statements of fact or opinion. In the case at bar, Ogilvie's definitions and spellings, which are only his opinions as to what English usage then permitted, would certainly be accepted in any court, and the only way in which I can rationally exclude his statement of the sources from which those opinions proceeded is by finding some ground in reason for distrusting the one which does not apply to the other. There is no such ground, and the admissibility of the work as a reliable authority must carry with it the explanatory portions. It may be that on authority a statement quite disconnected with the book's substance would not go in, irrational though that result might be. Thus, if Ogilvie had put in his preface that he married at the age of 30, authority might rule it out; but, if the law admits his learned opinions at all, it would, in my judgment, be quite absurd to refuse also to admit his statement about their derivation. That one should admit his conclusions as reliable but not his statements of the means by which he reached them is more of a strain than the law of evidence can carry.

The attitude of the Circuit Court of Appeals for the Second Circuit upon such questions is liberal rather than narrow. *Western Assurance Co. v. Mohlman Co.*, supra, 83 Fed. 820, 821, 28 C. C. A. 157, 40 L. R. A. 561. Wigmore, §§ 1691-1701 while recognizing that upon authority the matter is doubtful, takes, as he always does, a wise and rational view towards such proof. I can find no controlling authority which requires me to reject the statements as evidence, and I shall accept them as such.

Therefore the defendants had the qualified right to call their books "Webster's," provided they properly distinguished so as to cut out the secondary meaning, and the only question which can remain is whether the statement upon the title page of the books is sufficient notice, since the books were properly marked upon the back. The form of the notice is that set forth in the final decree of the Circuit Court for the District of Massachusetts, as contained in *G. & C. Merriam Co. v. Saalfeld*, 190 Fed. at page 931, 111 C. C. A. 517. The only criticism which I can make upon the printing at the top of the page is that it is in rather small type. Had the attitude of the complainant been different when the defendants approached it with a view of adopting their makeup to the terms of the Massachusetts decree, I might now be willing to take up the question whether that notice ought not to be more conspicuous upon the page, but I am not disposed to indulge this complaint in such a way in the case at bar. When the defendants each approached its officers in a bona fide effort to accommodate themselves to the utmost rights which the complainant had up to that time enjoyed, they were met with a demand for absolute discontinuance of the name; they are met with it here. This was illegal and had been so adjudged against this complainant in the very decree which is the basis of any supposed right they may have in the name "Webster." They certainly by such a claim absolved the defendants from any nice adaptation of their typography to the terms of that decree, and I shall not inquire whether it gives the fullest protection to which the complainant is entitled.

I have decided this case upon the assumption that the word "Webster" had acquired a secondary meaning, indicating at once the derivation of the work and its responsible compiler. That assumption I make in deference to the decision in the First Circuit, though it is in no sense authoritatively binding upon me. There are several reasons why, if it were necessary, I should not hesitate to re-examine that question of fact. In particular the defendant in that case did not contest the question, at least after the first decision, as his briefs show, nor did he contest it in the case in the Sixth Circuit. Moreover, the record must have been quite different in that case, for Judge Colt could say that no one but the complainant published any Webster dictionaries between 1847 and 1889, a fact abundantly disproved in the case at bar. I need not here decide the question of secondary meaning, and I accept, since it has not been necessary to question it, the result of the decision in the First Circuit, which is the first success the complainant has ever had in its long and persistent efforts to establish a monopoly over the word "Webster." Nevertheless this case can never be truthfully cited as in the slightest degree contributing to the establishment of that result or indicating that I

assent in any way to the claim of secondary meaning. That question I leave exactly as I find it, without deciding that the meaning exists, that it does not exist, that it has been proved, or that it has not been proved.

I have looked over all the advertisements of the Syndicate Publishing Company, which make a very shoddy kind of appeal, but after the date when the defendants attempted to come to terms with the complainant they appear usually to bear the addition which the complainant procured as the measure of its relief in the Ogilvie Case. As to those which do not and which for the most part are in the form of news articles, I find no evidence to contradict the bona fides of the defendant's efforts to conform the advertisement with the decree, and I am not disposed to charge them with such as continued to appear. The prominence and form of the suffix must be held satisfactory in view of the complainant's attitude towards the defendant when approached and its illegal claim of a monopoly in the name. If the defendant was content to yield to the terms of the Ogilvie decree, it might, upon the complainant's demand, have been subject to some modification of its advertisements as of its title page. That right justified no such proceeding as this, designed to do just what the complainant was forbidden to do in the First Circuit.

As to the Cupples & Leon Company, I am in more doubt; the testimony of Leon is of very unsatisfactory character, and his claims to a dictionary upon which the defendant had done any substantial work are not justified. The advertisements are not warranted by the facts, for it is in no sense the modern book it professes to be. I do not believe that the defendant knew or in the least cared what was its contents, if it would sell as an up-to-date book. However, that gives no rights to the complainant, so long as its own limited use of the name is not infringed. None of the advertisements attempt to pass off the books as the complainant's, and it cannot object that the public is buying as a modern Webster substantially the old Crown Dictionary. The law may some day protect one man who sells a sound quality of goods so described against another who sells an unsound quality, dishonestly described, but it has not done so yet. Now we trust to the public to find out that they have been hoodwinked and to distinguish. Moreover, it does not certainly appear that the defendant is responsible for its customers' advertisements.

Both bills will be dismissed, with costs.

W. D. Guthrie, of New York City (W. B. Hale, of New York City, of counsel), for appellant.

H. A. Bayne and Strong & Cadwalader, all of New York City (Lauren Carroll and Harry D. Nims, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Taken as a whole, we fully approve Judge Hand's opinion and upon it affirm the decree appealed from. In so doing, however, we must not be regarded as assenting to the proposition that the name "Webster's Dictionary" has a technical or secondary meaning as indicating a publication of the complainant. And, on the other hand, we must not be considered as indicating an opinion that cases cannot be presented showing unfair competition in the sale of books or as passing upon the relief which may be granted in cases of fraud.

The decree of the District Court is affirmed, with costs.

GREAT NORTHERN RY. CO. v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. July 24, 1913.)

No. 3,822.

1. MASTER AND SERVANT (§§ 90, 97*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—MEASURE OF CARE REQUIRED.

Where an employer has made reasonable provision for the safety of his employes, such as an ordinarily prudent man would make for his own safety if he was doing the work himself, he has as a rule performed his duty to his employes, and he is not bound to anticipate and provide against accidents, the danger of which is not apparent or which cannot be ascertained by the exercise of ordinary care and does not become apparent until after the accident has happened.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 139, 163; Dec. Dig. §§ 90, 97.*]

2. MASTER AND SERVANT (§ 123*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—APPLIANCES.

The condition of the implements or material furnished to an employe to work with must be such as to suggest to an ordinarily careful man that there is danger in their use before the employer can be charged with negligence in not providing against it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 233, 234; Dec. Dig. § 123.*]

3. MASTER AND SERVANT (§§ 97, 219*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE—ASSUMED RISK.

Plaintiff was a boiler maker employed in the shops of defendant railroad company. While he and other employes were engaged in replacing the flues of a locomotive boiler, using some old and some retipped flues, and he was expanding the end of a flue to tighten it in the flue sheet, he was injured by a piece which broke from the flue and struck him in the eye. He charged negligence in furnishing for the work flues which were old and unfit. The only way to test a flue was by actually attempting to install it in the boiler. Plaintiff and seven other witnesses, all experienced in such work, testified that they had never known a piece to break out of a flue before under such circumstances. *Held* that, where experts could not anticipate danger, defendant could not be charged with negligence in not doing so and providing against it, and that the injury arose from an ordinary risk of the employment which plaintiff assumed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 163, 610-624; Dec. Dig. §§ 97, 219.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action at law by Charles Johnson against the Great Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. J. Murphy, of Grand Forks, N. D. (Fred S. Duggan, of Grand Forks, N. D., on the brief), for plaintiff in error.

Seth W. Richardson, of Fargo, N. D. (William H. Barnett, of Fargo, N. D., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CARLAND, Circuit Judge. On the 7th day of January, 1908, Johnson was in the employ of the railway company as a boiler maker at Minot, N. D. While employed in making tight certain flues of a locomotive boiler, a piece of a flue upon which he was working, V-shaped, and about the size of a dime, broke from the flue and struck him in the eye. He brought suit against the railway company to recover damages on account of his injury, alleging that the company was guilty of negligence in furnishing him a flue that was old, worthless, and worn out, and which was of such poor material by reason of its long use that it could not withstand the force used in the work necessary to be done upon it; that the railway company knew of this defective condition of the flue, or might have known it by the exercise of ordinary care. Upon the trial of the action a verdict was rendered in his favor, and, judgment having been entered thereon, the railway company has removed the case here, assigning as error the ruling of the court in refusing to direct a verdict in its favor. The case was here at a former term of this court. 176 Fed. 328, 99 C. C. A. 618. From the record as then presented, we were of the opinion that there was no evidence sufficient to go to the jury that the flue from which the piece was broken was old, worthless, worn out, and defective, as alleged in the complaint. It is claimed that this defect in the evidence was supplied at the second trial. It is doubtful whether this is so, but we pass that question for the purpose of determining whether there was sufficient evidence to warrant the jury in finding that the railway company was guilty of negligence.

In order that this question may be better understood, a more detailed statement of the facts will be made. The locomotive boiler on which Johnson was employed at the time of his injury had 202 flues. These flues extended from the fire box end to the smokestack or front end of the locomotive. At the smokestack or front end these flues extended through holes, in what is called the flue sheet, one-half to three-quarters of an inch. In order to make the space around the flue, where it passes through the flue sheet, water tight, the flue is expanded. One of the ways in which the flue is expanded is to drive a round iron pin, tapered at one end, six or seven inches long, into the end of the flue where it extends through the flue sheet. At the time Johnson was injured he was in the front end of the locomotive boiler, engaged in expanding all flues that showed any evidence of leakage; that is, leaking water from around the flues at the point where they pass through the flue sheet. After he had inserted the pin into the flue, he thus describes the manner of his injury:

"We had some oil there that we usually use to start it; that—I don't remember whether we had any at that time; we were in a hurry on that job, and I started to push it in, and I had a small hammer there to pound it in, and I just started to pound it, and a piece flew off the flue."

Flues are of malleable iron or steel, so far as the record shows, so that they may be worked. Except as the water may affect that portion of the flue between the fire box and the flue sheet, flues may last for two or more years without repair. The part of the flue which extends into the fire box becomes defective by reason of the action

of fire, and when this occurs the flue is taken out and retipped. The portion of the flue which extends through the flue sheet is not exposed to water or fire enough to injure it. The boiler upon which Johnson was working was being retipped, for which purpose new, old, and retipped flues were used. One Collins was in charge of the work. One Starr, who was also engaged in refueling the boiler, testified that he had a conversation with Collins, as follows:

"I brought his attention to the flues and told him some of them I did not think were flues fit to put in the boiler. Collins replied, 'Go ahead, and put the flues in anyway;' and if they could not be used they could be ripped out and others put in."

Starr also testified that some of the flues were old, very thin and light, others crystallized—holes in them.

The only final test as to whether a flue can be expanded so as to prevent leaking where it passes through the flue sheet is the actual attempt to install the flue in the boiler. Johnson and seven other boiler makers, engineers, and roundhouse foremen testified that in all their experience they had never known a piece to break out of a flue, new or old, under circumstances such as detailed by Johnson. And there was no evidence to the contrary. The information imparted by Collins to Starr was simply to the effect that some of the flues were not good as flues; that is, for the purpose for which they were to be placed in the boiler. No interpretation can be placed upon the language used by Starr to give it any force as a notice to Collins that the flues were dangerous to employes to work upon. Conceding that the flue upon which Johnson was working was old and brittle, was there evidence of negligence upon the part of the railway company which would warrant the jury in finding a verdict against it? The fact that Johnson was injured as alleged, as between him and the railway company, is no evidence of negligence on the part of the company. *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. The question then comes to this: How could the railway company have obtained, by the exercise of ordinary care, any knowledge that the flue from which the piece broke off was dangerous to work upon? Johnson, a boiler maker, did not know it, nor did the seven other witnesses know it. Must the ordinary care required of the railway company be such as to compel it to investigate and ascertain that which experts in a particular business do not know, and never heard of, especially in view of the fact that whether or not a flue would throw off pieces of itself could not be determined in advance of the actual attempt to install it in the flue sheet, and in view of the further fact that, of all the flues that had been so expanded, eight witnesses, including Johnson, had never heard of such an occurrence?

[1] The only way to test the flue, as we have said, would be by actually attempting to install it in the locomotive boiler. This work of installing old and new flues had been going on for years at Minot and other places on a great railroad system. And if the breaking of a flue in the manner and under the circumstances detailed by Johnson had never occurred before, how could any degree of ordinary

care foresee the accident? An employer is bound to use ordinary care to furnish his employes with reasonably safe and proper means and appliances for doing the work which such employes are set about, but he does not become a guarantor of the safety of his men. When he has made reasonable provision for their safety, such as an ordinarily prudent man would make for his own safety if he was doing the work himself, he has, as a rule, performed his duty to his employes and servants. He is not bound to anticipate and provide against accidents to his men which are not apparent or which cannot be ascertained by the exercise of ordinary care and do not become apparent until after the accident has happened.

[2] The condition of the implements or material must be such as to suggest to an ordinarily careful man that there is danger before an employer can be charged with negligence in not providing against it.

There is no proof in the record that the railway company knew, or could have known by the exercise of ordinary care, that the pinning of a flue, old or new, would cause a piece to break from the same under the circumstances as detailed by Johnson. An injury that cannot be foreseen or reasonably anticipated as the probable result of negligence is not actionable. *Railway Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; *McCain v. Chicago, B. & Q. R. Co.*, 76 Fed. 125, 22 C. C. A. 99; *Cole v. German Savings & Loan Society*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Hoag v. Railway Co.*, 85 Pa. 293, 27 Am. Rep. 653; *Ness v. Great Northern Ry. Co.*, 142 N. W. 165 (Supreme Court, North Dakota, October term, 1912); 5 *Thompson on Negligence*, § 5333.

[3] We are satisfied that the injury to Johnson was one of the ordinary risks and hazards of his employment, for which the railway company is in no wise liable, and that a verdict ought to have been directed in its favor.

Judgment reversed, and a new trial ordered.

UNITED STATES v. BENNETT et ux.

(Circuit Court of Appeals, Ninth Circuit. August 18, 1913.)

No. 2,200.

1. WATERS AND WATER COURSES (§ 33*)—DIVERSION OF WATER FROM STREAM—
SUIT TO ENJOIN WASTE.

The fact that the United States has appropriated all of the unappropriated water of a stream in a county for an irrigation project, as permitted by a law of the state, does not give it standing to maintain a suit to enjoin a prior appropriator from using an excessive amount of water unless it is alleged and proved that it had acquired the right to such water under its own appropriation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. WATERS AND WATER COURSES (§ 24*)—DIVERSION OF WATERS FROM STREAM—RIGHTS OF PRIOR APPROPRIATOR.

Under Rev. St. § 2339 (U. S. Comp. St. 1901, p. 1437), which provides that vested rights to the use of water from a stream on public lands for mining, agricultural, or other purposes, recognized by local laws, shall be maintained and protected, while an appropriator of water may not waste the same he cannot be required to change his system of husbandry or devote his land to other purposes because it would require less water and leave more for subsequent appropriators.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 16; Dec. Dig. § 24.*]

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit in equity by the United States against W. S. Bennett and Josephine Bennett, his wife. Decree for defendants, and complainant appeals. Affirmed.

Oscar Cain, U. S. Dist. Atty., and E. C. MacDonald, Asst. U. S. Atty., both of Spokane, Wash., and E. W. Burr, Sp. Asst. U. S. Atty., of North Yakima, Wash.

Smith & Gresham, of Conconully, Wash., for appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge. This is an action in equity, brought by the United States in the District Court of the United States for the Eastern District of Washington, to restrain the defendants from diverting from the waters of the Salmon river, in that state, an amount of water in excess of 2½ acre feet per acre for certain lands owned by the defendants and described in the complaint, amounting to 62.82 acres.

The substance of the complaint is that in the year 1905 the complainant, proceeding under the provisions of the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1911, p. 662), and the act of the Legislature of the state of Washington of March 4, 1905 (Laws of Washington 1905, p. 180), appropriated all of the unappropriated waters of Salmon river in the county of Okanogan, in the state of Washington, for the Okanogan irrigation project; that the works necessary for the utilization of the water so appropriated have been constructed, and the said waters have been put and devoted to beneficial uses in accordance with law to a large number of persons occupying adjacent land which, without such water, would be valueless and incapable of cultivation; that the amount of water available from all sources of supply for the benefit of the water right applicants in the Okanogan project, during the year 1911, was found to be insufficient, and there was a shortage of water during the latter portion of such irrigating season. The lands of the defendants are described, and it is alleged that the lands described,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

susceptible of irrigation, do not exceed 50 acres; that such lands require not more than $2\frac{1}{2}$ acre feet per acre of water to sufficiently and properly irrigate the same; that the use of a greater amount of water is not only unnecessary but absolutely detrimental to the growing of crops thereon; that, notwithstanding this, the defendants have unnecessarily, wastefully, and uselessly diverted, consumed, and used of and from the waters of the Salmon river about 11 acre feet of water per acre in each season, thereby depriving the plaintiff of water which it could and otherwise would have used for the necessary and beneficial purposes mentioned in the complaint.

[1] The allegation that complainant has appropriated all of the unappropriated water of Salmon river in Okanogan county, and that defendants are diverting an excess of water to their lands in that county from the Salmon river, does not give the complainant the right to complain of the defendants, unless the excess of water so diverted by them was water previously appropriated by the complainant. This is the law and must be the very substance of complainant's cause of action.

The appropriation of the waters of the Salmon river was under section 4 of the act of the Legislature of the state of Washington, approved March 4, 1905 (Laws of Washington 1905, p. 180). That section provides, among other things, that:

"Any authorized officer of the United States, either in the name of the United States or in such name as may be determined by the Secretary of the Interior, may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project, such appropriation to be made, maintained and perfected in the same manner and to the same extent as though such appropriation had been made by a private person, corporation or association."

The cause of action stated in the complaint is the charge that the defendants "have unnecessarily, wastefully, and uselessly diverted, consumed, and used of and from the waters of the said Salmon river about 11 acre feet per acre of water in each season, thereby depriving the plaintiff of water which it could and otherwise would have used for the necessary and beneficial purposes" mentioned in the complaint. It is not charged that the water that is being diverted by the defendants was part of the unappropriated waters of the Salmon river at the time of the passage of the act of the Legislature of March 4, 1905, or at the time of the formation of the Okanogan project under that act and the act of Congress of June 17, 1902; nor is it charged that any part of the water diverted by the defendants was acquired by the complainant by appropriation under the authority of these acts. To maintain this action it must appear upon the face of the complaint that the defendants are diverting water which, under the statutes of the state of Washington and of the United States, had been appropriated by the complainant under the provisions of such statutes.

The law of Washington relating to the appropriation of water for irrigation purposes provides:

"The right to the use of water flowing in any river, stream or ravine of this state for irrigation * * * purposes, * * * may be acquired by

appropriation, and as between appropriations the first in time is the first in right." Section 1, act of the Legislature of the state of Washington, approved March 9, 1891, Laws of Washington 1891, p. 327.

The demand of the complainant is, not that the defendants be wholly restrained from diverting water from Salmon river, but only the quantity in excess of $2\frac{1}{2}$ acre feet per acre in any irrigating season. This demand is in effect an admission that the diversion of that amount of water by the defendants is under a valid prior appropriation, and, being first in time, they are first in right, at least to that extent.

But, whether the defendants' diversion of water in excess of that amount was the diversion of water unappropriated at the time of the establishment of the Okanogan project in 1905, the complaint is silent. The complaint appears to have been framed upon the theory that the complainant should not assume the burden of proving what was unappropriated water of the Salmon river when it entered the field with its irrigation project; but that question should be shifted to the defendants to prove that all the water they diverted had been previously appropriated by them and applied to a beneficial use. We think that primarily the burden was on the complainant to allege and prove that the excess of water diverted by the defendants over $2\frac{1}{2}$ acre feet was part of the unappropriated water of the Salmon river appropriated by the complainant. From this it would appear that it is a question whether the complaint states facts sufficient to constitute a cause of action; but in the court below no question was raised as to the sufficiency of the complaint. The answer of the defendants alleges that they had reason to believe and did believe that the complainant had appropriated or attempted to appropriate all of the unappropriated waters of the Salmon river, as alleged in the complaint, and they admitted that the complainant had constructed extensive works for the utilization of such waters; but by reason of lack of information and knowledge they denied, among other things, that the waters appropriated by the complainant had been devoted to beneficial uses in accordance with law; denied that the amount of water available from all sources of supply for the benefit of water right applicants in the Okanogan project during the year 1911 was found to be insufficient, and that there was a shortage of water during the latter portion of that irrigating season; denied that the defendants had but 50 acres of land susceptible of irrigation, and alleged that they had had 62.82 acres of land under irrigation from the waters of Salmon river for something like 25 years; denied that $2\frac{1}{2}$ acre feet per acre of water was sufficient to irrigate the same; denied that they had at any time deprived the complainant of any water whatever to which it was entitled; denied that the defendants had ever used any water in excess of their actual needs; and denied that the complainant had suffered any damage by reason of any use of waters of the Salmon river by the defendants.

The case was tried upon the allegation of the complaint that the defendants' land did not require more than $2\frac{1}{2}$ acre feet of water per acre for any one season and the allegation of the defendants' an-

swer that one miner's inch of water per acre was absolutely necessary and required for the successful growing of crops on defendants' land.

The issue as to the measurements of water must be reduced to equivalent terms to understand the testimony. The complainant contends that the defendants should be enjoined from diverting more than $2\frac{1}{2}$ acre feet of water per acre of land irrigated by the defendants in any one season; that is to say, that the defendants should not be allowed to divert more water in a season than enough to cover the land $2\frac{1}{2}$ feet deep. The defendants contend that they should be allowed to divert one miner's inch of water under six-inch pressure per acre during a season. This would require the diversion of 62.82 inches of water for the entire tract of 62.82 acres during the whole season. The equivalent terms, in government measurement, are: Forty inches of water under six-inch pressure is conceded to be in this case the equivalent of one cubic foot per second of time, and 62.82 miner's inches is the equivalent of 1.57 cubic feet of water per second of time, or 9.02 acre feet for 62.82 acres during a season of 5 months or 150 days. Measurement of Irrigation Water, United States Reclamation Service 1913.

The testimony on behalf of the complainant was directed mainly to the system of irrigation provided by the government project. From this testimony it appeared that complainant's contracts with the settlers under the project were of two classes: One class for those holding prior water rights for land coming under the system, and the other class for those whose water rights came into existence with the land when it was brought under irrigation by the system. These latter contracts were called subscription contracts. The first class of contracts called for 3 acre feet of water per acre for the season. The second class called for $2\frac{1}{2}$ acre feet of water per acre for the season. There was testimony on behalf of the complainant tending to show that defendants' lands could be cultivated with the allowance of water in accordance with the government project. The testimony on behalf of the defendants tended to show that the diversion of water from the Salmon river for the defendants' land was through a canal constructed by the defendants' predecessors in interest in 1887. The canal had a carrying capacity of two cubic feet of water per second of time and diverted the water of the Salmon river about three miles above the point where the complainant afterwards established the diversion weir for its project. The defendants' land is therefore not under that project or its distributing system. The complaint against the defendants is that they are diverting more water per acre from the Salmon river for their lands than is being diverted by the complainant for the lands under its project. This complaint is answered by the testimony on behalf of the defendants tending to show that the complainant's canals are of modern construction and concrete lined, while the defendants' canal was constructed about 25 years ago upon a grade and alignment that permits considerable loss of water by seepage before it is delivered on the land. A further loss is chargeable to the fact that the canal is not concrete lined. This feature of the controversy is, however, not material now, since the decree has fixed the point of measurement for the water diverted by the defendants at the point of its

diversion from the river. Any loss of water that may occur hereafter in passing through defendants' canal to their lands must, under the decree, be sustained by them. This feature of the decree is materially in favor of the government. The testimony on the part of the defendants further answers that the complainant's project is for irrigation of land set with orchards and devoted to the production of fruits, while the defendants' lands are mainly in alfalfa, timothy, clover, grain, and vegetables; that the latter require more water than the former; that the defendants' land is underlaid with gravel and decomposed granite and is of a porous character and does not hold water as does the land under the complainant's project.

The court heard the testimony in open court and, after giving it careful and, as we think, fair consideration, entered a decree allowing the defendants $1\frac{1}{2}$ cubic feet of water per second of time, or the equivalent of 7.02 acre feet for the season, to be measured at the point of diversion from the Salmon river; the irrigating season of each year to commence on April 15th and to end on September 15th. We have read the testimony carefully, and, although we find it conflicting, we are not disposed to disturb the decree. It is supported by the weight of the testimony and upon the whole is fair and just to all parties. We do not think the water allowed the defendants by the decree is in excess of what is required for such land according to the usual course of husbandry in which the defendants are engaged.

[2] When the defendants' predecessors in interest constructed the canal now owned by the defendants, and diverted water from the Salmon river for the irrigation of the land now owned by them, this, and the adjacent land, was the public land of the United States, and the appropriation of the water of Salmon river was under the act of Congress of July 26, 1866, c. 262, 14 Stat. 251. This act provides in section 9:

"That whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

The only limitation placed upon the vested right in water appropriated under this statute is the use for which the appropriation is made. The water may not be wasted so as to prevent others from using it for legitimate purposes. The right to water must be exercised by the appropriator with reference to the general condition of the country and the necessities of the people and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual. *Atchison v. Peterson*, 20 Wall. 514, 22 L. Ed. 414; *Basey v. Gallagher*, 20 Wall. 682, 22 L. Ed. 452. But we know of no law requiring the appropriator of water to change his system of husbandry to conform to some other system where less water is required. In other words, we know of no law requiring the defendants in this case to cease diverting water for the irrigation of alfalfa or other forage crops heretofore grown on their land and compelling them to reduce their diversion to that required for an orchard or other use requiring less water; nor do we know of any law

requiring them to reduce their appropriation of water to the quantity required for a less gravelly and porous soil simply because there is a better soil in the neighborhood requiring less water. What is required of the appropriator is that he shall not waste the water appropriated but shall put it to a beneficial use in accordance with the requirements of the husbandry in which he is engaged. In our opinion the decree of the court below conforms to such requirements.

The decree is therefore affirmed.

APOLLO BROS., Inc., et al. v. PERKINS.

(Circuit Court of Appeals, Third Circuit. September 16, 1913.)

No. 1,684.

1. TRADE-MARKS AND TRADE-NAMES (§ 67*)—NATURE OF RIGHT.

The law governing technical trade-marks is but a branch of the law regulating trade competition; the prevention of unfair competition being the desideratum in both.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—EVIDENCE.

Unfair competition in the sale of cigarettes under a similar name was not established, where the two brands were not offered in the same market, did not in fact compete, and no deception was attempted; defendant's package being radically different from plaintiff's in coloring, printing, and form, so that the one could not be readily mistaken for the other, and defendant's package could never have been used to deceive customers desiring to purchase cigarettes made by complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

3. TRADE-MARKS AND TRADE-NAMES (§ 3*)—REQUISITES.

A name, in order to constitute a valid trade-mark, must point distinctly to the origin or ownership of the commercial article to which it is attached, either in meaning or by association, and must be of such a nature as to permit of exclusive appropriation by one person.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 9*)—GEOGRAPHICAL NAME—REGISTRATION—EXCLUSIVE APPROPRIATION.

Under Trade-Mark Act Feb. 20, 1905, c. 592, § 5, 33 Stat. 725 (U. S. Comp. St. Supp. 1911, p. 1461), denying registration to marks which consist merely of a geographical name or term, the word "Nubia" was not only incapable of official registration as a trade-mark for cigarettes, but could not be exclusively appropriated by any one, where it had not obtained a secondary meaning indicating that the goods bearing it came from one and the same source.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 13; Dec. Dig. § 9.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 71*)—GEOGRAPHICAL NAME—RIGHT TO USE—INFRINGEMENT.

Where a geographical name was not subject to absolute ownership and exclusive use as a trade-mark, the rights obtained by the first user, as a name for goods to which it was attached, were not infringed by mere use of the name by a competitor, even though such use was in association with competing goods; the second user's liability being limited to a case of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 82; Dec. Dig. § 71.*]

Use of geographical names as trade-marks or trade-names, see notes to Hoyt v. J. T. Lovett Co., 17 C. C. A. 657; Illinois Watch Case Co. v. Elgin Nat. Watch Co., 35 C. C. A. 242.]

6. TRADE-MARKS AND TRADE-NAMES (§ 79*)—PROTECTION—NATURE OF RIGHT.

An action to protect trade-mark rights, whether at law to recover damages or in equity to restrain further infringement, is founded upon false representation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 89, 90; Dec. Dig. § 79.*]

7. TRADE-MARKS AND TRADE-NAMES (§ 93*)—PROPERTY—INFRINGEMENT.

A technical trade-mark, whether registered, or unregistered, is treated as property, and infringement thereof carries a presumption of fraud; but, where no exclusive right to use of a trade-mark exists, a technical trade-mark is not established, and fraud and unfair competition in the use of the trade-mark must be proved.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

Suit in equity by Charles B. Perkins, trading as Charles B. Perkins & Co., against Apollo Bros., Incorporated, and others. From a decree for complainant (197 Fed. 476), defendants appeal. Reversed.

Albert W. Sanson and Hector T. Fenton, both of Philadelphia, Pa., for appellants.

Edward M. Biddle, Charles L. McKeehan, and Joseph S. Clark, all of Philadelphia, Pa., for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and RELLSTAB, District Judge.

RELLSTAB, District Judge. In the court below, Charles B. Perkins, trading as Charles B. Perkins & Co., a citizen of the state of Massachusetts, the appellee, filed his bill in equity against Apollo Bros., Incorporated, a corporation of the state of Pennsylvania, the appellant, alleging a common-law property right in a trade-mark for cigarettes, and also infringement and unfair competition by defendant, and praying for relief by an injunction and an accounting. The trade-mark name claimed by complainant was the geographical name "Nubia," which it is admitted he was the first to appropriate and adopt for cigarettes manufactured and sold by him. It was also claimed that the name had acquired, through long use by him, a secondary meaning, indicating the origin and ownership of the goods upon which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it was impressed. The infringement charged against the defendant was in selling cigarettes manufactured by him, put up in sealed boxes for sale, with a label containing the word "Nubias" and "Apollo Bros." The court below found in favor of the complainant, and awarded a perpetual injunction against the corporation defendant, its officers, agents, etc., restraining them from using the word "Nubias" as a name or designation for the cigarettes made and sold by said defendant. From this decree the defendant has appealed.

The contention of the defendant in the court below, as here, was that the word "Nubia," claimed by complainant as a common-law trade-mark, was incapable of exclusive appropriation as such, by reason of its being a geographical name, and, further, that, whether such name has acquired a secondary meaning or not, the user's right in it can be infringed by nothing less than acts amounting to unfair competition.

The material facts in the case are not in dispute. Complainant commenced the manufacture of his cigarettes under the name "Nubia" in 1898. He testifies that that designation was arbitrarily chosen as a somewhat fanciful one, and that since then he has continuously marketed them under that name. The cigarettes were put up in small sealed boxes convenient for the pocket, and the label on the lid, containing the word "Nubia" at the top and the words "Charles B. Perkins, Boston, Mass., U. S. A.," in distinct letters at the bottom, has on its middle portion a picture representing a sunset in the desert, with pyramids and camels, suggesting an Egyptian scene.

The defendants entered into the cigarette business in Philadelphia in December, 1905, and in 1906 manufactured and marketed cigarettes under the name of "Nubias," which they have since manufactured and sold. Defendants' cigarettes seem to have been put up in sealed cases of about the size of those of the complainant, intended for pocket use, with a black label on the side, containing nothing but the words "Nubias" and "Apollo Bros."

[1] The law governing technical trade-marks is but a branch of the law regulating trade competition. The prevention of unfair competition is the desideration in both. Nims on Unfair Business Competition, §§ 1, 4; Hopkins on Trade-Marks (2d Ed.) § 19.

[2] We agree with the court below:

"That 'the evidence does not support the charge of unfair competition. The two brands of cigarettes are not offered to the same market, and do not compete in fact.'"

The package of the defendant, its coloring, printing, and form, were so radically different from the plaintiff's that they could not be mistaken for each other and could never have been used to deceive. The complainant's right to the relief prayed, therefore, depends upon his having secured a technical trade-mark in the word "Nubia."

[3] There is much confusion in the cases, but to our mind the best-considered cases hold that it is essential that such a trade-mark possess the following characteristics: That either in meaning or association the mark points distinctively to the origin or ownership

of a commercial article, and that it is of such a nature as to permit of an exclusive appropriation by one person. Nims, § 2.

[4] "Nubia," it is admitted, is a geographical name, and there is nothing in the circumstance of its selection or use by the complainant (such as was found in *Baglin v. Cusenier Co.*, 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863) that would permit of its registration under the Trade-Mark Act (33 Stat. 725 [U. S. Comp. St. Supp. 1911, p. 1461]), section 5 of which denies registration to marks which consist of "merely a geographical name or term." Not only is it incapable of official registration, but it may not be exclusively appropriated by any one. *N. Y. & R. Cement Co. v. Coplay Cement Co. (C. C.)* 44 Fed. 277, 10 L. R. A. 833; *Id.*, 45 Fed. 212; Nims, § 110; *Elgin Nat. Watch Co. v. Ill. Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

[5] We agree that a geographical name may, by use and association with a commodity, obtain a secondary meaning indicating that the goods bearing it come from one and the same source, and thus a superior right may be secured in the use of such name by one person; but, inasmuch as no absolute ownership in or exclusive right to use such name as a trade-mark vests in any one, the rights obtained by the first user are not infringed by the mere use of such mark by a competitor, even though such use is in association with competing goods. In such a case the second user becomes an infringer only when he makes an unfair use of such name. Not any competition, but only unfair competition, on the part of such user is actionable. *Canal Co. v. Clark*, 80 U. S. 311 (13 Wall.) 324, 20 L. Ed. 581; *Columbia Mills v. Alcorn*, 150 U. S. 464, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Elgin Nat. Watch Case*, *supra*.

[6, 7] The action to protect trade-mark rights, whether at law to recover damages, or in equity to restrain further infringement, is founded on a false representation. A technical trade-mark, registered or unregistered, is treated as property, and an infringement thereof carries with it the presumption of fraud; but where no such exclusive right to the use of such trade-mark exists, a technical trade-mark right is not established, and fraud—unfair competition—in the use of the mark must be proved. *Elgin Watch Case*, *supra*; *Siebert v. Gandolfi*, 149 Fed. 100, 79 C. C. A. 142.

The policy of the law is to foster and not to hamper competition, and it only permits a monopoly in the use of a trade-mark when it has become the absolute and exclusive property of the first user—good against the world. A geographical name can never become such property, and the utmost the first user can insist is that no one else shall so use it as to constitute unfair competition. The purpose in an honest selection of a trade-mark is that it be an exclusive identification of the marked commodity with the personality of the owner, and it is not too much to require that such selection be made from a class of subjects capable of exclusive ownership. When one fails in this, he has only himself to blame if by another's honest selection and use of a similar trade-mark he is denied an exclusive use thereof. In such a case commercial rights are apt to

overlap, but the utmost that the courts can do in such cases is to enjoin, not the use of such a trade-mark, but the improper use thereof—unfair competition.

The business of neither the complainant nor the defendant is carried on in Nubia, and neither handles the products of that region. As between the parties, neither had a superior right of selection. Being the first to select such name gave the complainant no exclusive right in the use of it; but, being the first user, he has a right to protection as against any subsequent user who so uses the name as to bring to the latter the trade which belongs to the former, and in affording such protection the later comer will be required to so accompany the use of the name, whether on his goods or in advertising them to the trade or public, regardless of the trouble or expense to which he will be put, as is necessary to effect such purpose. *Am. Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263. Regulation, but not prohibition, is the remedy in such cases. To hold otherwise would be to give to one who could not register such name as a trade-mark all the benefits that such a registration would give, and preclude one innocent of any unfair trade dealing from using the name which the registration laws, by necessary implication, concede to be the common property of all. Or, stated differently, the complainant would be given all the rights flowing from an absolute ownership in a name in which he at best could only obtain a superior right.

In the present case the complainant has no property but only a commercial right in such mark. He has as yet suffered no commercial injury. As his or the defendant's trade expands, some impairment of the complainant's rights may take place. Whether more distinguishing accompaniments to the use of the word "Nubias" may then be required we cannot now say. As to such word, no prohibitive or injunctive relief is justified; and, as no unfair competition exists, regulative relief is not now called for.

The judgment of the District Court is reversed, with costs.

BIG FOUR IMPLEMENT CO. et al. v. WRIGHT.

(Circuit Court of Appeals, Eighth Circuit. August 4, 1913.)

No. 3,889.

1. FRAUDULENT CONVEYANCES (§ 299*)—EVIDENCE—WITHHOLDING FROM RECORD—CONDITIONAL SALES.

The mere failure to file contracts of conditional sale for record, although they are required to be filed by statute to be valid against subsequent purchasers and certain classes of creditors, is not sufficient to show fraudulent intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 876-890; Dec. Dig. § 299.*]

2. SALES (§ 474*)—CONDITIONAL SALES—EFFECT OF FAILURE TO FILE CONTRACT.

Under the law of Kansas, the failure to file a contract of conditional sale for record does not render it invalid as against general creditors without lien.

[Ed. Note.—For other cases, see Sales Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.*]

3. BANKRUPTCY (§ 152*)—LIEN OF TRUSTEE—DATE.

The lien conferred on a bankrupt's trustee by Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), dates from the time of the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. § 152.*]

4. BANKRUPTCY (§ 161*)—PREFERENCE—"CONDITIONAL SALE" CONTRACTS—FILING WITHIN FOUR MONTHS.

Under the general law and also the statutes of Kansas (Gen. St. 1909, §§ 5224-5226, 5237), there is a clear distinction between a contract of "conditional sale" by which the seller retains title until full payment, with the right to take possession at any time, and contracts of sale by which the title is passed and a chattel mortgage for the purchase money taken back, and a contract of conditional sale, although made before, but not filed as provided by the Kansas statute until within four months prior to the bankruptcy of the purchaser, does not constitute a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1408-1410.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

In the matter of one Bell, bankrupt; Isom Wright, trustee. The Big Four Implement Company and the Kansas Moline Plow Company appeal from orders denying their petitions for reclamation of property. Reversed.

Samuel Feller, of Kansas City, Mo., for appellants.

William Osmond and Elrick C. Cole, both of Great Bend, Kan., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WILLARD, District Judge. In this controversy between the Big Four Implement Company and the Kansas Moline Plow Company on the one hand, and Wright, the trustee of Bell, the bankrupt, on the other, the court below held that the appellants were not entitled to a return to them of certain farm implements received by the bankrupt on conditional sale contracts. The contract between the Plow Company and Bell was made on January 23, 1911, and filed in the proper register's office on November 11, 1911. The contract between the Implement Company and Bell was made on December 8, 1910, and was filed on November 9, 1911.

Within three or four days after the filing of the contracts Bell made a trust deed for the benefit of his creditors of all his property, except that covered by these contracts. A petition in bankruptcy was filed against him on February 22, 1912, and he was adjudicated a bankrupt on March 19, 1912. Some of the property delivered under these contracts came into the possession of his trustee. Appellants appeared in the bankruptcy proceeding and asked for a return to them of such property. The two cases were consolidated in the court below. The referee refused to grant the petition of the claimants, the court affirmed this ruling, and they have appealed.

[1] The trustee claims that these contracts were fraudulent in fact, because "there was an understanding between the bankrupt and the interveners that they were not to be filed unless necessary for interveners' interests, and that the bankrupt would see that they received notice in time to protect themselves." That the mere failure to file the contracts is not sufficient to show fraudulent intent cannot be doubted. The evidence shows the following additional facts: While the contracts were made in December and January, none of the goods of the Plow Company were shipped until March, and most of those of the Implement Company not until June. The bankrupt, being pressed by the German-American Bank, one of his creditors, for security, went to Kansas City, it seems, about November 11, 1911, and saw the agents of the appellants. He then told the agent of the Implement Company that he could not meet his obligations. At that time he had no talk whatever with the Plow Company about the filing of their contract. The agent of the Implement Company, however, suggested or spoke of the fact that they would file their contract. The property here in question was expressly excluded from the trust deed made on November 15th. Bell had dealt with these companies before under similar contracts, which had not been filed, and had settled with them according to their terms. This is all of the evidence tending to show any agreement on the part of the companies to withhold the contracts from record, and it is in our opinion entirely insufficient to establish their fraudulent character.

[2] Some of Bell's creditors became such after the making and before the filing of these contracts. No one of them had, however, at the time of such filing, obtained any specific lien upon the property here involved. Under the law of Kansas relating to the filing of chattel mortgages, the protection given to creditors by the law requiring such filing was intended to include only those having some specific

lien upon or right to the mortgaged property, and not mere general creditors. *Youngberg v. Walsh*, 72 Kan. 220, 83 Pac. 972; *Geiser Mfg. Co. v. Murray*, 84 Kan. 450, 114 Pac. 1046. The statute requiring the filing of chattel mortgages is in this respect the same as that requiring the filing of conditional sale contracts, and the same rule must apply to the latter. This case is thus distinguished therefore from *Re Wade* (D. C.) 185 Fed. 664, and *First National Bank v. Connett*, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148, both of which cases arose in Missouri.

Prior to 1910 the trustee stood in no better condition than the bankrupt, and these contracts would have been valid as to him, even though never recorded. It is said, however, by the trustee, that this condition has been changed by the amendment of section 47a of the Bankrupt Act made in 1910. That amendment is as follows:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

[3] This amendment must speak as of the time of the bankruptcy. The lien which the trustee is considered as holding must be a lien attaching as of that date. There can be no ground for saying that the lien is in existence before the bankruptcy. No case has been cited which so holds. In most of the cases referred to by the trustee the contract was never filed. In *Rock Island Plow Company v. Reardon*, 222 U. S. 354, 32 Sup. Ct. 164, 56 L. Ed. 231, the contract was not filed, yet the vendor had taken possession of the property covered by it before the bankruptcy. It appeared, however, in that case, that prior to that possession by the vendor another creditor had secured a lien by execution, which lien was preserved by the trustee for the benefit of the creditors. There is no authority for holding that a trustee can, in his own right, avoid such contracts as these when they have been filed before the bankruptcy. The decisions are to the contrary. *Keeble v. John Deere Plow Co.*, 190 Fed. 1019, 111 C. C. A. 668 (5th Cir.). Part of the opinion of the court below in this case is found in *Re Jacobson & Perrill* (D. C.) 29 Am. Bankr. Rep. 603, 200 Fed. 812; *Re Farmers Co-operative Co.* (D. C.) 202 Fed. 1005; *Hart v. Emmerson-Brantingham Co.* (D. C.) 203 Fed. 60. In *Sturtivant Bank v. Schade*, 195 Fed. 188, 115 C. C. A. 140 (8th Cir.), it appeared that a deed was made in 1902 and not recorded until August 8, 1906. A petition in bankruptcy was filed on October 8, 1906, and an adjudication had on October 31, 1906. The trustee came into possession of the real estate covered by the deed. The court considered that any judgment lien which the trustee was deemed to have was created subsequent to August 8, 1906. It is not necessary to determine whether, under the amendment of 1910, the lien of the trustee attached on the filing of the petition, or on the date of the adjudication, because the filing of the papers in this case preceded both dates.

[4] The trustee claims also that the transaction constitutes a preference, saying that these contracts are, under the laws of Kansas,

nothing more than chattel mortgages, and, not having been filed until within four months of the bankruptcy, they must be set aside on that ground. *Mattley v. Geisler*, 187 Fed. 970, 110 C. C. A. 90 (8th Cir.). But they are not instruments of that character. They are in the usual form of conditional sale contracts of farm machinery. The Implement Company's contract contains this clause:

"It is also agreed that the title to and ownership of, and the right to the immediate and exclusive possession, upon demand either oral or written, of all goods which may be shipped as herein provided, or during the current season, shall remain in, and their proceeds in case of sale, shall be the absolute property of the Big Four Implement Company and subject to their order until full payment shall have been made for the same by the purchaser in money. In case the Big Four Implement Company shall take possession of any property as provided for in this contract, they or their agent shall have the right to sell the same at public or private sale, with or without notice and at such place as they or their agent may deem best, and the proceeds arising from such sale, after paying the expenses of the same, shall be applied to the payment of the indebtedness due to said Big Four Implement Company. The appraisalment of said property to be sold is hereby waived, but nothing in this clause will release the purchaser from making payment as herein agreed."

The Plow Company's contract contains this clause:

"It is understood and agreed that the goods sold under this contract may be resold by said party of the second part only in the ordinary course of trade at retail, and that the title to and ownership of all said goods, until sold, in the manner aforesaid permitted together with the proceeds of those sold shall be and remain in the party of the first part and subject to its order until full payment in cash shall have been made by the second party for said goods, or of said notes, and until any judgment rendered therefor or thereon shall be paid in full."

There are no other provisions in either contract limiting these clauses. They are, therefore, under the rule in force in this circuit, conditional sale agreements. *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435 (8th Cir.); *In re Pierce*, 157 Fed. 755, 87 C. C. A. 537 (8th Cir.); *Monitor Drill Co. v. Mercer*, 163 Fed. 943, 90 C. C. A. 303, 20 L. R. A. (N. S.) 1065, 16 Ann. Cas. 214 (8th Cir.); *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; *Bryant v. Swofford Bros.*, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997. Are they conditional sale contracts under the laws of Kansas? The trustee says that they are not. He relies for that statement upon a single case, *Christie v. Scott*, 77 Kan. 257, 94 Pac. 214. It was there said:

"At least since the enactment of section 4257 of the General Statutes of 1901, providing for the recording of such notes and contracts as chattel mortgages, these contracts should be regarded as on the same basis as chattel mortgages. Indeed the transaction, reserving the title and right of possession and right to retake the property, is intended and operates simply as a security for the debt. The transaction does not essentially differ from one in which the seller, at the time of making a sale, takes a promissory note for the purchase price, and at the same time, and before he has really transferred the property sold, takes a mortgage thereon to secure the payment of the note—the purchase price. Under the law of this state such a mortgage conveys the title and right of possession to the mortgagee. In the one case the purchaser agrees unconditionally to pay a certain stated sum as the purchase price, and agrees that the seller shall hold the title to the property and right of possession until the debt is paid, and, if it be not paid, that the seller may take the property and sell it and apply the proceeds of the sale towards.

the payment of the note, implying that the proceeds may be less than the amount of the note. In the other case the purchaser executes a promissory note and unconditionally promises thereby to pay the purchase price, and, before he has actually received the property purchased, conveys the title and right of possession thereof to the seller, and further agrees that the seller may take possession of the property and sell it and apply the proceeds, less the expenses, toward the payment of the note. There is a theoretical distinction between the two transactions, but no practical difference."

The only question which the court *decided* in that case was that a vendee in a conditional sale contract was liable on his promissory notes, although the creditor had retaken the property. The court said:

"Authorities are cited from several states which hold that, where the contract attached to a note shows the seller retained the title and right of possession of the property until payment was made, and took possession of the property under the contract, the consideration for the note thereby failed and he cannot recover upon the note. The contract in this case, however, goes further and provides that the seller may take possession of the property, remove and sell the same, and apply the proceeds toward the payment of the note, less the expense of such removal and sale. This is a plain recognition of the obligation to pay the note after the taking of the property."

It also said on page 262 of 77 Kan. (94 Pac. 215):

"In the case at bar the purchaser may have had full consideration in the use of the articles purchased for the balance remaining unpaid on his notes. Under the contract attached to these notes, we hold that the plaintiff was authorized to take the property and sell it and apply the proceeds toward the payment of the notes, and that by so doing the law does not imply a revocation of the contract of sale, nor does the law imply that there remains no consideration for the payment of the balance due on the notes."

Conditional sale contracts have long been recognized in the law of Kansas. They were valid as to third persons, when there was no statute requiring them to be filed, while there was a statute requiring the filing of chattel mortgages. *Sumner v. McFarlan*, 15 Kan. 600; *Hall v. Draper*, 20 Kan. 137; *Standard Implement Co. v. Parlen & Orendorff Co.*, 51 Kan. 544, 33 Pac. 360; *Moline Plow Co. v. Witham*, 52 Kan. 185, 34 Pac. 751. The statutes of Kansas recognize the difference between a chattel mortgage and a conditional sale contract, by providing separate and different provisions for filing. The provision relating to chattel mortgages is found in section 5224 of the Compilation of 1909. Section 5237 relating to conditional sales is as follows:

"No. 5237. Sale Notes. No. 44. That any and all instruments in writing or promissory notes now in existence or hereafter executed evidencing the conditional sales of personal property, and that retain the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds of the county wherein the property shall be kept, and shall be entered upon the records of the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is fully paid, without the renewal of the same by the vendor; and any conditional verbal sale of personal property reserving to the vendor any title in the property shall be void as to creditors and innocent purchasers for value."

Section 5226 requires a chattel mortgage to be renewed every two years. Section 5237, as is seen, provides that the effect of the filing

shall continue, without renewal, until payment. Section 5232 provides for a public sale after notice under a chattel mortgage. There is no provision for such sale in the case of conditional sale contracts. The Supreme Court of Kansas did not, in our opinion, intend to hold in the case of *Christie v. Scott* that conditional sale contracts could not exist under the law of Kansas. So far as the effects of filing are concerned, they are similar to chattel mortgages; and this was all that was meant by what was said by this court in *National Bank of Commerce v. Carbondale Machine Co.*, 195 Fed. 180, 115 C. C. A. 132.

These being contracts of conditional sale, there is no foundation for the claim that the filing of them within four months of the bankruptcy constituted a preference. There could be no preference without a transfer by the bankrupt of his property. If there were any transfer in this case it is evidenced by these instruments dated December 8, 1910, and January 23, 1911. But they transferred no property of Bell. They expressly refrained from transferring any to him. *Re Farmers' Co-operative Co.* (D. C.) 202 Fed. 1005. In *Hall v. Draper*, 20 Kan. 137, it was said by Judge Brewer:

"In this respect such a conditional sale differs from an absolute sale with a mortgage back. In such case the vendee has everything, except as limited by the terms of the mortgage; here he has nothing except as expressed in his contract."

The orders of the court below are reversed, and the case is remanded, with directions to grant the petitions of the appellants.

INCORPORATED TOWN OF STONEWALL, OKL., v. STONE.

(Circuit Court of Appeals, Eighth Circuit. July 14, 1913.)

No. 3,864.

1. PLEADING (§ 236*)—AMENDMENT—DISCRETION OF COURT.

The granting or refusal of leave to amend a pleading during the trial to allege fraud is within the discretion of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

2. MUNICIPAL CORPORATIONS (§ 374*)—CONTRACTS.

Where plaintiff built a waterworks system for defendant town in accordance with plans and specifications furnished by an engineer employed by the town, he was not bound to inquire into the limitation on the engineer's authority; and in an action to recover a balance due on his contract, the contract between the town and engineer is immaterial, in the absence of proof that plaintiff knew of any departure therefrom by the engineer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action at law by F. R. Stone against the Incorporated Town of Stonewall, Okl. Judgment for plaintiff, and defendant brings error. Affirmed.

George W. Burris, of Stonewall, Okl., and King & Maxey, of Ada, Okl., for plaintiff in error.

D. B. Welty, of Oklahoma City, Okl., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. Stone, the defendant in error, who was the plaintiff below, made a contract with the town of Stonewall for the construction of a system of waterworks for \$19,900. On this contract \$16,400 has been paid, and this suit is brought to recover the remainder, \$3,500. There was a verdict for plaintiff.

Among the things to be constructed by the plaintiff was the following: "One 50,000-gallon steel tank on tower, as per plan." Stone built a tower 42 feet high. The defendant claims that the tower should have been 75 feet high. There was evidence that the original plan called for a tower located in the middle of the town 100 feet high, that a change was afterwards made in the location of the tower, and it was placed on top of a hill outside of the town, and made 42 feet high. Plaintiff testified that his bid, upon which the contract was later based, was made upon a plan then in the office of the clerk of the town, which called for a tower 42 feet high.

1. The first assignment of error is as follows:

"The court erred in holding that the allegations set out in defendant's pleadings [answer] were insufficient to warrant the admission of evidence offered by defendant going to show a fraudulent conspiracy between the plaintiff and the defendant's agent, the town engineer, whereby the plans and specifications of the tower and tank, the subject-matter in action, were changed and substituted without the knowledge and consent of the defendant."

The answer admits the making of the contract, denies that the plaintiff completed it, denies that the defendant is indebted to the plaintiff in any sum, and alleges as a counterclaim that plaintiff agreed to erect a tank 75 feet high, and that he failed to do so, to defendant's damage in the sum of \$5,000. There is no allegation of any kind in the answer of any fraud or conspiracy. This assignment of error cannot be sustained. Moreover, the case shows that when defendant asked leave to amend its answer the following proceeding took place:

"The Court: I will refuse the amendment, gentlemen. I think it is a little too late.

"Mr. King: To which we except, if the court please. Now, your honor, you will allow us to show now if Mr. Stone and Mr. McIntire did fraudulently change this plan of the original blueprint, and we didn't know any thing about it; we can show that, can we?"

"The Court: If the plaintiff here is connected with it in the manner which you suggest, it would be pertinent to the point, although he built according to the plans testified to that they were not the plans, and he knew it. In that phase of the case it would probably be competent."

Evidence was received as to all that took place in regard to the plans, as to the plaintiff's knowledge of a change in them, and his participation therein, and the court charged the jury as follows:

"Of course, if, on the other hand, he knew, or had reason to know from all that occurred there, that he was entering into a contract with the president

of the board of trustees and the clerk, who represented the board of trustees of the town of Stonewall, they believing that he was contracting to build the original tank and tower, and believing that he had that tank and tower in his mind, he knowing that the engineer, unknown to them, without their authority, had changed the plan, and that he was going to build a tank and tower in conformity with the changed plans, which was unknown to them, then he cannot recover in this case. * * * I say, therefore, it is largely a question of good faith. If, on the other hand, he knew the engineer was doing that which deceived other parties to the contract, that is, the city of Stonewall, represented by the board of trustees, and that by that deception he was entering into a contract to build a substantially different plant from what they thought they were getting, he then cannot recover, because he cannot be said to have complied with the contract according to its terms, and especially with reference to the plans, if that be true, that he knew was in the minds of the other contracting parties."

[1] 2. The second assignment of error is based upon the refusal of the court to allow the defendant to amend its answer, so as to allege the existence of fraud and collusion between the town engineer and the plaintiff with regard to the plans. Whether or not this amendment should have been allowed was in the discretion of the court, and there is nothing to show that that discretion was abused. Moreover, as has been seen, the court left to the jury the question as to whether or not the plaintiff acted in good faith, and in rendering a verdict for the plaintiff they must have found that he had no knowledge of any fraudulent change of plans.

3. The third assignment of error relates to the following observation made by the judge during the trial, in the presence of the jury:

"It doesn't make any difference, in my judgment, so far as this case was concerned, whether the plans were adopted by the city or not, if their representative, the city engineer, without the collusion of this plaintiff, and that is not in this case, presented to those bidders that night the plans—he presented them as the representative of the city, and the city is bound by those plans, when it proceeds to accept those bids."

No exception was taken to this remark, and when, later, the court charged the jury substantially to the same effect, the defendant did not except.

[2] 4. Defendant assigns as error the refusal of the court to admit in evidence the contract between the town and its engineer McIntosh. The part of the contract claimed to be material is the following:

"It is understood that all plans and specifications are to be submitted to the board of trustees for their approval and adoption, and that such copies of the approved plans as are required will be furnished."

As has been already observed, the court held that evidence was admissible which tended to show that the plaintiff and McIntosh fraudulently changed the plans without the knowledge of the defendant. The court charged the jury, as hereinbefore indicated, that if the plaintiff knew that there had been a change of plan, not known to the trustees, he could not recover. The verdict of the jury necessarily indicated, either that there was no such change, or, if there had been, that the plaintiff did not know of it. No evidence tending to show such knowledge was ruled out by the court. Under these circumstances, the fact that the contract provided that the plans must be

submitted to the trustee was immaterial. Plaintiff was not bound to inquire as to the limitation upon the authority of the engineer. He was entitled to act upon the plans submitted to him by the proper authorities of the town and upon which he based his bid.

The judgment of the court below is affirmed.

HULL et al. v. BURR et al.

(Circuit Court of Appeals, First Circuit. September 12, 1913.)

No. 1,015.

APPEAL AND ERROR (§ 832*)—SCOPE OF RELIEF—REHEARING.

Where appellants' brief specifically prayed for a decree quieting title by enjoining respondents from further asserting any adverse claim to the property in controversy, and no question of appellants' right to other general relief was presented to the District Court, from which complainants appealed, nor to the Circuit Court of Appeals on the original hearing, a rehearing would not be granted on the ground that the trial court might have given complainants substantial relief under the prayer for general relief without granting an injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.*]

On petition for rehearing. Denied.

For former opinion, see 206 Fed. 1.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. The parties assume this case to be of so much importance that we think it advisable to file a memorandum with reference to the petition for a rehearing filed on July 24, 1913, being careful not to qualify what we previously said in approval of the opinion and conclusions of the learned judge of the District Court.

The petition proceeds on the theory that our judgment was based on section 720 of the Revised Statutes (U. S. Comp. St. 1901, p. 581), prohibiting the federal courts from enjoining state courts. This is a narrow view, because, while our opinion refers to the statutory prohibition, yet this reference is immediately followed by the statement that "the authority of the court which first acquired jurisdiction, the parties being substantially the same, must prevail." That we relied on broad principles, having extensive application, without regard to the fact that one court is a federal court and the other a state court, is entirely plain from our references to *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, and *Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807, with the remark that "we leave this appeal to stand on the rules applied in the two cases cited." This is particularly noticeable because *Bank v. Stevens* applied the rule as against a court of the state of New York undertaking to obstruct by injunction the party concerned while pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceeding in the federal courts, in violation of the general rule explained especially at page 461 of 169 U. S., page 413 of 18 Sup. Ct. (42 L. Ed. 807).

One point of criticism by the petitioners for a rehearing is based on the proposition that the proceeding in Florida to which our opinion related was abated until revived by bringing in a new trustee in bankruptcy. This is a trivial proposition when considered in the light of what occurred, and was decided, in the litigation between Hall and Ames in the courts of this circuit, according to the opinions found in 182 Fed. 1008, 190 Fed. 138, and 190 Fed. 144, 111 C. C. A. 178. A further illustration of the broad rule on which our opinion relied, and of its long reach, is found in the decision of this court in *McDermott v. Hayes*, by an opinion passed down June 18, 1912, reported in 197 Fed. 129, beginning especially at the foot of page 135, 116 C. C. A. 553.

It is further said that the original bill contained a prayer for general relief, with reference to which the District Court appealed from might have given the complainants substantial relief without granting any injunction. It is enough to say that no proposition of that character was submitted to the District Court, or brought to our attention when the case was heard before us. On the other hand, the brief of the appellants specifically prayed for a decree quieting title by enjoining the respondents from further asserting any adverse claim to the property, and no other relief was asked for.

As to the request that our decree be amended to operate without prejudice, we need only remark that we see no occasion therefor; but, on the contrary, it is time, so far as we can discover, that all the parties should seek their rights in the court which we are asked to enjoin, which is fully capable of protecting all interests, especially as the ultimate subject-matter of litigation is realty, over which that court has direct jurisdiction.

The petition for rehearing filed on July 24, 1913, is denied, and the mandate will issue forthwith.

SYNNOTT v. TOMBSTONE CONSOL. MINES CO., Limited, et al. †

(Circuit Court of Appeals, Ninth Circuit. August 18, 1913.)

No. 2,263.

BANKRUPTCY (§ 463*)—REVIEW ON APPEAL—RECORD.

A decree of a district court, disallowing a claim in bankruptcy based on written instruments on the ground that they constituted a contingent liability, cannot be reviewed on appeal where the record does not disclose the terms, provisions, or conditions of such instruments.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 926; Dec. Dig. § 463.*

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the District of Arizona; Richard E. Sloan, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 29, 1913.

In the matter of the Tombstone Consolidated Mines Company, Limited, bankrupt, and another. On appeal from an order disallowing a claim filed by Thomas W. Synnott, individually and as attorney and agent for Alexander Sedgwick and Merrill K. Green. Affirmed.

Adams & Blinn and Amos L. Taylor, all of Boston, Mass., and Doan & Doan, of Douglas, Ariz., for appellant.

Everett E. Ellinwood and John M. Ross, both of Bisbee, Ariz., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. Upon the hearing and submission of this cause at the last term of the court, the appellant was given permission to bring up such portions of the record of the case in the court below as he claimed to be necessary to its proper disposition here. In response to that leave given there has been filed herein an affidavit of one of the attorneys for the appellant containing only matter wholly irrelevant to the case before this court. There has been no addition to the record made, nor any offer of any portion of the record in the court below. We must therefore dispose of the matter upon the record here as we find it.

It appears therefrom that the appellant, on the 8th day of August, 1912, filed with the referee in bankruptcy, on behalf of himself and others, a claim against the bankrupt based upon 461 special contract bonds of the face value of \$439,055, with interest thereon from the several dates of the bonds, which claim the referee disallowed on the ground that the instrument constituted contingent and not fixed liabilities of the bankrupt; that the appellant thereupon petitioned for a review of that decision of the referee by the court below, which petition was granted; and that upon a hearing thereof the court took the same view of the bonds relied on by the appellant and affirmed the decision of the referee. It is from that decision of the court that the present appeal was taken.

While the record before us contains the "registered name," "serial Nos.," and "face value" of the bonds, it contains nothing whatever concerning the terms, provisions, or conditions of the bonds.

No error being shown, we must affirm the judgment.

Judgment affirmed.

THE SUPERIOR.

(Circuit Court of Appeals, Second Circuit. July 23, 1913.)

No. 244.

COLLISION (§ 125*)—SUIT FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

The libelant *held* not to have sustained the burden of proof resting upon it to establish the allegations of fault in a libel for collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266-279; Dec. Dig. § 125.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by the Interstate Lighterage Company, as owner of steam lighter No. 20, against the steam tug Superior, the Lehigh Valley Railroad Company, claimant. Decree for claimant, and libelant appeals. Affirmed.

The following is the oral opinion of Veeder, District Judge:

It is perfectly obvious that this testimony cannot be reconciled. But the general situation satisfies me that the libelant has not sustained the burden of proof by credible testimony. There is no doubt that the Superior came from the New Jersey shore and was angling over towards New York. Nor is there any doubt that the Interstate was bound downstream. Whatever the truth may be as to what happened after that, I fail to see any fault on the part of the Superior. She kept her course, as she had a perfect right to do, and as she was bound to do, and I think that the preponderance of the evidence shows that this accident happened when both the Superior on her course and the Interstate off her course, from whatever reason, were pointing in towards and were near the New York shore. Such being my conclusion, it is unnecessary to discuss the testimony concerning the steering gear of the Superior. I shall have to dismiss the libel.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a libel filed against the steam tug Superior to recover damages sustained by steam lighter No. 20 from a collision with the Superior.

Foley & Martin and F. A. Spencer, Jr., all of New York City, for appellant.

Harrington, Bigham & Englar, of New York City, for appellee.

Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. The decree is affirmed on the opinion of Judge Veeder.

NOTE.—Judge Noyes heard the arguments, participated in the consultations, and agreed in the conclusion of this court, but resigned before the filing of this decision.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. J. HEINZ CO. v. COHN.

(Circuit Court of Appeals, Ninth Circuit. August 4, 1913.)

No. 2,195.

1. PATENTS (§ 157*)—ANTICIPATION—ORIGINAL AND DIVISIONAL PATENTS.

A patent granted on a divisional application relates back to the date of the original application, and the patent granted on the latter is not in the prior art and cannot anticipate the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229-232; Dec. Dig. § 157.*]

2. PATENTS (§ 312*)—VALIDITY—PRESUMPTION AND BURDEN OF PROOF.

A patent is presumptive evidence of prior invention and novelty and when produced makes for the patentee or his assignee a prima facie case which can only be overcome by proof of lack of novelty or of prior invention by another beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

3. PATENTS (§ 41*)—COMBINATION PATENTS—NOVELTY—"PATENTABLE NOVELTY."

A combination of old elements, which performs no new function and accomplishes no new results, does not involve patentable novelty.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 48; Dec. Dig. § 41.*]

For other definitions, see Words and Phrases, vol. 6, p. 5234.]

4. PATENTS (§ 25*)—"INVENTION"—AGGREGATION.

The mere aggregate of several results, each the complete product of one of the combined elements, does not involve invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-29; Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3749-3754.]

5. PATENTS (§ 27*)—"INVENTION"—EXTENSION OF USE OF OLD COMBINATION.

The extension of the use of an old combination of elements is not invention where no new result is produced and no new method is found for producing the old result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

6. PATENTS (§ 41*)—NOVELTY—NEW COMBINATION OF OLD ELEMENTS—"PATENTABLE NOVELTY."

In a new combination of old elements, whereby through their new relations they perform new functions and produce a new result, there is patentable novelty.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 48; Dec. Dig. § 41.*]

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

7. PATENTS (§ 27*)—"INVENTION"—TRANSFER OF DEVICE TO DIFFERENT ART.

The transfer of a device from one branch of industry to another, so that it may be put to a new use, may constitute patentable invention, depending to some extent upon whether the uses are so nearly analogous that the adaptation would be obvious to a person of ordinary mechanical skill and upon the importance of the result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

8. PATENTS (§ 36*)—INVENTION—EVIDENCE.

The presumption of novelty arising from the issuance of a patent, the general and extensive use of the new device, and the persistency with which it is infringed are all evidence of invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. § 36.*]

9. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ENVELOPE.

The Cohn patents, No. 835,850, for a one-piece envelope with a window in the face rendered transparent by the application of an oily preparation and having a colored border to conceal its irregularity of outline, and No. 824,908, for a similar envelope with the addition of advertising devices, were not anticipated and disclose patentable novelty and invention, also *held* infringed.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit in equity by Max M. Cohn against the H. J. Heinz Company. Decree for complainant, and defendant appeals. Affirmed.

Thomas A. Banning, Samuel W. Banning, Thomas A. Banning, Jr., and Ephraim Banning, all of Chicago, Ill., for appellant.

Chas. E. Townsend, of San Francisco, Cal., for appellee.

Before GILBERT, Circuit Judge, and WOLVERTON and DIETRICH, District Judges.

WOLVERTON, District Judge. This is a suit instituted by Max M. Cohn against H. J. Heinz Company, the user, for an infringement of certain letters patent of which Cohn is the owner. The patents, two in number, consist of an original and a divisional patent upon certain alleged inventions of Cohn as new and useful improvements in envelopes. The original application was filed November 8, 1904, the divisional January 17, 1905, and the patents issued, respectively, November 13 and July 3, 1906. Thus it will be seen that the original patent was issued later than the divisional, although necessarily applied for first. The patents are numbered, respectively, 835,850 and 824,908. The claim under the first is:

"As a new article of manufacture, an envelope with an unpunctured face of relatively opaque stock, said envelope face having a portion to which a preparation has been applied to render such portion transparent, and a colored or tinted border surrounding said transparent portion for the purpose of obliterating or concealing the effects of the tendency of the said preparation to creep into the surrounding opaque stock."

The claim under the second is:

"(1) An advertising device comprising an envelope having a window through which the addressee's name on an inclosure may show through; said window being in outline characteristic of some symbol of trade, a tinted or colored border surrounding and giving definition to said window, and permanent advertising matter forming no part of the address, appearing on said tinted border and related to and in juxtaposition with the outline of said window.

"(2) As an advertising device, an envelope having a generally opaque face except for a transparent window portion through which an addressee's name on an inclosure may show through; said window being in general outline characteristic of a symbol of trade, and permanent printed matter on the face

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the envelope related to and in juxtaposition with the outline of the window and co-operating with said outline to indicate a particular brand of goods."

The invention consists of a one-piece unpunctured envelope, of opaque or semitransparent stock, to a portion of which is applied paraffin oil and resin or grease, a preparation which renders the portion to which it is applied transparent, so that the address of an inclosure may be read through the envelope. About the transparency, which is styled a window, is printed a border of opaque coloring matter for the purpose of covering the irregular and ragged appearance caused by the tendency of the oil or grease preparation to creep or run beyond the margin of the stamp or die imprinting the window and to give definition to the window. The coloring matter, as described by the inventor, may be applied solid on the face of the envelope around the window, or it may take the form of graduated tints or shading.

The device covered by the second patent is in all essentials the same as that of the first, except that the window with its border is representative of some symbol of trade and in relation to and in juxtaposition with printed matter; the whole calculated and designed as a device for advertising purposes.

The defendant is using an envelope manufactured by the Transo Paper Company, which is a one-piece unpunctured envelope, manufactured of opaque or semitransparent stock, with an opening or window produced by an application of an oil or grease preparation, through which an address may be read, which window has a border of opaque colored matter. The border, not the window, represents in outer configuration and design a cucumber, or pickle, and there is printed on the lower flap of the envelope, on the inside, the word "Heinz," so that it may be read through the window when there is no inclosure in the envelope.

The defenses interposed are that the alleged inventions do not involve invention, nor anything beyond the exercise of ordinary mechanical skill and knowledge, that neither of them was new or novel at the time of the application and issuance of plaintiff's patents, and that each has been anticipated by prior patents; and, as to the second patent, infringement is denied.

Among other things, it is contended that Julius Regenstein, who is president of the Transo Paper Company, discovered or invented the style of envelope upon which plaintiff acquired his first patent prior to the date of its invention by the plaintiff (if it be that such envelope is a subject of invention at all), and this question we will dispose of first.

[1] The original Cohn patent will be referred to as the first, and the divisional as the second patent. Preliminarily the two cannot be considered in any way as one anticipating the other. The latter, being divisional relative to the former, relates back to the date of the original application. So that the first patent does not, with respect to the divisional or second patent, belong to the prior art. *Brill v. North Jersey St. Ry. Co.* (C. C.) 124 Fed. 778, 781; *Suffolk Company v. Hayden*, 3 Wall. 315, 18 L. Ed. 76; *McMillan et al. v. Rees et al.* (C. C.) 1 Fed. 722; *Ide v. Trorlicht, Duncker & Renard Carpet Co.*,

115 Fed. 137, 53 C. C. A. 341; *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, 131 Fed. 853, 858, 68 C. C. A. 233.

It will be recalled that Cohn applied for the first patent November 8, 1904. During the same month he manufactured and furnished to A. Zellerbach & Sons 10,000 envelopes in pursuance of his alleged invention. Cohn puts the date of his discovery prior to October 15, 1903, and fixes it by reference to the time of his severing his connection with the Illinois-Pacific Glass Company, which was on that date. In the progress of his invention Cohn tried a great many different kinds of paper and many kinds of preparations and was not satisfied with his results; the principal difficulty encountered being the tendency of the oil preparation to creep or spread beyond the limits of the impression. Finally he struck upon the idea of printing a border about the window to obscure the irregular or ragged margin. His first experiments resulted in developing a border produced by a zinco-graph, having a cloud effect; the coloring growing gradually lighter as it approached the outer margin of the border. The border, however, gave a distinct and regular outline to the window. The first ink used did not seem to answer the purpose, and it was only after many experiments that a suitable kind was found. Shortly after Cohn took up his duties with the Zellerbach Company, within a week or two, he began having his printing done by F. H. Abbott & Co.; they being commercial printers. It was then that he began to apply the oil preparation by means of a printing press. Prior to that he had applied the preparation with a brush, or a wood block, or a piece of rubber, much the same as rubber stamps are used. Up to the date of October 15, 1903, he had conceived the idea of an unpunctured envelope with a window addressing space, had succeeded in making an opaque sheet transparent by the use of an oily substance, had discovered and applied a printed border about the window, and had disclosed his invention to one B. T. Bean. Cohn, however, states that he did not bring his conception to a state of perfection until about August or September, 1904. It was shortly after that that he manufactured 10,000 envelopes for the Zellerbach Company. In the summer of 1904 Cohn conceived the idea of utilizing the envelope as an advertising medium by printing the border about the window to represent some article of trade, such as the outline of a cigar, a pickle or cucumber, and the like, and printing in connection and juxtaposition therewith upon the envelope the firm or trade-name of the manufacturer or dealer in such articles. Some time in October, 1904, he took samples of his invention to his attorney, which resulted in his application for patents. Shortly after consulting with his attorney, he had a well-known advertising firm make many specimens of his designs, one of which was produced and offered in evidence, representing by the shape of the window in connection with the border a cigar, with the printed matter in conjunction therewith upon the envelope, namely, "Perfecto Cigar"; the word "Perfecto" being printed above the cigar design and "Cigar" below. There are also stamped upon this envelope designs representing matches. Two other specimen envelopes of the advertising species are also referred to by the witness; one having a cigar-shaped window with the word "Cremo" printed above and

"Cigar" below, and the other the outline of the window in the shape of a pickle, with the word "Heinz" printed above and "57 Varieties" below.

Cohn's testimony is corroborated by several witnesses. Samuel E. Selling testifies that he was in the employ of the Illinois-Pacific Glass Company for 23 years; that Cohn showed him his idea of an envelope to take the place of one with a piece of paper pasted thereon forming the window, which was shortly before Cohn left the employ of the Illinois-Pacific Glass Company; and that Cohn had several samples of an entire envelope. Selling also saw samples with the advertising idea. He recognized a sample marked "R," this being a sample of an envelope constructed of transparent stock, the window being formed by rendering the remaining portion of the envelope opaque; also Exhibit L, which is one of the envelopes printed for Zellerbach & Sons. The sample of latter pattern, he says, he saw some little time after Cohn went into the employ of that firm. On cross-examination witness explained that "some little time" meant within two or three months. On redirect examination witness was thoroughly satisfied that Cohn had shown him a sample with the window produced by an oily substance before he (Cohn) had left the employ of the glass company.

B. T. Bean testifies that Cohn, while in the employ of the glass company, and before October 31st, showed him in confidence samples of an envelope after the style of an "Outlook" envelope (which latter was a two-piece envelope), except that the window was produced by some process making it transparent. The samples were of rather rough construction, having the appearance of being made up by hand. "Some of the samples were flat, just blanks, treated with this preparation. The transparent part was surrounded by a sort of a border of cloud effect."

A. Vanderweip, used the Zellerbach & Sons type of envelope in the latter part of 1904.

John C. Tooker, in the employ of F. H. Abbott, printed the Zellerbach & Sons order for 10,000 envelopes, and the earliest date that he began working for Cohn on the envelope with opaque stock was before the Christmas holidays of 1903.

Edward Epting made designs of the pattern of a one-piece envelope with transparent window for Cohn before Cohn left the glass works.

On the other hand, Julius Regenstein testifies, in substance, that some time in December, 1903, he and Mr. George Reese took to the firm of Banning & Banning a one-piece envelope of opaque stock, with a window produced by an oily preparation, for their advice respecting its patentability, and that he was advised by a letter dated December 16, 1903, that it was patentable over the Callahan patent, which is the "Outlook" two-piece envelope heretofore referred to. Regenstein was further advised that paper manufactured with opaque portions should be patented separately from the envelope, inasmuch as envelopes form one class in the Patent Office and paper another. Further testifying, Regenstein did not remember whether the window had the shape of an oval or a square, but said that the use of oil

made the transparent window. This envelope had no ring around the window. He also testified that he and Reese started to make envelopes with transparent windows with the use of oils during the first part of January, 1904. They discovered, however, the tendency of the oil to creep and to produce a ragged outline for the window, whereupon it was decided that they would go back to their "old trick" and print a border, which was intended to cover the bleeding. This feature did not consume more than one or two days. The first rings printed were too narrow, and it was found to be safer, so as to cover fully the bleeding, to print them broader. Regenstein further testifies that they completed envelopes with transparent windows, with borders or rings about the windows, some time during the month of January, 1904. Samples of such envelopes are produced, one with a much lighter border in color and width than the other. Much difficulty was experienced in producing the oily preparation for rendering the window transparent on account of atmospheric conditions, nonelastic oils, and various other causes; but at the present time the product of the Transo Company is the most perfect envelope of the kind now in existence. Regenstein attributes the credit of bringing the manufacture of these envelopes to their present state of utility to himself and Ernest Sauerman. On cross-examination Regenstein further testifies that the first envelopes his company put out of the Heinz pattern were in 1908 or 1909, and that in 1909 or 1910 he printed the envelope with the cigar pattern, but had seen the Cohn idea late in the year 1905 or in 1906, which came about by Cohn sending him parts of an envelope showing the advertising design. In a letter addressed to Max W. Cohn, of date December 10, 1906, Regenstein writes:

"We have made envelopes with a ring to cover the spreading of the oil, at least one year before you handed in your application. The idea, therefore, was not at all novel and was very old as far as we were concerned. It is very true that you have a patent which I could have obtained if I cared for it. This feature of a ring is very immaterial and we never considered it of very much consequence. We have made very successful experiments in making envelopes without a ring, and expect to have nothing else in the future, on the market, but such envelopes as mentioned."

Ernest W. Sauerman testifies that the first recollection he has of an envelope of the kind is that Regenstein and Reese came to him with some paper and oil and asked him to take an impression of the oil on the paper, which he did. Finding that the oil spread, they made a ring-plate and printed it on the paper to cover up the unevenness of the margin of the oil impression. Shortly after printing the paper in that way, the witness cut some envelopes out by hand and folded them, which he says was in the first part of January, 1904.

Joseph Wien relates that he assisted Sauerman in putting oil on envelopes, or rather on the paper of which they were to be made, and at the same time they printed a ring or border about the transparency produced by the oil. The time, he asserts, was about January 15, 1904.

Gustaf Olson, an engraver, had made plates for borders for 16 or 17 years. He testifies that he made a plate for printing a ring about

the transparency, which he thinks was in January, 1904. He afterwards saw envelopes printed by use of the plate.

Max Lau thinks he saw Regenstein and Reese working upon one-piece transparent window envelopes prior to 1904.

Adolph G. Voss testifies that he saw Sauerman and one Wien printing on paper with transparencies and a ring around them, which he thinks was in February or March, 1904.

George A. Behrens says that he saw Sauerman and Wien printing transparent portions, as well as a border around the same, at various times about five or six months prior to his leaving the American Colortype Company, which was in the latter part of May, 1904.

In this connection, it is in evidence that one George Reese, who was backed financially by Regenstein, filed in the Patent Office on January 15, 1904, a claim for an invention of a one-piece envelope with transparent window, so that an address could be read through, but without a border. This claim was rejected because anticipated by a British patent to Busch, No. 11,876, and a United States patent to Callahan, No. 701,839, and another to Brown, No. 36,393; the rejection being made some time prior to February 11, 1904. On the same date (January 15th) Reese, assignor of one-half interest to Julius Regenstein, made application for a patent on an alleged invention comprising a sheet or roll of paper adapted for the formation of a series of envelope blanks, so to be formed that, when a letter or article is inclosed within the completed envelope, the portion of the letter containing the address will show through, thus obviating the necessity of providing an additional address upon the exterior of the envelope. A patent was granted in pursuance of the application August 9, 1904. This application, or the patent issued, does not include the element of a border about the window, but one of the processes for making the window is by the application of oil or similar substance to the opaque general stock. The patent was filed in England December 28, 1904, in Canada December 16, 1904, and a French patent was issued of date April 5, 1905.

On May 9, 1904, Cohn applied to the Patent Office at Washington, D. C., for a patent, and later, namely, on June 27, 1904, applied, one John Shipp joining with him, for a British patent on an envelope without any cuts or openings in it, leaving raw edges, but which was to have a transparent space, with a comparatively opaque background, to allow the addressee's name to show through. The Washington application was rejected, but a British patent was issued. A sample envelope made in accordance with this idea was introduced in evidence marked "Exhibit R," which has been previously referred to. Cohn relates that envelopes manufactured under the patent proved unsuccessful, because the ink application for rendering them opaque except the window also rendered them brittle, and stamps would not adhere, and the public did not take to their use.

Both Cohn and Regenstein are strongly corroborated in their respective claims respecting the invention of a one-piece unpunctured envelope having a window with a border to give definition thereto; the time of discovery fixed by Cohn being in October, 1903, while that of Regenstein is prior to January 15, 1904.

The patent to Cohn is evidentiary of his prior invention. So that Regenstein (or the defendant) has not only the burden of showing that Cohn made no such discovery prior to Regenstein's alleged discovery but of amplifying his own discovery so clearly and indubitably as to overcome the effect of the patent.

It is not deemed essential that we discuss the testimony of the respective parties in detail. There are certain features that seem to dominate the controversy, and to these we will refer.

It seems clear that Regenstein had not discovered the border idea when he applied to Banning & Banning for advice as to the patentability of his supposed devices, for his attorneys wrote him of date December 16, 1903, and their letter is proof of that fact. Nor in all probability had he made such discovery at the time Reese applied for the British, French, and Canadian patents, which was as late as December, 1904, and April, 1905. Furthermore, the letter written by Regenstein to Cohn of date December 10, 1906, tends strongly to the former's discredit. By this he asserts that he made envelopes with a ring to cover spreading of oil at least one year before Cohn made his application, which was November 8, 1904. If this were so, why did he claim his discovery as late as January, 1904? Then he asserted that the ring was very immaterial, as they never considered it of very much consequence. If such were the case, it is very improbable that Regenstein and his collaborators would have spent any time in trying to devise a method for covering the creep and the ragged edges about the window. That Regenstein made envelopes with a window and border in an experimental way is very probable, but the time of the experiments does not so clearly appear. On the other hand, it appears that Cohn did not comprise his idea of a ring about the window in his application of May 9, 1904, which was rejected, nor in his application for a British patent of date June 27th. But the concept of this envelope was upon an entirely different basis. The stock was to be transparent, to be rendered opaque by the use of ink except the window, and there was no reason for employing the border, because no oily preparation was to be used, and there would be no creeping to be obscured. The inference, therefore, that Cohn had not discovered the utility of the border prior to that time, could not be so strong as with Regenstein. From a consideration of these features of the controversy, we are impelled to the conclusion that the plaintiff has made the better case.

[2] At any rate, it is very clear that the defendant has not, upon the evidence adduced, rendered its contention in the way of overcoming plaintiff's evidence, including his patent, free from doubt. The patent is always presumptive evidence of prior invention and novelty and, when produced, makes for the patentee or his assignees a prima facie case which, to overcome, requires proof of the lack of novelty, and that some one else is the prior inventor, beyond a reasonable doubt. The authorities are uniform to this purpose. *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *Cantrell v. Wallick*, 117 U. S. 689, 695, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Parker v. Stebler*, 177 Fed. 210, 101 C. C. A. 380. This the defendant has not done.

We are now to inquire whether plaintiff's devices in envelopes, in either or both forms, involve invention. This question must be con-

sidered in two aspects; one relating to whether the supposed inventions are such that they do not involve inventive faculty or genius but merely the application of ordinary mechanical skill and knowledge, such as any one engaged in the mechanic's art could readily apply as a means of accomplishing a desired result; and the other relating to and comprising the previous state of the art, which every person engaged in invention is unalterably presumed to know. That is to say, whether, having knowledge of the previous state of the art, the supposed invention is such as would reasonably and naturally occur to or suggest itself to any practical man in the exercise of ordinary mechanical skill and knowledge. The two aspects of the inquiry are so interrelated in their premises and consequences that it will be more satisfactory to discuss them together. Indeed, the insistence of counsel for defendant is predicated more upon the latter aspect than the former, for they say:

"The defense that we are now insisting upon * * * is that there was no invention in the envelopes of the Cohn patents, when what Cohn did, over what was known and existed before, is taken into consideration."

This involves, necessarily, the ascertainment of the prior state of the art. In this we are to keep in mind what is claimed for the invention. It is a combination consisting of three elements, namely, a one-piece envelope, a transparent window in the envelope produced by a given process, to wit, the application of an oily preparation, and a border about the window to obscure marginal irregularities in appearance. This refers to the concept under the first patent. We will consider the second later.

September 9, 1862, a patent was issued to J. S. Brown for an envelope containing a window for display of a business card or an address. The processes for producing the window are three: One by rendering the space designed for the window transparent by the same means or substances as are employed for making tracing paper; another by cutting out a portion of the envelope of proper size and leaving the aperture uncovered; and still another by covering the aperture with transparent paper.

In 1896 August Busch procured a British patent for postal envelopes, differing from others in that a portion or the whole of the envelope is transparent. The patent further specifies:

"In some cases the front of the envelope is made of transparent material, while the back is opaque, or vice versa; or a portion of the front may be transparent, while the rest of the envelope is opaque, or the back and a portion of the front may be transparent. The desired contrast or difference may be produced either by choosing two different kinds of paper or by printing with opaque coloring matter applied to a portion of the envelope."

Simply stated, this concept comprises the use of transparent stock rendered opaque as to portions of envelope desired by application of coloring matter.

On June 10, 1902, Americus F. Callahan secured a patent for an envelope, which may be styled a two-piece envelope, and which is produced by cutting the window in the envelope and covering it from the inside with transparent paper permitting the address to be read through.

Beyond these evidences of the state of the art, Cohn has testified touching a device that consisted in simply cutting an aperture in the envelope for the address to be read through, concerning which he relates that complaint was made of it by the postal authorities because of the unprotected edges of the aperture catching and tearing through handling in forwarding and distributing the mails, and that the concept proved unsuccessful and its use was abandoned.

In this relation the Reese patent for a series of envelope blanks, and the Cohn and Shipp British patents, both heretofore noted, may be referred to, although, having been issued subsequent to plaintiff's invention, it is doubtful if they are relevant as bearing upon the prior state of the art.

Tracing a different variety of old art, defendant's counsel invoke an art pertaining to three-color picture printing, printing of lithograph labels, and printing in general, in connection with which borders have been employed to give regularity, finish, and decoration to the picture, labels, or matter in print. Regenstein relates that he had been for some time prior to the date of plaintiff's supposed invention engaged in printing three-color pictures, and that, in order to give finish, in many instances a border was printed about the outer edges to cover any irregularities that might arise from applying the three colors. The idea, he thinks, has been applied in the art for something like 20 years. As illustrative of this character of art, certain art calendars have been produced showing borders of various styles. Some are printed, plain or decorative; some, one in particular, designed to show a mat as a frame for the picture; some are merely stamped upon the paper; and some, being stamped, are gilded for decorative purposes.

Another variety of old art is one that pertains to the decoration of windowpanes, and the Tudor patent, issued in 1877 and reissued in 1878, is referred to for illustration. The invention consists in paper having opaque lines printed, painted, or stained thereon, resembling the outlines of leaden sash bars, and transparent coloring applied by printing, staining, or painting to the spaces between the opaque lines. In rendering spaces and portions more or less transparent, oil, resinous substances, and varnish are used. In the same relation, the Smith and Browne patent of 1902, relating to the production of posters, labels, etc., is referred to.

Then, again, still another style of art is produced, illustrated by the Hole patent of 1894 and the Boldt patent of 1897, as indicating the prior state of the art. The first of these relates to the construction of perforated coin bags for use in banks, railway shops, and like places, and the latter to packing cases for hooks and eyes, pins, and other like articles, constructed with a window of suitable transparent material to permit the contents to be seen through.

These, with others not necessary to take special note of, are all brought forward as illustrating and showing the prior state of the art. Of all these, it may be conceded, for the purposes of this controversy, that the plaintiff had notice and knowledge. In view of the premises, has the plaintiff, in the production of his supposed art, exercised inventive faculty, or has he merely applied ordinary mechanical skill,

such as would occur to any artisan in the prosecution of his particular occupation?

As it relates to the particular art of the production of a one-piece envelope with a transparent window and a border, we find nothing in the older prior art that has been brought to the state of perfection that Cohn's concept has been. As to the first element, namely, a one-piece envelope, that is old. As to the second, namely, the transparent window in envelopes, produced by the application of an oily preparation, that is new in envelopes but apparently old in the decorative art. And, as to the border, that is new as applied to a window in envelopes but old as applied in other arts.

[3] A few principles in patent law may be stated as an aid towards the solution of the problem before us. A combination of old elements, which performs no new function and accomplishes no new results, does not involve patentable novelty. *Knapp v. Morss*, 150 U. S. 221, 227, 14 Sup. Ct. 81, 37 L. Ed. 1059.

[4] Nor does the mere aggregate of several results, each the complete product of one of the combined elements, involve inventive faculty. *Mosler Safe Co. v. Mosler*, 127 U. S. 354, 361, 8 Sup. Ct. 1148, 32 L. Ed. 182.

[5] Nor is the mere extension of the use of an old combination of elements invention where no new result is produced and no new method is found for producing the old result. *Voigtmann v. Weis & Ridge Cornice Co.*, 148 Fed. 848, 78 C. C. A. 538. See, also, *Schweichler v. Levinson*, 147 Fed. 704, 78 C. C. A. 92.

[6] But in a combination of elements that are old, whereby through their new relation they perform new functions and produce a new result, there is patentable novelty. *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Taylor v. Sawyer Spindle Co.*, 75 Fed. 301, 22 C. C. A. 203.

Mr. Justice Hunt states the principle succinctly in *Reckendorfer v. Faber*, 92 U. S. 347, 357 (23 L. Ed. 719). He says:

"The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements."

See, also, *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749.

[7] Novelty, however, may consist in transferring a device of one branch of industry to another, so that it may be put to a new use. In such case, whether the concept of transferring the device and putting it to a new use is the result of inventive faculty "depends," says Mr. Justice Brown in *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275—

"upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries; what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use, particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the

effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer. Doubtless a patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him; but the person who has taken his device and, by improvements thereon, has adapted it to a different industry may also draw to himself the quality of inventor."

And further:

"If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty."

Archbald, D. J., states the principle in another way, but concretely, as follows:

"That the mere mechanical adaptation of an old device to an analogous one is not invention, while a new application in a different art, whereby a new and distinct result is produced, will be." *Diamond Drill & Machine Co. v. Kelly Bros.* (C. C.) 120 Fed. 289, 292.

See, also, *General Electric Co. v. Bullock Electric Mfg. Co.*, 152 Fed. 427, 81 C. C. A. 569; *Hale & Kilburn Mfg. Co. v. Oneonta, C. & R. S. Ry. Co.* (C. C.) 124 Fed. 514.

All the elements in plaintiff's device being old, the novelty, if it has any, consists in the combination and in their application, or the application of a part, or one or more of them, to a new use; such use resulting from a transference from one branch of industry to another. Thus we find, from a review of the state of the art, that an oily preparation for rendering opaque stock transparent in envelopes was not so used or applied prior to the invention by Cohn and Regenstein; the latter's discovery being the later, as we have previously determined. But it was applied, as shown by the Tudor patent issued in 1877, in the decorative art to prepared paper for ornamenting glass windowpanes. Manifestly Brown had not struck upon the idea in envelopes when he secured his patent in 1862, for the patent declares that the transparent portion of the envelope or wrapper may be so rendered by the same means or substances as employed for making tracing paper, or any other, in the process of manufacturing the paper or the envelope. It must be conceded that such process is widely different from the process of rendering paper transparent by the application of a grease or oily preparation. A patent that comes nearer to the one in controversy in the character of the art is the Smith and Browne patent for combined opaque and transparent posters, labels, and the like, in which the transparent portions were so rendered by the use of spirit varnish but not by a grease or oily preparation.

As it respects the border, that is an element and a concept very common and old in several arts. It is employed as a plain band in the printing and decorative arts, and also it may represent the rim of a mat or the frame of a picture. In concept the border is the same thing as a frame of a picture, or the casing to a door or a window in mechanics. In all these the manifest purpose is to cover defects, correct irregularities, conserve the finish, and add decoration to the par-

ticular thing under construction. And yet it is worthy of remark that it was never applied to cover defects produced by the creep of grease or oil applied to paper until Cohn did it.

The Busch patent, like the Reese patent and the Cohn English patent, has not the element of a border in its simplest form. The envelopes in the Busch and Cohn English patents are produced by the use of transparent paper rendered opaque except the portion left for reading through, be it large or small, and in these there was no purpose to subserve, such as covering ragged edges or irregularities arising from any cause. The Reese patent, although the window is produced by the application of an oily preparation, is absolutely without the concept of a border, although the border has proven to be essential to cover the ragged edges and to give definition to the window. This had not even suggested itself to Regenstein, although counsel for defendant claim now that the application of the border was a thing of ordinary mechanical skill.

It is often difficult, as has been remarked by the authorities, to distinguish between the exercise of inventive faculty and the application of ordinary mechanical skill.

In *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866, it was held that the stamping of the figure upon the surface of a roller for pebbling leather by pressure, where the use previously had been of a smooth roller, required no invention. In *Brown et al. v. Piper*, 91 U. S. 37, 23 L. Ed. 200, invention was denied to one who applied the principle of an ice cream freezer to the preservation of fish. In *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267, it was declared that so changing the proportions of a refrigerator as to utilize the descending instead of the ascending current of cold air was not invention. And in *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438, that the placing of a dredging screw at the stem instead of at the stern of a steamboat lacked in invention.

On the other hand, many instances may be found where very simple concepts have been declared to be the product of inventive genius. Two instances which are fair illustrations are referred to in *Potts v. Creager*, *supra*. One was respecting the application to telegraph instruments of a torsional spring such as had been previously used in clocks, doors, and other articles of domestic furniture (*Western Electric Company v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294), and the other the substitution of the use of anthracite coal for bituminous in smelting iron ore, inasmuch as it produced a better article of iron at less expense (*Crane v. Price*, Webster's Pat. Cas. 409). Thus it is that simplicity of device is not necessarily the test of lack of invention or patentability. When a thing has succeeded it often seems very plain and simple, and the wonder is that its suggestion had not come earlier; but the fact remains that no one has ever thought of it, whether skilled or not, and yet its utility is at once recognized when brought to public attention. This of itself is evidence of invention. As is said by Mr. Justice Bradley in *Loom Co. v. Higgins*, 105 U. S. 580, 591 (26 L. Ed. 1177):

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

[8] Beyond this, the presumption of novelty attending the issuance of letters patent, the general and extensive use to which the new device is applied, and further the use persisted in by one infringing the device are all evidence of the product of inventive faculty and genius. *Diamond Rubber Co. v. Consol. Rubber Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; *A. R. Milner Seating Co. v. Yesbera*, 133 Fed. 916, 67 C. C. A. 210; *Buchanan v. Perkins Electric Switch Mfg. Co.*, 135 Fed. 90, 94, 67 C. C. A. 564; *Morton v. Llewellyn et al.*, 164 Fed. 693, 90 C. C. A. 514.

It is an admitted fact that the Transo envelope has grown rapidly into general use. Such is not the case with any other patent on envelopes in any form, except the Callahan patent, which does not anticipate Cohn's concept. Regenstein declares in his testimony that "the ring on a Transo envelope adds in every way to the clean and perfect appearance of the envelope." And he further testifies that "the clean and artistic appearance of the envelope adds to its merchantableness," and that they do not put out any envelopes without the ring. This in the face of his declaration to Cohn by letter of December 10, 1906, that "this feature of a ring is very immaterial, and we never considered it of very much consequence." He testifies, furthermore, that for the last six years, ending February, 1911, he gave almost exclusively to the promotion of the Transo envelope. But he had previously testified:

"Our envelope is now considered the most perfect transparent envelope in existence and has a sale in this country as well as in foreign countries. * * * To my knowledge, I am the only manufacturer and have never seen any one-piece transparent envelopes made by any one else in this country."

We are strongly impressed that all this, including the proven and acknowledged utility of this envelope, which is a duplication of the Cohn envelope (first patent), is sufficient to settle any doubt in favor of the presumption of novelty which attends the patent. The Acting Commissioner of Patents, in his final analysis of the claim, says that:

"While the final result is to enhance the appearance by concealing the irregular outline, the result is brought about by mechanical features, namely, the application of the printed border to a portion of the paper to which the oily preparation has been applied."

[9] We conclude, therefore, that the combination, consisting of a one-piece envelope, having the window rendered transparent by the application of an oily preparation, together with the border to conceal the irregular outline produced by the use of the oily preparation and to give definition to the window, is the result of inventive faculty and not of mere application of ordinary skill and adaptation. Nor is there anticipation by any prior patent. Infringement as to this patent is conceded.

As it relates to the second patent, there is little more to be said. The one-piece envelope with the transparent window and the plain border being patentable, the one-piece envelope with the transparency and border so modeled as to represent some article of manufacture, or the trade-mark of the manufacturer, employed in connection with printed matter so as to produce a device for advertisement, is, upon

like principles, manifestly the result of invention. The defendant's attempt to vary the concept by printing the name of the manufacturer on the inside of the lower flap of the envelope so that it may be read through the transparent window, of the usual shape, when no inclosure is within the envelope, is an equivalency or a distinction without a difference in principle and is also an infringement.

These considerations lead to an affirmance of the decree, and such will be the order of this court.

UNITED TUNNEL IMPROVEMENT CO. v. INTERBOROUGH RAPID
TRANSIT CO. et al.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 258.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TUNNEL CONSTRUCTION.

The Reno patents, No. 723,307 and No. 754,807, for tunnel structures and process of making same by removing segments from the bottom of the iron or steel shell after it is in place and constructing a reinforced concrete girder beneath, to which the shell is anchored, construed, and *held* not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the United Tunnel Improvement Company against the Interborough Rapid Transit Company and the Rapid Transit Subway Construction Company. Decree for defendants, and complainant appeals. Affirmed.

Following are the statement and opinion of Hand, District Judge, in the court below:

This is a suit in equity upon two patents each issued to Jesse W. Reno, the first granted on March 24, 1903, numbered 723,307, and the second granted on March 15, 1904, and numbered 754,807. The complainant is a company organized by Reno for the purpose of holding these patents. Except in so far as the defendant has used them, the patent has never gone into practical operation anywhere nor has the patentee or the complainant ever issued any license upon the patents, which therefore are what are colloquially known as "paper patents." Each patent consists of structure and process claims for tunnels, built in uncertain foundations. The patentee recites in the first invention that his object is to construct tunnels in easily compressible earth by the use of the well-known segmental iron tunnel shell. He presupposes that the tunnel is to be made by the use of the Brunel shield which is driven forward at the end of the tunnel having an open face from which the earth is excavated. In order to keep the earth and water from entering the open face of the tunnel, a bulkhead is placed at a convenient distance to the rear in that part of the tunnel shell already made and air pressure is maintained between the bulkhead and the open face sufficient to overcome the combined head of water and earth upon the open face. All this the patentee presupposes, and in addition that the foundation of the earth about the tunnel shell was comparatively soft and yielding and that the tunnel would be large enough to take the standard cars and locomotives where the speed is to be very high. Under these conditions "the thin shell of the ordinary tunnel construction is not rigid enough to withstand the enormous concentrated weights

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

moving rapidly over them. Moreover the vibrations caused by the rapidly moving trains set up a motion in the particles of earth which immediately surround the walls of the tunnel, causing an unstable support for the walls and resulting in cracks and leaks in the tunnel. In my invention I provide a concrete girder of sufficient mass to take up these vibrations before they reach the surrounding earth and of sufficient strength to distribute the load over a large area." His method is to take up the plates on the bottom of the already constructed tunnel between the bulkhead and the shield and to excavate the bottom, to drive longitudinal wooden sheeting in a trench below the tube, to fill the trench with concrete, to lay at the bottom of it steel rods embedded in the concrete, and then to anchor the edges of the shell into the concrete by substantial iron anchors. There is a dispute in the testimony as to whether an alternative form is indicated under which the plates may be replaced over the top of the concrete and the concrete in turn filled up to the level of the ties on the top of the replaced plates. The patentee, speaking of the concrete girder so formed, says: "The concrete girder thus formed and anchored to the cast-iron shell above it will act with the shell as a single member or beam." Also he says that the girder will add to the weight of the tunnel and therefore counteract its buoyancy. The claims in suit are six in number, three for the structure and three for the process. They are Nos. 5, 6, 9, 11, 13, and 15 and read as follows:

"(5) In a tunnel structure, the combination with a cylindrical shell having the shape of a horseshoe arch in cross section of a continuous girder of concrete securely anchored to the springers of said arch.

"(6) In a tunnel structure, the combination with a cylindrical shell of an exterior concrete re-enforcement extending longitudinally beneath said shell and rigidly secured thereto; said concrete re-enforcement having embedded within it longitudinal tension rods."

"(9) In a tunnel construction, the combination of iron segments bolted together in the form of a horseshoe arch; a longitudinal concrete girder joining the end segments of said arch and anchor bolts, securing said end segments to said concrete girder."

"(11) The herein described method of constructing a re-enforced tunnel which consists in driving a segmental tunnel through silt, sand, or easily compressible earth, removing one or more of the lower segments of said segmental tunnel, excavating a trench there beneath and filling said trench with concrete."

"(13) The herein described method of constructing tunnels in easily compressible earth, consisting in first building a tunnel proper of segmental rings then removing certain segments in the floor of said tunnel between the heading and the bulkhead, and then building under the floor a massive concrete girder."

"(15) The herein described process for constructing a re-enforced tunnel consisting in forcing in advance of a bulkhead, maintaining air under pressure between the cutting shield and the bulkhead, excavating material cut by said shield, lining the cut made by the shield with segments adapted to resist the collapsing external pressure, excavating a trench beneath the working chamber, and constructing therein a concrete girder."

The second patent is for a method of building tunnels and proceeds on precisely the same presuppositions as the first.

The girder in question is built in a somewhat different way and is supported upon piles driven into the earth. This may be constructed either by having an iron shell anchored into the concrete girder or by replacing plates, with an opening through which the concrete is poured, making a firm grip around the ribs of the plates. The concrete girder is itself made in the same way except that it is made up of tongued and grooved blocks and that I-beams take the place of rods. When the tunnel base is opened, piles are driven down into the earth, a row of four for each plate, and upon the tops of these the concrete girder is built. The details of driving the piles and removing the plates are disclosed in the patent but are not material to this suit. Four of the 14 claims are here in suit, all of them method claims, Nos. 6, 7, 8, and 12, as follows:

"(6) The method of tunnel construction consisting in forming a segmental tunnel shell, removing floor segments in the base of said tunnel shell, driving piles from within the tunnel through the openings formed, and securing the tops of said piles to said tunnel shell.

"(7) The herein described method of constructing tunnels which consists in forming a segmental tunnel shell, removing floor segments, driving straight piles through the openings made by the removal of said floor segments from within the tunnel, forming a concrete bed upon the tops of said piles, and securing said bed to the tunnel shell.

"(8) The herein described method of constructing tunnels, which consists in forming a segmental tunnel shell, removing floor segments, driving piles through the openings thus formed, forming a load distributing member upon the tops of said piles, and securing said load distributing members to said tunnel shell."

"(12) The herein described method of constructing tunnels, which consists in forming a segmental tunnel shell, removing segments from the floor of said shell, excavating a trench from beneath, forcing piles down through the openings formed in the bottom of the tunnel shell, filling said trench with concrete, and securing said concrete to said tunnel shell."

The defendant operates a tunnel across the East river from the borough of Manhattan to the borough of Brooklyn, which consists of two iron tubes driven by the familiar Brunel method presupposed in the patent in suit. After the tunnel was substantially completed, the defendants found that it was not all in grade. This was due in part to the sinking of the shield in its progress owing to the insufficient air pressure which let in mud and water, in part to the sinking of the completed shell owing to the settling around it of the earth through which it ran. To restore the grade various experiments were tried, among others those to which the complainant objects. In both tubes on the Brooklyn side to about the water level from a point east was made what is known as the "concrete invert," of which there was built 88 feet in the north tube and 172 feet in the south. All this except 16 feet in the south was built at atmospheric pressure. To do this the engineers removed the lower plate of the tube and substituted a concrete base, so that of the original circumference of the tube the cylinder covered about two-thirds and the remaining one-third was covered by the concrete. The details of the structure can be so much more readily comprehended by the diagrams than by words that it is best for an understanding of them to refer to the complainant's exhibit, "Drawing of Sub-base Construction Arched Metal Shell," and to the complainant's exhibit, "Drawing No. 5." It may be well here to say, however, that the "invert" contained no longitudinal rods but did contain transverse rods. Whether it was anchored to the shell above is in dispute between the parties and is considered in the opinion.

The other part of the structure which the complainant thinks infringes the first patent was built below the water level and for a distance of 108 feet, and in the north tube considerably nearer the Brooklyn than the Manhattan shore, and like the "concrete invert" can best be understood by reference to the drawings which are exhibits in the case, complainant's Exhibit 22.

The alleged infringement of the second patent arises from the fact that after the tunnel was built the defendant, fearing for its safety while the superincumbent earth was settling around the sides of the shell, opened the bottom and drove down iron piles, two abreast, which they then filled with concrete. The tops of these they anchored in cradles of concrete upon which the tube rested. The cradles were 25 feet and 51 feet apart and had no connection between them. They were fastened to the plates when replaced only by forcing grout through the grout holes left in the plates.

These patents can best be considered separately. I will consider first patent 723,307, next patent 754,807.

Patent 723,307.

There are three structure claims in suit and three method claims. I shall assume with the complainant that claims 5 and 9 indicate a tunnel in which the bottom plates have been permanently removed, while claim 6 indicates

one in which they have been replaced, so that figure 1 of the patent reads upon it: Is the "concrete invert" an infringement of claims 5 and 9? Is the "sub-base construction" an infringement of claim 6? Was the reconstruction of the tunnel at either or both parts in which they occur an infringement of claims 11, 13, and 15?

The "concrete invert" is a tunnel structure having a cylindrical shell. The question is whether it has a continuous girder securely anchored to the springers of the arch. That the girder is not continuous in the sense which the disclosure indicates is too obvious for comment, because it has no binding rods which can give it any reinforced longitudinal tensile strength. It must depend wholly upon the inherent tensile strength of concrete, and that too of concrete which was laid in blocks at intervals. However, it may still be regarded as a girder. Again, if "anchored" at all, the girder is anchored only because of the pressure on top of the horseshoe arch which keeps the shoes in engagement with the lugs of the transverse bars and thus takes up the sheering strain between the iron shell and the "concrete invert." If so, the whole acts as one girder; the concrete being in tensile strain, the tube in compression.

I do not mean to consider whether this is an equivalent to "securely anchoring" the girder to the arch, because I am so clearly satisfied that the concrete is not a "continuous girder" in any such sense as the patentee intended. A girder is a member put in to take up a strain between two supports, and it is perfectly obvious that this invert was put in for no such purpose at all. The foundation was entirely adequate over the whole surface where it was used, nor is there the slightest reason to suppose, if the tunnel had not been deformed in the making, that any foundation at all would have been necessary. Furthermore, whatever the theoretic tensile strength of concrete, it is very doubtful whether practical men would rely upon it for that purpose, under the conditions in which it must be laid. Noble, for instance, the complainant's witness, says that it cannot be depended on and that it has no factor of safety. If one could be sure that no holes would not exist to which the cement has not reached, and if laboratory conditions could be secured, the case might be different, but obviously they cannot. Therefore I should hold, if it were necessary, that even a monolithic base of concrete, if made a foot thick, under the conditions in question, was not sufficiently shown to have any such tensile strength as would or could practically be thought to act as a girder. As I shall show later, the defendants certainly had no intention of the sort and Freeman's assumption that they did not reinforce it longitudinally, though they did transversely because they thought it already strong enough, cannot be taken seriously for a moment.

However, this is all on the assumption that the "invert" is a monolith, which it is not. It is laid in lengths of on the average 13 feet and each length when laid was flanked by a board against the surface of which the concrete was poured. The average time between the completion of one section and the beginning of another was seven or eight days. When the new section was commenced, the concrete was poured against the old surface without any effort to bind the two together. Now the bond between new and old concrete, the defendant's witnesses say with much detail, is quite different from the cohesion of a concrete monolith. Reno left his girder to depend upon nothing of the sort but in both patents inserted tensile steel or iron to bind the whole together. To meet the defendant's case the complainant presents practically nothing. Reno himself, it is true, says that the adhesion is nearly as great as cohesion, but his witness Freeman does not support him as I shall show, while Noble will not even give any practical value to monolithic concrete in tensile strains. Freeman, when first questioned (XQ. 47), had an impression that he had seen somewhere that the adhesive strength was 90 per cent. of the cohesion. This certainly is negligible. Later and in rebuttal (folios 1007-1010) he assumed that the concrete was put on in horizontal or inclined surfaces so as to have a bond, an assumption subsequently contradicted by the testimony. He further says that, even if this were not so, the whole would be a "very stiff structure." On cross-examination (XQ. 7 and 8) he declines to say more at first than that the bond would

be less than the cohesion of a monolith. Finally on redirect, in answer to a question presupposing no bond, he explains the load distributing effect of separate sections if the impact was on one end only.

From all this it abundantly appears that the adhesion between the old and the new concrete does not in any sense make a continuous and massive girder, such as Reno had in mind. One cannot with any justice compare the succession of short section each less than a fourth of a car length with the structure which Reno had in mind and which was to distribute the impact of a heavy locomotive over a substantial area. Indeed, as I read the testimony, the final position is that the term "girder" will include a series of successive blocks, none of which performs any girder function, but each one of which by its resistance to compression will transmit some of the strain to the others when the impact is at its end. When the weight is at the middle of any block nothing will support it but the friction at its edges. Reno's girder has become a split lintel operating wholly by compression.

Again, consider that the defendant expected strains laterally and provided against them by the rods to take up tensile strains, while no rods were used longitudinally. Certainly the defendant could not have intended the base to take up as much strain longitudinally as it must transversely, or it would have reinforced the concrete in that way too. Therefore it is quite obvious that the defendant never intended that substance to act as a girder longitudinally at all, since it was not able to do so transversely, unless the strains were very different. They were in fact different, because, owing to the excellent foundation, there was no longitudinal strain, no shock to be distributed. If the defendant built a girder, it certainly did so unwittingly. The words of the patent must be interpreted reasonably and with a sense of their context. By a girder the patentee of course meant something capable of distributing the impact of a locomotive. The only distribution which would help would extend over an area much longer than the locomotive. A member having an inherent girder action which would effect such a distribution of shock was all he meant and all he could have meant. The "concrete invert" does nothing of the sort, because it acts as a girder only in sections much shorter than any single car which will pass over it. Even the whole of the whole section of 177 feet is shorter than a train. It is quite clear to me that these fragments are not in any sense within claim 5.

Claim 9, being more specific than claim 5, necessarily falls with it.

The next question is of the 108 feet of sub-base construction below the water line in the north tube. This structure is in my judgment a form of girder; at least it would be such if rigidly annexed to the shell of the tube. I agree that if detached it is more doubtful, because the iron reinforcement is substantially in the neutral plane of stress and would have no tensile value, yet even in that position it would act as a girder of a depth from below the rods to the top of the concrete, disregarding the tensile strength of the concrete below the rods altogether. It is not therefore because it has no capacity as a girder that I disregard it but because it is not "rigidly secured" to the cylindrical shell. I need not go into the theory of the cohesion between iron and concrete, because there is actual evidence from plates subsequently taken up to show that there was no such attachment between the concrete and the base of the tube as justifies the term "rigidly secured." The concrete when laid was kept an inch or more below the replaced plates and, when the grout was squirted in through the grout holes, it attached the two together, so far as we can now find out, over not more than half the surface. Indeed, the plates detached themselves from the concrete when they were pulled at one end. Mud and water had in part filled in the space between the concrete and the plate over a large part of the area.

Now it does not appear just what Reno meant by the rigid securing of the girder to the tunnel, in case the plates are replaced. He does not in his specifications refer to any such structure and I am giving his patent that scope, because figure 1 seems to show it. Whether the replaced plate was to have apertures in it as the case in the second patent or not, I cannot say, probably not. If not, then the rigid attachment must be that understood by one skilled in the art and such a one could have understood nothing but the very

common use of grout for the purpose. For the sake of argument therefore, and in view of the fact that no means of attachment is anywhere shown, I shall assume the attachment intended was that between metal and concrete or grouting. Even in that case the patent could not mean such an attachment as was in fact effected by the defendant, made without any effort to keep the mud and water out, and resulting in what cannot under the circumstances be regarded as a rigid securing in the sense that the tube and girder form one member for engineering purposes.

Moreover, if this be not true and if the defendant's attachment be regarded as rigid within the patent, the complainant at once falls foul of Breuchard, No. 706,380. There the structure disclosed was a heavy concrete girder laid below a complete shell and re-enforced with longitudinal iron beams to take up tensile strains. It is quite true that Breuchard shows no rigid attachment, but then, I have shown, Reno shows none either. The only rigid attachment actually disclosed was when the bottom plates are removed, and, when they are replaced, a person following the patent would have only his knowledge of the art to guide him. If that would lead him to use grouting in the case of Reno's patent, it would lead him to use it in the case of Breuchard. Therefore Reno's patentability over Breuchard in respect of this structure must rest only upon the fact that Reno said that the girder must be rigidly secured without showing any means, while Breuchard did not. Now such a suggestion might be patentable in some cases, but it is absurd to regard it so in the case of a tunnel of this character in which it had been customary for many years to surround the whole shell with grouting anyway. For example, the defendant has done this to the whole of both its tubes, and Reno's own disclosure shows it (figure 1, No. 5) apparently as a usual method of construction. There was therefore nothing novel in suggesting that the concrete girder be attached when grouting was to be the attachment.

Coming now to the method claims, I can see no substantial difference between 11 and 13, unless it be that claim 11 covers any opening within the tunnel, while claim 13 covers only an opening between bulkhead and heading, and there must be a girder to satisfy claim 13. After Breuchard, 706,380, and Stone, 748,809, there can be said to be nothing new in building beneath the shell of such tunnels a massive concrete girder or digging a trench and filling it with concrete. It is true that Breuchard does this in advance, just as he drives his piles in the same place, but Stone did not, for his manhole with his cover "1" was situated back of the end of the shield. Now I really cannot see how the difference is patentable. Breuchard depended upon the rigidity of his shield to hold back the earth until he laid his foundation at the bottom, and he left an opening at the bottom for just that purpose. Stone did precisely the same thing, though his manhole was further to the rear, a difference which to me seems absolutely immaterial. It is true that each of them had a substantially solid front between the opening and the bulkhead in the rear, and this was indeed a very good thing, because it would prevent the difference in pressure between the top and bottom of the shield, which was dangerous beyond any doubt, if the bottom was to be left open. The chance of blowouts where the whole front of the shield is open is greatly increased, and in excavating with either Stone's or Breuchard's method the air pressure could safely be kept much higher than with the complainant's. I do not forget that Breuchard had openings in the front of his shield through which some air might escape, but that is a very different matter from having the whole of the face quite open, because the openings were small and would allow the escape of much less air. The defendant's reconstruction between two solid bulkheads, therefore, much more nearly approximates these than it does the patentee's.

The complainant must therefore depend for patentability over these two disclosures upon the fact that he has built his tube and then opened it afterwards. This his counsel describe quite warmly as a very bold conception never before ventured in the history of the art, but surely it was no more temerous to take out the bottom of one or more of the segments already laid than it was to keep the bottom of the shield itself open. Indeed, it seems to me to be a clumsier way of accomplishing the same result than Breuchard or

Stone. Nor, indeed, was there anything bold at all about leaving open the bottom of the tunnel when you had command of compressed air. The only boldness which was involved was that of the complainant in suggesting that the bottom be opened while the whole heading remained under pressure from water and earth; and that, while perhaps it may be feasible, at least has never been done and is in the opinion of competent experts an extremely hazardous operation. If the ends be solid, so that there is no great difference of pressure, the mere opening of the base, which was all that the defendant did at any time, was a thing known in the art before either Breuchard or Stone. Vide Edwards, British Patent, 1883, 3864. If the patent in suit had proved itself in any given instance to be practically a great advance over the disclosures which I have been discussing, I should yield my merely personal conviction to the history of the industry, but, except in so far as this supposed infringement be an instance, none has ever used Mr. Reno's method for any purpose, and with the best will in the world not to substitute for the invention the mere opinion of a judge I cannot bring myself to think that there is anything more than a very obvious difference in method between building a concrete girder for a foundation from below a hole made in the shell and building it below any opening in the shield itself.

In respect to the fifteenth claim the same considerations apply, except that no strain of the words here seem to me to permit the construction which would result in an infringement in this case. The claim is so specific that the air pressure should be between the cutting shield and the bulkhead as to eliminate either concrete invert or sub-base. Indeed, in the case of the concrete invert the infringement is met for two reasons, both because the whole of the reconstruction was long after the cutting shield had been removed and because it was nearly all done at atmospheric pressures. Certainly if the complainant cannot recover under the eleventh claim he cannot hope to recover under the fifteenth claim. I think he can recover under neither one of the two.

Throughout his testimony the complainant speaks as though he had conferred a great benefit on the defendant and alone made possible the reconstruction of its tunnels. This seems to me to be a quite unfounded position, for the testimony is absolutely uncontradicted that the foundation for the tunnel was absolutely safe everywhere; Noble joins in this conclusion with the rest. Reno meant his structures to answer difficulties, which did not exist here, and it is really absurd to speak of these tunnels as being made possible by what he disclosed. I cannot indeed see how any one can even cursorily look at the supposed infringements to the first patent and think that they are essential. Instead of being of any assistance for the reconstruction of the tunnels, I think that it is nothing short of the exact truth to say that he helped them not a bit and that no fair-minded person observing the wholly fragmentary and experimental character of the supposed infringement could come to this conclusion. These considerations, it is true, are not strictly relevant to the question as to whether there has been infringement or not, but they are nevertheless an answer to what I cannot but feel is an unfair suggestion by the complainant that the defendant is trying to appropriate his invention without any return. The concrete invert proved to be a most extravagant method, wholly impracticable as soon as those conditions were encountered which the complainant presupposed in his patent. As for the sub-base construction, it is proved quite unnecessary, for the defendant reconstructed its tunnel except for that 108 feet without any sub-base anywhere.

The bill is dismissed as to the first patent.

Patent 754,807.

This patent is quite easily disposed of in view of Breuchard, if the considerations be valid which I have already stated. Breuchard shows piles driven from the fore part of the shield. He shows a concrete bed upon top of them, continuous in character and knitted together by iron I-beams. I cannot understand the distinction which the defendant's expert witness attempts to draw between this patent and the patent in suit. He seems to suppose that a comparison between the claims is material, but surely it is not necessary to

say that it is not the claims but the disclosure which anticipates. I do not say that Breuchard anticipates all the claims in such sense as to make the whole patent invalid, because the method shown by Reno for securing the girder and piles to the tunnel shell is quite different from that disclosed by Breuchard, since, the bottom plates of the tunnel being left open, there will be grillage embodied in the concrete which will effectively anchor the whole shell to the girder even more strongly than is shown in figure 4 of patent 723,307. This idea is probably indicated in the last words, "securing the tops of said piles to said tunnel shell," with which claims 6, 7, 8, and 12 all conclude. The structure so indicated would be in every sense a single member of great girder-like capacity and may prove of utmost value for certain purposes, but it is not the defendant's structure. The only "securing of the tops of the piles to the tunnel shell" was by squirting grout between the shell and the cradle, and that proved, as I have already said, to constitute a very tenuous attachment. If the patent is to depend merely upon securing Breuchard to the shell by grout, the patent is not novel.

Nor was Breuchard alone the only person to drive piles through a tunnel of this sort. There was no difficulty in opening the bottom of the tunnel under the pressure accessible; nor was there any difficulty in driving down piles or piers. This had been indicated and done in tunnels of this character by several others before this; thus, Jacobs, 690,960, and Lindenthal, 714,204 and 714,205. I do not mean that any one of the inventions was an anticipation of the patent in suit, but I do mean it showed that there was no difficulty in driving piles through an opening made in the base of such a tunnel. Such patents taken in connection with the first patent in suit, itself a part of the prior art, leave the second patent too limited in scope to cover the defendant's method.

It is very significant, as I think, that, at about the time that the tunnels were built under the East and North rivers in this city, a whole group of patents for tunnels came out and that there was nothing radical achieved by any one of the patentees, but each elaborated ideas of somewhat similar character to meet the supposed difficulties which would be encountered in the soft material supposed to exist, especially under the North river. This was to be done either by a pile or pier foundation, or a concrete foundation, or a combination of both, and the number of these patents at that time seems to me pretty fairly to indicate that there was nothing of invention in the general ideas but only in the details in which they were worked out. I have already alluded to one such detail in the case of the present patent which may be patentable, but the mere use of piles with separate cradles of concrete on which the tube is to rest was not a patentable idea. In this view I need not consider whether cradles at intervals of 25 feet or 51 feet could from any point of view infringe the claims. The bill will be dismissed also as to the second patent.

I have hitherto assumed in this discussion that both Breuchard and Stone anticipated the defendant's patent. There is no dispute in respect of the second patent in suit. In respect of the first, the complainant does not concede it. The application in that case was filed on December 24, 1902, and the application of Breuchard was filed February 24, 1902, and of Stone on February 12, 1902. Stone's patent by stipulation has been antedated to the summer or autumn of 1901, and in rebuttal of this the plaintiff attempts to antedate his own invention to October or November in 1900, over two years prior to his application. In proof of this his wife testifies to a conversation she had with her husband on the date in question in which he showed her two sketches exhibiting the section of a completed cylindrical shell with a concrete girder beneath it and re-enforcing rods at the base embedded in the concrete. In the consideration of this question I shall assume the truth of the conversation as testified to by Mr. and Mrs. Reno. Reno, however, gives no explanation of the delay except that he was studying a good deal on the question and was looking up in text-books as to the strength of concrete girders and was reading everything that he could find on the subject.

The law in respect of this subject is laid down after a full examination of the authorities by Judge Colt in *Automatic Weighing Machine Co. v. Pneum*

matic Scale Co., 166 Fed. 288, and it may be accepted, especially in view of the great authority in patent law of the learned judge who delivered the opinion of the court. It is this: An invention may be carried back to the date of its full conception by the inventor, provided he has used due diligence in reducing to practice or in making application, if there be no reduction to practice, as in the case at bar there could be none. In that case an unexplained delay of one year in reduction to practice was held too long. Judge Lanning for the Third Circuit Court of Appeals announced the same rule in *Continental Rubber Works v. Single Tube A. & B. T. Co.*, 178 Fed. 452, though the delay was there excused. Judge Kohlsaat applied it in *Curtain Supply Co. v. National Lock Washer Co.*, 174 Fed. 45, where the delay had been six years. The earlier cases may all be found in Judge Colt's opinion.

Now Reno is in this dilemma; if his disclosure was complete in October, 1900, he was not reasonably diligent in waiting until the end of December, 1902, to file his application; if he was reasonably diligent it was because he needed for the completion of his conception the intervening two years, and he does not antedate Stone and Breuchard. I cannot see any escape from one horn or the other. He himself suggests no reason for the delay, but the necessity of engineering study, and that did not interfere with an application if he had really fully conceived the invention. It was necessary only in case he was not yet satisfied that he had actually grasped and solved the full problem, and that means that he regarded his ideas yet as tentative and provisional. If they were such, they were not the conscious answer to the problem, for which the inventor will hold himself responsible, that the law requires, but he had only pregnant suggestions still offered as hypothetical solutions, thrown out provisionally as the basis for investigation and confirmation. He makes no claim that poverty or sickness stood in his way, nor that he was too engrossed with independent affairs, assuming that such would be any excuse. For these reasons his date of invention must be in my judgment that of his application.

Bill dismissed, with costs.

This cause comes here from an appeal from a final decree of the United States District Court, Southern District of New York, dismissing a bill in equity for infringement of two patents. They were both issued to Jesse W. Reno; the first, No. 723,307, March 24, 1903, for "tunnel construction"; the second, No. 754,807, March 15, 1904, for "pile foundation."

Prindle & Wright, of New York City (Edwin J. Prindle and Arthur Wright, both of New York City, of counsel), for appellant.

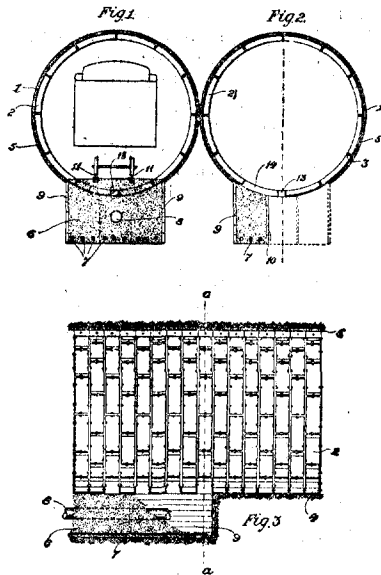
J. L. Quackenbush, of New York City (J. E. Bull and Chas. T. Adams, both of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. In the opinion of the District Judge will be found a full statement of the specifications and an enumeration of the claims relied upon; repetition of them is unnecessary. We fully concur with Judge Hand in the reasoning by which he reached the conclusion that defendants have not infringed the patents as he has construed them and would not find it necessary to add anything were it not for the circumstance that he has given to the senior patent a broader construction than we think it is entitled to.

Whatever may have been in Reno's mind and whatever he may have said in some contemporaneous document, we find it impossible to persuade ourselves, with all the help that his counsel's brief affords, that his patent discloses a structure in which the segments of the shell

rings, which are removed for the purpose of building the concrete girder, which is to underrun the entire length of the tunnel, are to be replaced after the girder is built. Possibly it may be held to indicate that: If we number the successive shell rings 1, 2, 3, 4, 5, 6, 7, 8, etc., 1, 3, 5, 7, etc., have their lower segments removed, their place being taken by the concrete girder, while 2, 4, 6, 8, etc., remain undisturbed. But that seems a very strained construction and we should doubt whether such a tunnel would be practicable in operation; certainly none such has ever been built so far as this record shows. We find nothing in the patent to warrant the conclusion that the tunnel, when completed, consists of a shell, wholly of iron or steel, which rests on a concrete base. On the contrary, the patentee at lines 96 etc., p. 2, states that the concrete which forms the girder "replaces those segments" which were removed to build it; and again at line 98, etc., p. 1, he says that the rings, when bolted together on their sides, form (not the whole shell) but "the *main part* of the shell of the tunnel."



The only support for the contention that the removed segments of the tunnel rings are to be replaced after the concrete girder sets is said to be in the drawings. Judge Hand thought that such a structure was shown in figure 1, but we do not so understand it. Turning to the drawings, there are shown at the bottom of Fig. 1 segmental plates (the three lower plates, one 13, a very short one) of a ring, but they are no part of the ring nearest to the spectator; they belong to the ring next beyond, showing plates, which have not yet been removed. This is manifest from the specifications, which state that Fig. 1 represents a cross-section on the line *a-a* of Fig. 3. On that line *a-a*, the bottom segment (13) of the ring that line intersects has been removed, so

that the segment 13 shown in Fig. 1 must belong to some other ring.

Fig. 2 does not show that restored segmental plates 13 and 14 have been removed and all it indicates is the method of building up the concrete; it indicates nothing as to what the tunnel will be when completed. This figure also indicates a cross-section on the line *a-a*.

All that there is to base the contention on is the single heavy line in Fig. 3 at the lower end of the longitudinal section of the left-hand ring. We know of no authority which will warrant a court, from so small a portion of a patent drawing, to insert into the claims a material element, not suggested or described anywhere in the specifications or claims. In addition to the passages already quoted from the specifications, the following excerpt will indicate how carefully the patentee avoided expressing the idea of replacing removed segmental

plates, which it is now contended he had in mind and intended to cover by his patent:

"When the shield has been advanced a sufficient distance from the bulk-head, about fifty (50) feet, one or two of the narrow segments 13 and the adjacent segments 14 are removed, as shown in Figs. 3 and 5, and the earth beneath the tunnel is removed to form a trench for the concrete girder. This trench is preferably excavated in three separate sections, as indicated in Fig. 2. First, the outer sections are formed by driving the wooden sheeting (indicated by numerals 9 and 10 in Figs. 1 and 2) forward for a length sufficient to allow the placing of a length of tension rods 7. The two side trenches are then filled with concrete in the same manner, the drainpipe 8 being formed by packing the concrete around suitable wooden moulds, as is well understood. After the three sections of the trench have been filled with concrete up to the circular rings, forming the shell of the tunnel, the lower segments 13 and 14 are removed from the alternative rings, the anchor bolts 15 are inserted in position, and the concrete is built up to the required level to support the track stringers or cross-ties for the rails. After the concrete has set the remaining lower segments may be removed and the spaces which will be occupied with concrete as before.

"By removing at one time only the alternative segments and allowing the concrete which replaces those segments to set before the remaining segments are removed all tendency of the shell to collapse by reason of their removal is avoided."

On all other branches of the cause we fully concur with Judge Hand.

Decree affirmed, with costs.

CORN PRODUCTS REFINING CO. v. DOUGLAS & CO.

(District Court, N. D. Iowa, Cedar Rapids Division. August 18, 1913.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF MAKING LUMP STARCH.

The Moffatt patent, No. 541,941, for a process of forming starch into coherent masses by subjecting starch containing not more than 30 per cent, nor less than 16 per cent. of water to a temperature in excess of 100 degrees F. and less than 160 degrees F. conjointly with pressure is limited with respect to heat to the maximum of 160 degrees stated, which is shown by the specification and proceedings in the Patent Office to be an essential and important element in the process. As so construed the patent is not infringed by the process of the Gudeman patent, No. 789,127.

In Equity. Suit by the Corn Products Company against Douglas & Co. On final hearing. Decree for defendant.

Robert H. Parkinson, of Chicago, Ill. (Hurd, Lenahan & Kiesel, of Dubuque, Iowa, on the brief), for complainant.

Charles A. Clark, of Cedar Rapids, Iowa, and Jones, Addington, Ames & Seibold, of Chicago, Ill., for defendant.

REED, District Judge. The complainant, the Corn Products Refining Company, a New Jersey corporation, sues the defendant, an Iowa corporation, for the alleged infringement of United States pat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ent No. 541,941, issued July 2, 1895, to Ansil Moffatt, for improvement in the process of forming starch into coherent masses. The complainant derives title to the patent and all rights thereunder from the original patentee. The defendant denies the validity of the patent and its infringement if valid and alleges that it makes lump starch according to the process described in United States Patent No. 789,127, issued May 2, 1905, to Edward Gudeman for the process of making lump starch. The suit was commenced in April, 1905. A large amount of testimony has been taken by both parties, and the cause is now finally submitted upon the questions of the validity of the patent and of its infringement by the defendant.

The process of forming starch into coherent masses for commercial use from cereal grains, commonly called "lump starch," is not new with Moffatt, and he distinctly asserts that he is not concerned with the initial steps of manufacturing such starch, for he says in the specifications of his patent:

"My process is not concerned with initial steps of manufacturing but in the way in which I prefer to operate it. I take starch from the 'runs,' dry rapidly until it possesses about 20 per cent. of water, and then subject it to the joint action of heat and pressure, whereby it is consolidated into compact masses or 'lumps,' without the necessity of 'crushing,' 'scraping,' or long subjection to heat in dry rooms, as heretofore. Normal air-dry starch contains about 16 per cent. of water and about 84 per cent. of real starch, and it is my aim to leave my starch in a normal air-dry state, when put into the boxes for commerce. Hence I allow a slight excess of water during pressing to allow for evaporation. At ordinary temperatures, if wet starch be subjected to sufficient pressure, nearly all of its water above the 'air-dry' standard may be pressed out, but the starch, although dry, remains in an incoherent mass or powder. Likewise 'air-dry' starch under pressure will not produce coherent 'lumps' at ordinary temperatures; but I have found if dry-air starch, or starch containing a slight excess of moisture, be heated to from 100 to 160° Fahrenheit, and subjected to pressure, it will cohere in masses of greater or less firmness according to degree of temperature and pressure. If pressed at 100° Fahrenheit the 'lumps' are comparatively soft, but if pressed at upward of 140° Fahrenheit the 'lumps' are firm, compact, and durable. Above 160° Fahrenheit the starch is in danger of gelatinization or 'cooking.' The starch produced by my joint application of heat at 140° Fahrenheit, and pressure say of 500 pounds per square inch for five minutes, is distinguishable from that produced by the old method of long drying, in appearance and properties, and the 'lumps' possess the advantage of retaining any given shape. Beside I am enabled to take starch already dried, of any form, and by my process turn it in a short time into 'lump' starch.

"'Lump' starch being the highest priced starch entering commerce in large quantities, the advantages of my process in this way are easily seen.

"I do not limit myself to the production of starch in coherent masses from cereal grains alone, but include all starch-containing substances or even other forms of starch itself as sources of my raw material.

"Having fully described my invention, what I claim and desire to secure by letters patent is:

"(1) The process of manufacturing coherent masses of starch consisting in the application of pressure to starch containing not more than 30 per cent. nor less than 16 per cent. of water, and subjected to a temperature in excess of 100° and less than 160° Fahrenheit conjointly with pressure, substantially as described.

"(2) The process of manufacturing coherent masses of starch, consisting in reducing the moisture in the starch until approximately only 20 per cent. of water remains, then subjecting the mass to a temperature of approximately 140° Fahrenheit conjointly with pressure."

Neither is the defendant concerned in the initial steps of manufacturing lump starch, for it takes the mass after it has passed through the initial stages or steps of the manufacture and then subjects such mass to a process that results in the completed product of the starch for commercial use.

The steps in the manufacture of lump starch at the time of the Moffatt patent are admitted by both the complainant and defendant and briefly stated are: (1) The evaporating process, by which the moist starch is formed into cubes or blocks and allowed to stand in the open air, or in kilns or ovens, for several days, in order that the excess of moisture in the mass may escape by evaporation, during which period the impurities work to the surface and are subsequently removed. The lumps are then trimmed and subjected to a drying process of several days to reduce the moisture to a normal air-dry condition, containing about 16 to 20 per cent. of moisture; (2) the centrifugal process, by which the moist cubes or lumps of starch are placed in receptacles of a rapidly revolving machine, whereby the excess moisture is expelled by centrifugal force, after which the lumps are placed in an oven or kiln and allowed to remain for several days to dry or cure; and (3) the compression process, in which the wet mass of starch is formed into lumps by means of compression in some sort of a press, whereby the excess of moisture is removed by pressure, and the lumps in a moist condition then subjected to a drying process for several days in an oven or kiln. In each of these processes the excess of moisture in the starch mass is eliminated either by evaporation, centrifugal force, or pressure, after which the lumps are subjected to a drying or curing process in an oven or kiln for several days.

Moffatt by his process proposes to do away with this long drying or curing process of several days and produce a lump starch suitable for commercial purposes after the initial steps are completed, in the short period of five minutes, or some approximately short period of time, by subjecting the moist lumps of starch, containing not more than 20 per cent. of moisture, to the joint action of pressure of about 500 pounds per square inch, and a temperature in excess of 100° Fahrenheit, and less than 160° Fahrenheit (and preferably about 140° Fahrenheit), he says is necessary to prevent gelatinization of the starch cells which, according to his teachings, will seriously injure, if not destroy, the completed starch product for laundry purposes.

The defendant by its process of manufacturing lump starch for commercial use, after the initial steps have been taken, whether it be according to the Gudeman patent or not, deliberately subjects the moist lumps of starch containing about 20 per cent. of moisture to a temperature in excess of 160° Fahrenheit and from 180° to 200° Fahrenheit for the express purpose of producing incipient or initial gelatinization of the starch cells (which is a substance in the nature of glue) to cement or bind the starch particles together in the completed commercial product. This is an essential difference, it claims, between the process of Moffatt and the process practiced by it.

The testimony is voluminous, and it cannot be adequately re-

viewed within the proper limits of an opinion of a trial court; but an excerpt from the testimony of one of the defendant's experts will show the difference, as claimed by the defendant, between the process of Moffatt and that practiced by it in the manufacture of lump starch. Dr. Doerflinger, one of defendant's experts, after stating the various steps practiced by the defendant in making lump starch for commercial use, summarizes them as follows:

"(1) Finely ground cornstarch containing about 20 per cent. of water is heated and agitated in a steam-jacketed covering mixing machine at a temperature above that at which the gelatinization of cornstarch begins. A portion of the starch cells are broken down by the heat and moisture, forming a binder of gelatinized starch, which becomes disseminated throughout the mass, coating the ungelatinized cells.

"(2) The charge from the cooker, while still hot, is compressed at a pressure of a low order of magnitude, while the binder is in a fluid condition. This serves to compact the charge and bring the gelatinized binder into close contact with the starch particles. The charge of starch in the cylinder is confined under pressure.

"(3) The starch in the cylinder is then removed from the press and is allowed to cool under pressure. During the cooling the binder hardens and sets, cementing the mass into a solid block.

"(4) The block of starch is removed from the cylinder, broken up, and the pieces dried in a kiln, and are finally taken out, sorted, and packed for market."

A question was then asked the witness as follows:

"Q. 13. Please compare the defendant's method of making lump starch as described by the witnesses Heede and Johnson on behalf of the complainant, and Staring and Smith on behalf of the defendant, with the Moffatt patent in suit, and state whether in your opinion the defendant's method is or is not that described by the specification and recited by the claims of the said patent, giving your reasons for any opinions you may express."

To which he answered:

"A. The process recited in the specification and claims of the Moffatt patent in suit consists of a single operation: 'The application of pressure to starch containing not more than 30 per cent. nor less than 16 per cent. of water and subjected to a temperature in excess of 100° and less than 160° Fahrenheit conjointly with pressure.' Moffatt aims to leave his starch in a normal air-dry state when taken out of the press. He depends for the formation of his lumps entirely upon the force of cohesion. Any chance of gelatinization he carefully avoids. In the process of Moffatt the heating and pressing are conjoint. His pressure is of a high order of magnitude. In applying pressure and a heat of 140° Fahrenheit jointly, he uses a pressure of 500 pounds per square inch for five minutes. Moffatt's preferred degree of heat is a temperature of 140° Fahrenheit. The process of the defendant as described by complainant's witnesses Heede and Johnson and defendant's witnesses Smith and Staring is different in mode of operation and in principle from that described and claimed in the Moffatt patent in suit. It is not the process described in the Moffatt patent in suit. The process of the defendant depends for its success upon the formation of a binder of gelatinized starch. In the process recited and claimed by the Moffatt patent in suit the formation of lumps is due to the force of cohesion. In that of defendant's it is due to the force of adhesion caused by the cooling and setting of a fluid binder of gelatinized starch. The process recited in the specification and claims of the Moffatt patent in suit uses a pressure of a high order of magnitude, while the process of the defendant uses a pressure of a low order of magnitude. In the process recited by the specification and claims of the Moffatt patent the application of heat and pressure is joint, while in the process of the defend-

ant there is no joint application of heat and pressure. To operate the process of the defendant it is necessary to use temperatures which are much higher than 160° Fahrenheit, which is especially warned against in the Moffatt patent in suit."

Others of defendant's experts agree with him.

After the parties had stipulated in regard to certain matters, Dr. Doerflinger was recalled by the defendant, and he testified as follows:

"Q. 1. It has been stipulated that the pressure exerted by the platen against the starch in the presses as employed by defendant, based on some recent calculations of Prof. G. F. Gebhardt, of the Armour Institute of Chicago, is between 216 and 230 pounds per square inch; considering defendant's process as practiced at defendant's plant at Cedar Rapids, and assuming that the pressure exerted by the platen against the starch in the presses is between 216 and 230 pounds per square inch or thereabout, what is your opinion as to whether said process so practiced is, first, substantially the process disclosed in the Moffatt patent in suit, No. 541,941, and, second, substantially the process disclosed in the Gudeman patent, No. 789,127, giving your reasons for any opinion you may express?

"A. In my opinion such a process would be substantially the process of the Gudeman patent, No. 789,127, and would not be the process of the Moffatt patent in suit, No. 541,941. My reasons for this opinion have been set forth at length in my deposition heretofore given in this case. I consider the vital distinction between the Moffatt process and defendant's process to be this: Moffatt proposes to form lumps of starch by pressure sufficient to produce cohesion of the starch granules; the heat being cautiously applied so as never to exceed 160° Fahrenheit, so that absolutely no gelatinization may occur. My experiments, to which I am referring in my former depositions, show that a high order of pressure is necessary to produce lumps by cohesion, such as 1,400 pounds per square inch with starch containing 41 per cent. water, 2,000 pounds with starch containing 21 per cent. water, etc. The pressure having been retained not for five minutes, as suggested by Moffatt, but for many hours. See my answer to Q. 20, p. 206, of the printed deposition. Defendant's process is based upon a different principle, and a new discovery, as I have pointed out in my earlier deposition in analyzing the process of defendant, and comparing the same with the prior art. Defendant heats the starch to a temperature substantially above 160° Fahrenheit (that is, to 190 to 200° Fahrenheit) for a new and definite purpose, to wit, to produce an initial gelatinization of the starch granules to thereby form in situ a binder or cementing agent. The starch with the binder so formed is then subjected to a pressure of what I have termed a low order of magnitude to bring the binder into intimate contact for a prolonged period while the starch is cooling off, about 24 hours to permit the binder to firmly set with a firm and compact starch lump, as the result. In defendant's process the pressure is of secondary importance. The pressure need be only such as will hold the granules in intimate contact while the binder is setting. The consideration of primary importance in defendant's process is the temperature to which the starch is subjected, which must be over 160° Fahrenheit in order to definitely produce a binder by gelatinization; the binder having been thus formed, any adequate pressure may be applied and maintained during the setting of the binder. The Gudeman patent mentions 20 pounds per square inch, but any higher pressure may be employed without departing from the essential spirit of the process, the vital characteristic of which is maintaining under suitable and adequate pressure of a mass of starch containing a gelatinized binder for a period of time sufficient to permit the binder to cool and set and harden to form the lump. A pressure of 216 to 230 pounds per square inch on the starch in the press, while more than would be absolutely necessary, would still be a pressure of a low order of magnitude, as I have defined that term in this art, which would serve to compact the mass while the binder is setting and would therefore, in my opinion, be such a pressure

as, employed in connection with defendant's binder, formed in situ, would realize the Gudeman process. This pressure would be below the higher order of pressure, as defined by me, necessary to form an effective lump by cohesion in the absence of the binder. The Moffatt patent in suit does not contemplate the formation of a binder in situ by gelatinization but contemplates strict and definite precaution to prevent the temperature conditioned where gelatinization would be at all possible. Moffatt relies wholly upon cohesion of the granules to produce the lump. There is nothing in the Moffatt patent, even suggestive of an essential feature of the defendant's process, which contemplates the holding of the starch under pressure for a prolonged period while the starch is cooling off and the binder is setting. This step is vital to the formation of starch lumps by defendant's process, and no such step is mentioned in the Moffatt patent or remotely suggested. The Moffatt patent, on the contrary, as I have shown, contemplates subjecting starch to heat less than 160° Fahrenheit while in the mold under pressure for five minutes, then removing the starch mass from the mold. Moffatt says this will produce lump starch, but my experiments prove the contrary. As I have shown by my experiments, a pressure of 500 pounds per square inch for five minutes, mentioned in the Moffatt patent, will not produce lump starch. In my answer to R-D Q. 132 in a former deposition, I have defined the difference between the pressure of a low order, which is sufficient for the process of defendant, and a pressure of a high order, which is necessary for forming lumps by a process of cohesion. Manifestly a pressure such as is contemplated by the present question is a pressure of a low order of magnitude, as defined by me in answer to R-D Q. 132 above mentioned.

"Q. 2. It has been stipulated that the pressure exerted by the platen against the starch in the presses, as employed by complainant during the progress of this suit, as calculated by Prof. Gebhardt, is approximately 313 pounds per square inch; considering the process practiced by complainant at its Pekin factory and assuming that the pressure exerted by the platen against the starch in the presses is approximately 313 pounds per square inch or thereabout, what is your opinion as to whether said process as practiced is, first, substantially the process disclosed in the Moffatt patent in suit, No. 541,941, and, second, substantially the process disclosed in the Gudeman patent, No. 789,127, giving your reasons for any opinions you may express?

"A. For the reasons stated in answer to the last question, it is my opinion that such a process would not be the process disclosed in the Moffatt patent in suit, No. 541,941, but would be substantially the process set forth in the Gudeman patent, No. 789,127.

"Q. 3. Considering the process practiced by complainant at its Argo factory, and assuming that the corn from which the starch is made has been treated by the so-called acid process, that the pressure exerted by the platen against the starch in the presses is approximately 313 pounds per square inch or thereabout, and that the temperature of the starch in the cylinder of the press immediately before pressure is applied is approximately 198° Fahrenheit, what is your opinion as to whether said process so practiced is, first, substantially the process disclosed in the Moffatt patent in suit, No. 541,941, and, second, substantially the process disclosed in the Gudeman patent, No. 789,127, giving your reasons for any opinions you may express?

"A. The Argo process of making lump starch as practiced by complainant is, so far as concerns the temperature, much the same as that employed by defendant at Cedar Rapids. Defendant heats to a temperature in the neighborhood of 200° Fahrenheit in the cooker, giving a temperature around 180 to 190° Fahrenheit in the press cylinder, whereas the complainant's press cylinder temperature is 198° Fahrenheit or thereabout. With the starch heated to this temperature, a binder of gelatinized starch will result, as set forth in the Gudeman patent. The pressure is somewhat higher than that of defendant's, as stipulated, but the pressure employed, although unnecessarily large, will serve to compact the mass during the period the binder is setting and thereby produce lump starch by the adhesion plan. It is my opinion, therefore, that the process described in this question is substantially the process of the Gudeman patent, so far as concerns essentials, and is not substantially the process of the Moffatt patent in suit."

The testimony of the complainant's experts, of course, does not agree with that of the defendant's witnesses; but the complainant and some of its experts are driven to the contention that the temperature of 160° Fahrenheit, to which the lump starch may be subjected in the final step of the Moffatt process, is not intended as the limit of the degree of heat that may be applied to the moist lumps under that process; but that such degree is stated simply as a warning to those who may practice the process that it is not safe to subject moist starch to a greater degree of heat for fear of injury to and waste of the completed starch product. If that is true, Moffatt was unfortunate in the language used to express such thought. But the specifications and claims of his patent show beyond any doubt that his purpose was to not cause gelatinization of the starch cells at all because of the waste of material that such gelatinization would cause, and its effect upon the completed product for commercial use. His purpose is more clearly stated in the file wrapper and contents of his patent. In a communication to him from the Patent Office the examiner said:

"Claim 1 (as submitted by Moffatt) presents a mere double use of the processes covered by the references of record. In view of these references, there is no invention in the broad idea of subjecting any composition of matter to heat and pressure for the purpose of consolidating it into cakes or tablets. * * * Applicant's process, as described, consists in subjecting starch containing about 20 per cent. of water to heat at 140° Fahrenheit and pressure of 500 pounds per square inch for five minutes, and as admitted in the specification, as well as in the argument presented, the moisture, heat, pressure, and time are conditions in the process which must be observed within substantially the limits specified in order to obtain the desired result. In view of these facts, claim 1 is broader than the invention disclosed, while claim 2 is not sufficiently restricted to the limits of moisture, pressure, and time which must be observed to render the process operative. * * * The claims are rejected because in their present broad and indefinite form they present nothing patentable over the state of the art as disclosed in the references of record. * * *"

In answer to this communication Moffatt by his attorney of record said:

"* * * Again the degree of moisture below 16 per cent. detracts from the weight of the starch and results in a corresponding financial loss. The temperature and pressure are also correlative. The maximum temperature for starch containing over 16 per cent. of water can safely be placed at 160° Fahrenheit, as above that degree of heat a physical change will take place wholly defeating the purposes of the process. * * *"

Moffatt then amended his claims to read as they appear in the patent, and the patent was allowed. That it was Moffatt's purpose to limit the maximum degree of heat to which the moist starch should be subjected under his patent, and that he deemed such limit essential to his process, admits of no doubt under the specifications and claims of his patent and his communication to the Patent Office above referred to, while the purpose of the defendant by its process in subjecting the moist starch to a much higher degree of temperature was to cause a "physical change in the starch cells" to a certain extent for an entirely different purpose than Moffatt intended to accomplish by preventing such change. It was Moffatt's right to limit by his claim the

maximum degree of temperature to which the moist starch should be subjected in the practice of his process; and, having done so to meet the requirements of the Patent Office, he cannot now be permitted to say that such degree of temperature is not an essential element of his process. *Corbin Lock Co. v. Eagle Lock Co.*, 150 U. S. 38-40, 14 Sup. Ct. 28, 37 L. Ed. 989; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609-617, 27 Sup. Ct. 307, 51 L. Ed. 645; *Brill v. St. Louis Car Co.*, 90 Fed. 666, 33 C. C. A. 213; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693-714, 45 C. C. A. 544; *St. Louis Street Flushing Machine Co. v. American Street Flushing Machine Co.*, 156 Fed. 574-581, 84 C. C. A. 340.

The complainant urges with much persistence that the higher degree of heat to which the defendant in its process subjects the moist lumps of starch is immaterial, for by its cooling process it subjects the starch conjointly to the degree of heat and pressure stated in the Moffatt patent, and thereby infringes that patent whenever it continues the pressure conjointly with a temperature of 160° Fahrenheit and below to 100° Fahrenheit, though its pressure may be less than complainant applies; and that defendant's claim of gelatinization of the starch for the purpose of more firmly cementing together the starch cells in the completed product is a mere pretext to evade the charge of infringement of the Moffatt patent. If the only purpose of the defendant in the practice of its process was to subject the moist starch to a degree of heat only slightly in excess of the limit fixed by Moffatt, and the pressure somewhat less, thereby causing only somewhat more of a waste of the starch mass, there would be force in complainant's contention. But the testimony decisively preponderates in favor of the defendant upon this contention of the complainant and its experts and clearly shows that the gelatinization of the starch cells in defendant's process does operate in a substantial degree to more firmly cement or bind together the starch cells in its completed product without injuring that product for commercial use. Moffatt having fixed the maximum degree of heat to which the raw material used in the manufacture of lump starch shall be subjected under his process, any material departure by others in the use of a higher degree of heat in the manufacture of such starch is a process different from that described in his patent and is not an infringement thereof.

Counsel for complainant cite and rely largely upon the case of *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279, as sustaining their contention. In this case the court overruled its former decision in the case of *Mitchell v. Tilghman*, 19 Wall. 287, 22 L. Ed. 125, in which the same patent was involved. *Mitchell v. Tilghman* was decided upon the ground that the apparatus or means described by Tilghman for heating the water in the practice of his process was an essential element or ingredient of that process; and, inasmuch as Mitchell used a substantially different apparatus for heating the water in the practice of his process, it was held that he did not infringe Tilghman's patent. In the subsequent case of *Tilghman v. Proctor*, 102 U. S., it is held that the Tilghman patent was for a process only and not for the apparatus or mode of applying the process pointed out in the specifications, as held in the former case. It is to be observed that in the *Tilgh-*

man patent the degree of temperature of the water to be used in the process described by him is not an essential element or ingredient of his process. Mr. Justice Bradley, speaking for the court, said at page 732 of 102 U. S. (26 L. Ed. 279), of the opinion:

"Finally the defendants argue that they only use a low degree of heat and pressure compared with that pointed out by the (Tilghman) patent, namely, only about 310° Fahrenheit instead of 612°. The precise degree of heat, as we have seen, is not of the essence of the patent. The specification only claims that a high degree of heat, such as would be sufficient to melt lead, is most effective and rapid in producing the desired result, but suggests a trial of the apparatus employed with different degrees of heat so as to ascertain that which is best for each particular kind of fat. 'By starting the apparatus,' the language is, 'at a low heat, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed can easily be determined.'"

It is obvious that the particular degree of heat mentioned by Tilghman in his specification was a suggestion only and was not deemed by him an essential ingredient or element of his process, while in the Moffatt patent the degree of heat described by him to meet the requirements of the Patent Office is, as before stated, an essential element of his process.

The defendant contends, and its proof shows, that it manufactures lump starch according to the process described in the Gudeman patent, No. 789,127. This patent is some years later than Moffatt's, is presumptively valid, and not an infringement of the process described by Moffatt. The burden is upon the complainant to overcome this presumption, and the conclusion under the testimony is that it has failed to do so.

The defendant further contends that the Moffatt process has never been put into actual practice; that it is a mere paper patent and a failure commercially; that Moffatt himself and a corporation of which he was a member attempted without success to manufacture lump starch according to its teachings; and that complainant does not use it in the manufacture of lump starch for commercial use. It also contends that it is anticipated by a number of prior patents, which it sets forth in an amendment to its answer, and is therefore void. In the view of the testimony it is unnecessary to consider this branch of the case, for, admitting without deciding that the patent is valid, the conclusion under the testimony is that defendant does not infringe the same.

The bill should therefore be dismissed on the merits, at complainant's costs, and it is accordingly so ordered.

VINCENT v. TONOPAH MINING CO. OF NEVADA et al.

(District Court, D. Delaware. August 8, 1913.)

No. 299.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS FOR TREATMENT OF ORES.

The Brown patent, No. 781,711, for a process for the treatment of precious metal-bearing ores, the essential feature of which consists in changing the order of the well-known steps in the recovery of metals from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the ores by the cyanide process so that the cyanide treatment for the recovery of the fine values precedes concentration, to which only the residue or tailings is subjected, while not entitled to a broad construction in view of the prior art, is valid and is infringed by a process in which substantially the same steps are taken in the same order, although other steps not included or required by the patent are added.

2. WORDS AND PHRASES—"LEACHING."

As applied to the cyanide process of treating ores, the essence of "leaching" does not depend upon any special mode of applying to the ore the dissolving cyanide solution, but upon the fact of the application producing dissolution of the finer values.

In Equity. Suit by Joseph A. Vincent against the Tonopah Mining Company of Nevada and the Desert Power & Mill Company. On final hearing. Decree for complainant.

Horace Pettit, of Philadelphia, Pa., for complainant.

J. Harvey Whiteman, of Wilmington, Del., and Joseph C. Fraley, of Philadelphia, Pa., for defendants.

BRADFORD, District Judge. [1] This suit was brought by Joseph A. Vincent against the Tonopah Mining Company of Nevada and the Desert Power & Mill Company, both of them corporations of Delaware, charging infringement of letters patent of the United States No. 781,711, dated February 7, 1905, granted to Alden H. Brown, for "Improvements in Processes for the Treatment of Precious-Metal-Bearing Ores," and praying an injunction and an account. The complainant is assignee and sole owner of the patent in suit. In the description the patentee says:

"My invention relates to a process for the treatment of precious-metal-bearing ores, and embraces the treatment of the ore by a solution of cyanide of potassium or of other alkaline cyanide and the subsequent treatment of the ore by concentration. It has been the practice for many years in plants where the concentration and cyanide processes are used in combination to treat the ore, first by concentration, and, secondly, by cyanide. The process which I have invented and which I now have in successful operation is a reversal of this proceeding with the addition of certain special features in connection with the cyanide step. The advantage in treating many ores by my present system is due to the fact that in case of most gold and silver bearing ores the use of water in crushing by stamps or rolls or in connection with the concentrating process occasions much loss of values by what is technically known as 'sliming,' resulting from the fact that a large percentage of the values in the ore treated is reduced to so fine a state of division that it is taken up in suspension by the water used, making it difficult, if not impossible, to settle these values for further treatment within the limits of a plant of ordinary construction for the reason that in the case of many ores these slime values remain in suspension for many hours. It will therefore be understood that in the case of ores of this sort, if amalgamation, concentration, or other process involving the use of water for crushing or treatment is used preliminary to the cyanide process, it will be necessary to have a very extensive system of settling-tanks in order to recover these suspended values and hold them in the mill, so that they may be subjected to further treatment. It is a well-known fact that the cyanide process recovers only the fine values, and in the treatment that I have devised these fine values are recovered by the cyanide process in the beginning, leaving only the coarser values, which are readily recoverable by concentration, the latter being specially adapted for saving this class of values. * * * The special features of my improve-

ment so far as the cyaniding process is concerned consist in cutting down the volume of solution used by settling and pumping back the solution to the stamp battery and the use of cyanide solution to create the ascending current in the classifier."

The charge of infringement has been restricted to claim 1, which is as follows:

"1. The herein-described process for the treatment of ore consisting in first pulverizing the ore in the presence of cyanide solution; second, subjecting the ore to hydraulic classification by the introduction of cyanide solution at the bottom of an overflow-tank to produce an ascending current; third, leaching the ore by the use of cyanide solution whereby the finer values of the ore are dissolved; fourth, removing the dissolved metallic values from the ore in any suitable manner; and finally subjecting the residue of ore to concentration."

Claim 1 plainly indicates that "subjecting the residue of ore to concentration" was the final step in the process of that claim. For prior to the subjection of the residue of the ore to concentration, according to the requirements of the claim, first, the ore must be pulverized; second, subjected to hydraulic classification as therein specified; third, leached by the use of cyanide solution whereby the finer values of the ore are dissolved; and fourth, the removal of the dissolved values from the ore. These four steps having been taken the residue of the ore or tailings are subjected to concentration. That the patentee regarded his invention as essentially requiring concentration as the last step in his process not only accords with the scope and spirit of his alleged invention, but is to be deduced from the description. For in it he states that the invention "embraces the treatment of the ore by a solution of cyanide of potassium or of other alkaline cyanide and the subsequent treatment of the ore by concentration"; that his process is a reversal of the old practice "to treat the ore, first, by concentration, and, secondly, by cyanide"; that "the cyanide process recovers only the fine values, and in the treatment that I have devised these fine values are recovered by the cyanide process in the beginning, leaving only the coarser values, which are readily recoverable by concentration, the latter being specially adapted for saving this class of values"; that "so far as the broad idea of employing the cyanide step previous to concentration is concerned the advantage in this respect would be equally great if dry crushing instead of wet crushing were employed"; that "after the cyanide treatment has been completed the sand-tailings from the leaching tank" are transferred by the means therein specified to a mixer which "distributes the tailings to the concentrating table"; and that "by using these processes in the order set forth in this specification it is practicable to recover a high percentage of the values without the use of roasting," &c. The patent in suit was granted virtually for changing the order of certain well-known steps in the recovery by the cyanide process of gold or other metals from precious-metal-bearing ores, and assuming that it is valid, claim 1 in view of the prior art is not entitled to a broad construction. The patentee in various forms, as has been shown, stated and reiterated the idea as the essence of his invention that the cyaniding steps, within the meaning of the patent, must be completed before

concentration occurs, and the complainant must be held bound by and restricted to the order of steps set forth in claim 1, certainly so far as that order is mentioned as between cyaniding and concentration. At the hearing the complainant's counsel admitted in open court that the vital question in the case was whether the leaching of the finer values within the meaning of claim 1 occurs prior to concentration. Infringement is the principal issue in the case, the complainant contending that the defendants in the process practiced by them use every step in the combination of claim 1, and the latter alleging that they have not used either a combination of all the steps of the patented process or a combination including steps arranged in the same order. The complainant contends that the process practiced by the defendants embraces treatment of ore by a solution of cyanide of potassium, and also the treatment of the ore at a later stage by concentration. The first step in the patented combination process is pulverizing the ore in the presence of cyanide solution and is common to the practice of both the complainant and the defendants.

The second step is subjecting the ore to hydraulic classification by the introduction of cyanide solution at the bottom of an overflow-tank to produce an ascending current. In the process practiced by the defendants, as in that of the complainant, classifiers with an ascending current of cyanide solution introduced at the bottom, and performing the same immediate function, as classifiers, in the separation of slimes from the granular material or sands, as the classifiers of the complainant, were, until November, 1908, used and calculated to perform or assist in the performance of the step next following the pulverizing of the ore in the stamp battery. What difference there was between the classifiers of the complainant and those of the defendants did not differentiate their immediate function. At the above named date the defendants discontinued the introduction of the cyanide solution at the bottom of the classifiers to produce an ascending current, and since that time the only current in the defendants' classifier has been due to the introduction of the solution along with the ore at the top, and the rise and overflow of the lighter portions over its periphery. With respect to this change in the classifier the counsel for the defendants in their brief of argument say:

"This matter of detail, however, does not go to the root of the charge of infringement, and in the main portion of the argument, about to be given, it will be ignored. The Court is asked to pass upon the issue as it was raised in regard to the Defendants' first installation from 1907 down to 1908; for the defense of noninfringement does not depend upon any minor matters, but goes to the essence of the subject."

Passing for the present any discussion of the Huntington mills and their function, the third step is leaching the ore by the use of cyanide solution whereby the finer values of the ore are dissolved. Much time and research have been spent by the counsel for the respective parties on the question of what constitutes leaching within the meaning of claim 1. The claim itself contains a definition, for it is a process of dissolving the finer values of the ore by the use of cyanide solution. Doubtless the term "leach" or "leaching" may connote different

methods of application of the leaching solution in different and varying cases. In *Moore Filter Co. v. Tonopah-Belmont Development Co.*, 201 Fed. 532, 119 C. C. A. 626, the Moore patent No. 764,486, for a filtering process for recovering the metal contained in metal-bearing slimes was sustained and held infringed. That case, however, was in principle different from and does not control this case. But the circuit court of appeals considered the subject of the cyanide ore process and defined leaching, saying:

"The cyanide ore process came into use about 1887, and is the real foundation of the tremendous increase of gold production in the last two decades. It is now the prevalent method of treatment. In it the ore is first crushed and then placed in tanks containing a solution of cyanide of potassium. This solution percolates through the crushed pulverized mass, and, being a solvent of gold, carries off such gold as is subjected to its action. This is called 'leaching,' and any crushed ore through which percolation took place was termed 'leachable.' For example, if the ore treated was of such a character, that, when crushed, it was reduced merely to the condition of sand, then the recovery of its metal by the cyanide solution might be effected by two methods. In the first method the cyanide solution would be poured on a bed of sandy crushed ore and be allowed to percolate through it. In its passage the solution dissolved the metal and passed off as a clear liquid to zinc boxes, or other well-known means of reclaiming metals in solution. This very simple method was called leaching. The second was decantation, wherein the crushed sandy material, after having been agitated in the cyanide solution, was permitted to settle, so that the clear liquid containing the dissolved metal might be decanted."

[2] But the essence of leaching does not depend upon any special mode of applying to the ore the dissolving cyanide solution but upon the fact of the application of the solution to the ore producing dissolution of the finer values. There can be no question that the process of claim 1 and the defendants' process include leaching by the use of cyanide solution for the purpose of dissolving and recovering the finer values of the ore, however the two processes may differ in details and the order of the steps included in them. The circumstance that in the defendants' process the ore is subjected to the cyanide solution and leached both at the time of its pulverization in the stamp battery and at the time of its repulverization or grinding in the Huntington mills, while in the complainant's process there is no repulverization or grinding in Huntington mills or the like, does not alter the fact that in each case the process includes "leaching the ore by the use of cyanide solution whereby the finer values of the ore are dissolved." The slimes and sands treated in the complainant's classifiers on escaping therefrom pass respectively to the slime tank and to the leaching tank, and in the slime tank the slimes are treated "by agitation, settling and decantation in order to remove the gold bearing solution, this part of the treatment being carried out in accordance with the standard practice"; most of the cyanide solution in the stamp battery going from the classifier with the slimes to the slime tank and being afterwards pumped back to the stamp battery. But after the slimes and sands are separated by the defendants' classifiers the sands are carried to the Huntington mills where they are repulverized, and on escaping from the Huntington mills the mixed sands and cyanide solution are re-commingled with the slimes from which they had been

separated immediately before the grinding of the former in the Huntington mills, and the recommended materials pass to the Wilfley concentrating tables. The use of the Huntington mills in the defendants' process is for the purpose of observing economy in securing the regrinding of only such portion of the sands originally pulverized in the stamp battery as require that treatment, but does not affect the question of the occurrence of leaching. The use of the Huntington mills in the defendants' process could not avoid the charge of infringement, provided all of the elements of the complainant's process are included in the defendants' process and operate as a combination in substantially the same way.

The fourth step in the patented process is removing the dissolved metallic values from the ore in any suitable manner and is satisfied by the removal of such dissolved values, as stated, in any suitable manner; no particular method or means of removal being specified or required.

The fifth step is "finally subjecting the residue of the ore to concentration." In the description the patentee says:

"After the cyanide treatment has been completed the sand-tailings from the leaching-tank G are transferred by means of suitable conveyors to the tailings-bin P, which is shown in outline behind the tanks I I. From this tailings-bin these tailings are sluiced into a mixer K through a trough J.' The mixer distributes the tailings to the concentrating-table L. * * * The term 'concentration' is used in this specification in its technical or metallurgical sense and must be distinguished from 'amalgamation,' in which mercury is always employed."

The tailings that escape from the complainant's concentrating tables are the comparatively worthless residue of the ore left at the conclusion of his process. It is true that in the complainant's process, as I understand it, no successive sets of concentrating tables are used, with leaching of values going on between them. There is only one set of such tables and the discharge of their function marks the end of his process. But I think that the defendants have nevertheless been guilty of infringement. They have used in their process all the steps contained in the complainant's process and in the order required by claim 1. There is, first, the pulverizing of the ore in the presence of cyanide solution in the stamp battery; second, the subjection of the ore to hydraulic classification within the meaning of the second step; third, leaching of the ore, not only in the stamp battery, but in the Huntington mills by the use of cyanide solution whereby the finer values of the ore are dissolved; fourth, the removing of the dissolved metallic values of the ore to the concentrating tables; and finally, the subjection of the residue of the ore to concentration. It is true they have added a number of steps or features not included or required in claim 1, but the steps and features so added do not operate to negative infringement of the combination process as embodied in the earlier steps of the process practiced by them. And the last step of their process, in so far as it covers the process of the complainant, consists of the same step, namely, the subjection of the residue of the ore to concentration.

A large amount of evidence has been taken and much has been said by counsel on the question of percentages of metal values recovered in the infringing portion of the defendants' process and the portion subsequent thereto. But it has been shown that each of the two portions of the defendants' process yields a large percentage of such values; and whatever effect this fact may have on the amount of profits and damages to be recovered does not affect the question of infringement.

On the whole I think that claim 1 of the patent in suit must be sustained, and a decree rendered in favor of the complainant. Let a decree be prepared and submitted.

CHARLES HUNNICUTT CO. v. A. B. GASTON CO. et al.

(District Court, W. D. Pennsylvania. August 22, 1913.)

No. 99.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SEED CORN GRADER.

The Hunnicutt patent, No. 989,976, for a seed corn grader, is void for lack of novelty as to claims 1, 2, and 4. Claims 3 and 5 *held* not infringed, if valid.

In Equity. Suit by the Charles Hunnicutt Company against A. B. Gaston Company, a firm, and the A. B. Gaston Company, a corporation. On final hearing. Decree for defendants.

Chester C. Shepherd, of Columbus, Ohio, and John B. McAdoo, of Pittsburgh, Pa., for complainant.

E. W. McArthur, of Meadville, Pa., Sion B. Smith, of Pittsburgh, Pa., and Hugh C. Lord, of Erie, Pa., for defendants.

YOUNG, District Judge. This is a bill in equity brought by the Charles Hunnicutt Company for the infringement of letters patent No. 989,976, granted April 18, 1911, to Charles Hunnicutt. In his specification the patentee says:

"My invention relates, more particularly, to a portable and manually operable corn grading device for grading seed corn. The object of my present invention, broadly stated, is to provide a portable corn grader, which will be strong and durable in construction, positive in action, light in weight, easily operated and controlled, and which can be manufactured and sold at a comparatively low price. More particularly speaking, my object is to provide a portable corn grader adapted to grade grains of seed corn as to thickness and to width, and to eliminate undesirable grains, and to accomplish the same at one operation and with certainty and precision."

Of the five claims of the patent, the first four are in controversy. These claims are:

"1. A hand seed corn grader, comprising a frame forming a hopper at its upper end, a screen in said frame forming the bottom of said hopper, said screen being formed to permit the free passage of a mass of corn over its apertures and having screening openings of a given width to prevent the pas-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sage of abnormally thick grains of corn, said openings being greater in length than in width, and a lower screen in said frame spaced from said upper screen to form a graded corn receptacle, said lower screen being provided with screening openings having portions that are as wide as the openings in the upper screen, but shorter than the same, there being an outlet from said graded corn receptacle for the discharge of the graded corn therefrom.

"2. A corn grader, comprising a bodily invertible frame and a pair of spaced screens mounted in said frame one above the other, and having openings therethrough, that portion of the frame that lies above the upper screen forming a hopper-like receptacle for which the upper screen forms the bottom, the frame being open at one end of the space between the screens, the upper screen being formed to permit the free passage of a mass of corn over its apertures and having elongated openings therethrough, and the lower of said screens having openings therethrough that are as wide as, but shorter than, the openings of the upper screen, the lower screen being extended beyond the opening of the frame to form a spout, as and for the purpose set forth.

"3. A hand seed corn grader, comprising a frame forming a hopper at its upper end, a screen in said frame forming the bottom of said hopper, said screen being formed to permit the free passage of a mass of corn over its apertures and having screening openings of a given width to prevent the passage of abnormally thick grains of corn, said openings being greater in length than in width, a lower screen in said frame spaced from said upper screen to form a graded corn receptacle, said lower screen being provided with screening openings substantially as wide as the openings in the upper screen, but shorter than the same, to permit the passage of narrow and short grains, there being an outlet from said graded corn receptacle for the discharge of the graded corn therefrom.

"4. A seed corn grader, comprising, in combination, a bodily invertible frame, forming a hopper-like receptacle at its upper part, an upper screen in said frame formed to permit the free passage of a mass of corn over its apertures, said screen forming the bottom of said hopper and provided with oblong screening openings of a given width to prevent the passage of abnormally thick grains of corn, a lower screen in said frame spaced from said upper screen to form a graded corn receptacle, said lower screen being provided with screening openings substantially as wide as the openings in the upper screen, but shorter than the same, to prevent the passage of grains of standard width, said upper screen being provided with means to effect the entrance of the grains of corn edgewise into its apertures, said frame being provided with a discharge opening leading from said graded corn receptacle."

There is some difference in these claims, but the only one necessary to notice is that claims 1 and 3 describe a hand seed corn grader, while claim 2 only describes "a corn grader, comprising a bodily invertible frame and a pair of spaced screens mounted in said frame one above the other," and claim 4 "a seed corn grader, comprising, in combination, a bodily invertible frame," etc.

The whole device may be simply described as a framework of wood having an upper and lower screen, with oblong openings in the upper and both round and oblong openings in the lower. The evidence shows that in the use of corn planters it is necessary to have corn of uniform size, so that an equal number of kernels may be deposited in each hill. To secure this the openings in the upper screen are oblong and of such width as to prevent the abnormally thick kernels from passing through, but permitting all the other kernels to pass through and be deposited on the lower screen, and the openings, both oblong and round, in this screen, are the same width as those in the upper screen, but are shorter as to the oblong openings. A quantity of corn being placed on the upper screen, there would pass

through the openings, by a manual shaking of the frame, all the corn except the abnormally large grains, and those will be retained on the upper screen, and at the same time and by means of the same operation there will pass through the lower screen the small undesirable grains of corn, whether the same be round or broad and thin, and so unfit for seed, leaving upon the top of the lower screen the kernels which are desirable for seed, graded both as to width and thickness. Three grades of kernels are thus secured—the abnormally thick, retained in the hopper in the top of the upper screen; the uniformly graded as to thickness and width, on the top of the lower screen; and a mixture of small and wide, but thin, kernels which have passed through the lower screen. The frame is provided with an opening between the upper and lower screen, so that the graded corn may pass into a receptacle, and the frame may then be inverted, and the thick grains in the hopper on the top of the upper screen be deposited in a separate receptacle, and the grains which may be sticking in the upper screen dislodged.

The advantage of this device consists principally in, first, that all the corn may be graded by one operation simultaneously; second, that the corn can be retained on the screens until thoroughly graded; third, that the screens may be cleaned by manually inverting the frame and as a continuation of the process of grading; fourth, that the device is portable, being light in weight, and is manually operable. A simple reading of the specifications and the evidence is convincing that the device is a most valuable, simple, easily operated, and desirable invention.

The defenses are prior invention, prior use, and lack of invention.

First, as to prior invention: The defense that the Hunnicutt patent was anticipated by the patents of Werckle, No. 868,898, dated October 22, 1907, and No. 887,557, dated May 12, 1908, cannot be sustained. Those patents were for machines in which were inserted several screens, one above the other, and which were given an end motion by the turning of a crank. These screens were inclined, and when the corn passed from the hopper on to the upper screen some were here retained and passed out through a spout, thence that which went through the upper screen to the second screen, and so through the three screens, securing four grades of kernels. The disadvantages which Hunnicutt cured were that it was not capable of manual operation, did not allow the kernels to remain on the screens until completely separated, and could not be inverted for cleaning.

The Delany patent, No. 823,322, dated June 12, 1906, offered in evidence as anticipating the Hunnicutt patent, is thus described in the specification:

"The device, as shown, is adapted to be operated by hand much like an ordinary sieve, and, as shown, comprises in brief two pan-shaped members of similar size, each having a perforated or screening bottom, one member having round perforations of suitable size to permit the escape of grains, etc., smaller than those desired for seed, while the other pan has oblong perforations which will admit the passage of grains suitable in size and shape for seed, and will retain all large imperfectly formed grains that are unsuitable for seed."

The disadvantages which Hunnicutt cured were that it had to be opened, so that the corn might be placed within, and that after the operation of vibrating the apparatus was completed it had to be again opened to remove the rejected abnormally large kernels. An examination of it and of the evidence shows that it lacked the simplicity of the Hunnicutt device, and was not capable of performing simultaneously the complete separation of the kernels into three grades. The Hunnicutt device was a step in advance of the Delany device.

The other patents recited need not be separately considered. None of them possesses the advantages of the Hunnicutt device. We therefore conclude that the Hunnicutt device was not anticipated by any prior patents.

As to prior use: It is claimed by respondent that the Kretchmer Manufacturing Company manufactured and used in January, 1906, and continuously thereafter, a double grader which clearly anticipated the Hunnicutt grader. An examination of the "Defendant's Exhibit, Kretchmer Mfg. Co. Corn Grader, No. 1," shows that it comprises a wooden frame, containing two screens, having a hopper about the upper screen for the reception of the corn, corrugated V-shaped ribs, between which kernels may pass and those abnormally large prevented from passing, a lower screen, perforated with round holes of sufficient diameter to permit the small undesirable kernels to pass through, and retain on the lower screen the kernels uniform in size and suitable for seed, with an opening from the top of the lower screen from which the graded kernels may be brought into a receptacle. It is portable, manually operable, and provides for grading the corn into three grades simultaneously, namely, the abnormally large kernels on the upper screen, the uniform and desirable kernels on the lower screen, and the small kernels which pass through the lower screen. It differs from the Hunnicutt grader only in that the top screen has openings extending the full length of the screen, the Hunnicutt grader having small openings divided into one inch spaces, and in that the Kretchmer grader has only round openings in its lower screen, while the Hunnicutt has both round and oblong openings in its lower screen.

We regard the Kretchmer grader as exactly identical in construction and function with the Hunnicutt grader, except as to the openings in the lower screen; but we do not regard the separation of the openings in the upper screen into divisions as being at all necessary or useful. The sole question, then, is: Does the evidence satisfy us that the Kretchmer grader was in public use for more than two years prior to the application of Hunnicutt? The rule to guide us in determining this question is that stated in *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821, by Mr. Justice Swayne:

"The burden of proof rests upon him [the defendant], and every reasonable doubt should be resolved against him."

Edward Kretchmer, manager of the Kretchmer Manufacturing Company testified (Respondent's Record, 25) that in the spring of 1904 he conceived the idea of a corn grader, and that he worked at

the construction of such a device until January, 1906, when he constructed and had manufactured under his direction about 40 graders of the description shown by "Defendant's Exhibit, Kretchmer Mfg. Co. Corn Grader, No. 1," that exhibit being one of the graders manufactured at that time; that most of the 40 graders were delivered to the Pioneer Implement Company as salesmen's samples. He was corroborated by Charles W. Kretchmer, foreman of the Kretchmer Manufacturing Company, who testified that in the latter part of January, or first of February, 1906, 50 graders of the kind of Exhibit No. 1 were made by the Kretchmer Manufacturing Company, and that he personally delivered 3 dozen of them to the Pioneer Implement Company, and 2 or 3 of them were given to traveling men of the Pioneer Implement Company, and that he personally gave one to W. H. Perkins about February 16, 1906, and this time he fixes by the making of a lease of his land to Perkins. Perkins testifies that Charles W. Kretchmer gave him a grader similar to Exhibit No. 1, and he produced the one given him; which is admitted to be of the same construction as Exhibit No. 1.

G. A. Smith, vice president of the Kretchmer Manufacturing Company, testifies (Respondent's Record, 47) that the "Defendant's Exhibit, Kretchmer Mfg. Co. Corn Grader, No. 1," was manufactured by that company in January or February, 1906, and that some of them were delivered to the Pioneer Implement Company.

We find no evidence contradicting this evidence of Edward and Charles Kretchmer and G. A. Smith; but it is argued that, because there is no entry in the books of the Pioneer Implement Company of the receipt or account for corn graders, and no witness produced who testified to the reception of graders by that company, the Kretchmers and Smith are not corroborated, and that the case is supported only by the evidence of the inventor and his associates in business.

We have carefully gone over all the evidence, fully considered the arguments of complainant's counsel, and we are well satisfied that respondent has carried the burden of showing beyond a reasonable doubt that the Kretchmer corn grader is identical with the Hunnicutt grader, except as to the oblong openings in the lower screen, and that it was perfected and passed into public use in January or February, 1906. This was more than two years prior to the date of Hunnicutt's application, which was April 20, 1908. The evidence is convincing that large quantities of the Kretchmer corn grader were delivered to the Pioneer Implement Company in the fall of 1906, and that in the fall of 1907 3,000 were contracted for by the Pioneer Company with the Kretchmer Company. This was some months before Hunnicutt filed his application. The burden was thereby shifted to complainant to convince by the preponderance of the evidence that his invention was made at least earlier than November, 1907.

We are not satisfied from the evidence before us that an earlier date can be given to the Hunnicutt invention than February 24, 1908, when Hunnicutt's grader was first put upon the market. We have carefully considered all the evidence bearing upon this branch of the case, and it fails to convince us that Hunnicutt constructed the

double grader involved in the claim of his patent prior to his application. It may be true that he conceived the idea of a double grader, but there is nothing in the evidence to convince us that he did more than to make two screens having different sized openings in them. The only evidence in support of his invention prior to February 24, 1908, is his own unsupported evidence. It is very meager and is as follows:

"Q. 9. You may state as nearly as you can when you first conceived the device which is the subject of this suit, and when you first produced an operative device of this kind. A. I first conceived the idea of mechanically grading seed corn in the spring of 1903, and in the spring of 1904 I constructed the lower screen of the device referred to, and in the spring of 1905, about the 1st of March, I constructed the upper screen of the device, and produced an operative device; that is, the double screen corn grader.

"Q. 10. Was any test of the double screen corn grader made at the time it was produced? A. Yes; I made an experimental test on my own corn.

"Q. 11. Was this test successful? A. Yes.

"Q. 12. When did you first market this double screen corn grader? A. First began to place it on the market about the 24th of February, 1906. I might say that after the production of the double screen grader, 1st of March, 1905, I continued my experiments along the corn grader line. I invented and made a rotary grader, which I found was too expensive for the farmers to buy. And I also placed upon the market locally a single screen corn grader, and in the marketing of this device among the farmers of the neighborhood I learned that the farmers were in the habit of dispensing or eliminating the small kernels from the ear by breaking off the tip of the ear, and by the use of this single screen grader, which eliminated the larger and abnormally shaped kernels. This was all they desired, and the low price at which it sold met with their favor. I then, in the fall of 1906, employed a man to go to the state fairs in the corn belt and exhibit this single screen grader. It met with very popular approval. He sold a large number to farmers and took orders from implement jobbers. On his return, I organized a stock company for the manufacture and sale of this device. This was the latter part of October or November, 1906."

We do not find in this evidence sufficient to satisfy us that Hunnicutt conceived and put into substantial form that which he claimed as his invention, and he has therefore not carried the burden placed upon him, and his patent must be declared void for want of novelty.

We have said that the Kretchmer device was identical with the Hunnicutt device, with the single exception that the Hunnicutt device has in the lower screen oblong openings, as well as round openings, which the Kretchmer device does not have. While there is a great advantage in having the oblong openings in the lower screen for the purpose of separating the wide, but thin, kernels from the desirable kernels, which this lower screen accomplishes, and which may be a reason for sustaining the third and fifth claims of the patent, it is not now necessary for us to decide that question, because the uncontradicted evidence shows that the alleged infringing device does not contain such openings.

This disposes of the whole case, and makes it unnecessary for us to pass upon the question of lack of invention. We therefore must declare the Hunnicutt patent, No. 989,976, except as to the oblong openings in the lower screen, which we do not now decide, void for want of novelty, and dismiss the bill, with costs to the respondent.

Let a decree be drawn accordingly.

LOUISVILLE & N. R. CO. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION, Intervener).

(Commerce Court, September 4, 1913.)

No. 86.

COMMERCE (§ 92*)—INTERSTATE COMMERCE COMMISSION—JURISDICTION OF COMMERCE COURT.

Judicial Code (Act March 3, 1911, c. 231) § 207, subd. 2, 36 Stat. 1148 (U. S. Comp. St. Supp. 1911, p. 216), which confers on the Commerce Court jurisdiction of "cases brought to enjoin, set aside, amend or suspend in whole or in part any order of the Interstate Commerce Commission," applies only to affirmative orders, and the court is without jurisdiction to review an order denying relief to a petitioner.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 142; Dec. Dig. § 92.*]

Petition by the Louisville & Nashville Railroad Company against the United States, in which the Interstate Commerce Commission intervened. On objection to jurisdiction. Objection sustained, and petition dismissed.

For opinion of Interstate Commerce Commission, see 24 Interst. Com. Com'n R. 228.

William A. Colston and William A. Northcutt, both of Louisville, Ky., for petitioner.

Winfred T. Denison, Asst. Atty. Gen., and Thurlow M. Gordon, Sp. Asst. Atty. Gen., both of Washington, D. C., for the United States.

P. J. Farrell, of Washington, D. C., for Interstate Commerce Commission.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Associate Judges.

CARLAND, J. An objection to our jurisdiction to hear and determine the questions presented by the petition is made by counsel for the United States. Counsel for the Interstate Commerce Commission do not urge this objection and are willing that we assume jurisdiction. The question of jurisdiction, however, is presented by the record, and we must take notice of it, even if the parties do not care to do so. That we have jurisdiction of a case must appear before we can do anything therein. Section 4 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), as amended June 18, 1910 (36 Stat. 547, c. 309, § 8 [U. S. Comp. St. Supp. 1911, p. 1288]), provides that it shall be unlawful for any common carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

being included within the longer distance. This section, however, contains the following proviso:

"Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

The Louisville & Nashville Railroad Company operates a line of railroad extending from Louisville, Ky., to Nashville, Tenn. The rates published and charged over this route from Louisville to Nashville were lower in varying amounts on one or more classes of freight than its rates from Louisville to practically all the stations and towns along the route intermediate to Nashville; but this is alleged to be due to steamboat competition at Nashville on the Cumberland and Ohio rivers. This rate situation being on its face in violation of the fourth section above referred to, the petitioner filed its application with the Commission, praying to be relieved from the operation of said section so far as the towns on the line of petitioner between Louisville and Nashville were concerned. Bowling Green, Ky., is one of these towns. As a result of a hearing had on petitioner's application the Commission on October 8, 1912, made the following order:

"It is ordered, that that portion of said application No. 1,952 which seeks authority to continue to charge lower rates on traffic through Bowling Green, Ky., to and from Nashville, Tenn., than are contemporaneously in effect on like traffic to and from Bowling Green, Ky., be, and the same is hereby, denied, effective December 1, 1912.

"It is further ordered, that that portion of said application No. 1,952 which seeks authority to continue to charge lower rates on oranges from Jacksonville, Fla., through Bowling Green, Ky., to Louisville, Ky., than are contemporaneously in effect on like traffic to Bowling Green, Ky., be, and the same is hereby, denied, effective December 1, 1912."

In the present proceeding petitioner seeks to have this order annulled. Our jurisdiction to hear and determine matters alleged in the petition is not to be determined by the nature and extent of the power conferred upon the Commission by section 4 of the act to regulate commerce, and therefore we need not stop to consider what, if any, relief we could grant to the petitioner, provided we had jurisdiction to review the order of which complaint is made. Our jurisdiction must be determined by a consideration of subdivision 2, § 207, of the Judicial Code, which reads as follows:

"Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

In *Procter & Gamble v. United States*, 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091, the Supreme Court had this subdivision under consideration. In the case cited *Procter & Gamble* filed a complaint with the Commission charging that certain charges for demurrage established by interstate carriers were repugnant to the act to regulate commerce, because unjust and oppressive, and because such charges created preferences and discriminations. The Commission denied the relief asked and dismissed the complaint, whereupon *Procter & Gam-*

ble filed a petition in this court praying that the action of the Commission in denying relief be vacated and set aside. This court took jurisdiction of the case, and after hearing determined that the Commission did not err in dismissing the complaint. Procter & Gamble then appealed to the Supreme Court, and the question of the jurisdiction of this court being raised, it was held that it had no jurisdiction to review the action of the Commission in dismissing the Procter & Gamble complaint. The question before the Supreme Court was stated by the Chief Justice as follows:

"Is the authority of the Commerce Court confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, or has it the power to exert its own judgment by originally interpreting the administrative features of the act to regulate commerce, and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order and accordingly pass on its correctness?"

Then, referring to the language of subdivision 2, hereinbefore quoted, the court said:

"Giving to these words their natural significance, we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance, when properly made, of complaints concerning the legality of orders rendered by the Commission, and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal. No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves."

It is claimed that this court has already decided in *A., T. & S. F. Ry. Co. v. United States* (Com. C.) 191 Fed. 856, commonly called the "Inter-Mountain Case," the question of jurisdiction now under consideration in favor of petitioner. This claim must fail. It is true the *Inter-Mountain Case* was decided by this court before *Procter & Gamble*, *supra*, was decided by the Supreme Court; but the order in the *Inter-Mountain Case* was an affirmative order. The Commission did not in that case simply deny the relief prayed for and dismiss the petition, but went further and made an affirmative order wherein it prescribed the extent to which the petitioning carriers should be relieved from the operation of section 4 by establishing zones and a schedule of rates with reference thereto. That case and the one at bar are plainly distinguishable.

Counsel for petitioner argues that, if there is no power in this court to review the action of the Commission in cases where it simply denies relief under section 4, then that section confers arbitrary power upon the Commission to do as it pleases, and said section is therefore void. The jurisdiction of this court to review the action of the Commission in dismissing petitioner's complaint in no wise depends upon the validity of section 4. More than that, we cannot determine the merits of the controversy until we first find that we have jurisdiction to do so. It is further claimed that the effect of the denial of petitioner's complaint by the Commission as to *Bowling Green* is to compel petitioner to either raise the *Nashville* rate or lower the *Bowling Green* rate; that petitioner on account of competition cannot raise the *Nashville* rate, and therefore is compelled to lower the *Bowling Green* rate.

This, it is urged, shows that the effect of the action of the Commission was affirmative in compelling the reduction of the Bowling Green rate. So it may be said in the Procter & Gamble Case that the dismissal of its complaint by the Commission compelled it to pay demurrage charges which it claimed to be unjust; but this fact had no weight in the opinion of the Supreme Court.

We are clearly of the opinion that under the ruling in the Procter & Gamble Case we have no jurisdiction in the case at bar. The order will therefore be that the petition be dismissed.

In re HERMAN.

(District Court, N. D. Iowa, Cedar Rapids Division. August 18, 1913.)

No. 756.

1. BANKRUPTCY (§ 340*)—PROOF OF CLAIMS—SUFFICIENCY OF EVIDENCE.

The making of an alleged loan to one who subsequently became a bankrupt could be disproved by the circumstances of the transaction and other circumstances, without any direct evidence contradictory of the testimony of the bankrupt, his wife, and the claimant, that the loan was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

2. BANKRUPTCY (§ 340*)—CLAIMS—PRESUMPTIONS—DESTRUCTION OF EVIDENCE.

The destruction by a bankrupt's wife and his mother-in-law of letters between them concerning an alleged loan by the mother-in-law to the bankrupt might be considered as an admission that their contents were unfavorable to the claim that the loan was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

3. BANKRUPTCY (§ 161*)—VOIDABLE PREFERENCES—EFFECT OF PRIOR AGREEMENT.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), providing that if a bankrupt shall have made a transfer, and if at the time of the transfer and within four months before the filing of the petition the bankrupt is insolvent, and the transfer operates as a preference, and if the person receiving it or to be benefited thereby shall have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable by the trustee, a chattel mortgage given to secure an antecedent indebtedness was voidable, if the other essentials of a voidable preference were present, even though it was given pursuant to an agreement to give it, made when the indebtedness was contracted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

4. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCES—INTENT OF PARTIES.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), providing that if a bankrupt shall have made a transfer of any of his property, and if at the time thereof and within four months before the filing of the petition the bankrupt is insolvent, and the transfer operates as a preference, and if the person receiving it has reasonable cause to believe that its enforcement would effect a preference, it shall be voidable by the trustee, a chattel mortgage,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which the mortgagee had reasonable grounds to believe would operate as a preference, was voidable, even though the mortgagor intended no preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

5. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCES—INTENT OF PARTIES.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), providing that if a bankrupt shall have made a transfer of any of his property, and if at the time thereof and within four months before the filing of the petition the bankrupt is insolvent, and the transfer operates as a preference, and if the person receiving it has reasonable cause to believe that its enforcement would effect a preference, it shall be voidable by the trustee, where a bankrupt's mother-in-law loaned him the money with which to engage in business, and at a time when the loan was nine months overdue, and the bankrupt was hopelessly insolvent, and was being pressed by other creditors for payment, made a further loan in reliance on his promise to give a chattel mortgage, she was put upon inquiry and chargeable with knowledge as to his financial condition, and the chattel mortgage subsequently given was therefore voidable, especially where the bankrupt's wife, who must have known that the mortgage was intended as a preference, acted for her mother in requiring the promise that a mortgage would be given, and received and forwarded the mortgage to her mother.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

In the matter of Joseph L. Herman, Bankrupt. Claim of Mrs. E. T. Crocker. An order was entered by the referee allowing the claim as a secured claim against the estate, and the trustee petitions for a review. Order vacated, and matter referred back to the referee, with directions.

Deacon, Good, Sargent & Spangler, of Cedar Rapids, Iowa, for trustee.

C. F. Clark, of Cedar Rapids, Iowa, for claimant.

REED, District Judge. Joseph L. Herman was adjudged a bankrupt by this court August 16, 1912, upon his petition filed that day. On September 2d following Mrs. E. T. Crocker filed with the referee proof of a claim against the bankrupt estate in the sum of \$1,500, based upon a promissory note dated August 12, 1912, due in two years, with 6 per cent. interest from date, alleged to be secured by a chattel mortgage upon the stock of groceries and store fixtures of the bankrupt and his book accounts, and asked that it be allowed as a claim secured by said mortgage, with 6 per cent. interest from the date of the note. October 19, 1912, she filed an amended proof of the claim, claiming interest on \$500 thereof from November 1, 1911, upon \$500 from December 1, 1911, and upon \$500 from July 1, 1912, alleging that such interest had been inadvertently omitted from the note and former proof of the claim.

The trustee filed objections to the allowance of the claim in excess of \$1,000, and asked that said amount be allowed as an unsecured claim only, upon the ground that the claim in excess of \$1,000, and the chattel mortgage securing the same, were made (1) to hinder,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

delay, and defraud the other creditors of the bankrupt under section 67e of the Bankruptcy Act; or (2) that, if not so fraudulent in fact under said section, the mortgage was a voidable preference under section 60b of the Bankruptcy Act, as amended by the act of 1910.

Upon the hearing of these objections the referee overruled or disallowed each of them, and allowed the full amount claimed by Mrs. Crocker, and held that the mortgage securing the same was a valid lien upon the property covered by it, and directed the trustee to pay the claim in full from the proceeds of such property in preference to other creditors of the bankrupt. The trustee, in behalf of such other creditors, petitions for a review of this order.

Mrs. Crocker, the claimant, is the mother-in-law of the bankrupt. The evidence before the referee shows that about November 1, 1910, she loaned to him \$500, and on December 1, 1910, another \$500, for which he made to her his promissory notes for such sums, respectively, on said dates, due in one year, with 6 per cent. interest from date. That such loans were made is not contradicted by the trustee; and they were made by Mrs. Crocker to enable the bankrupt to purchase a small stock of groceries and engage in the business of a grocer in the village or town of Clarence, in Cedar county, this state, where he then lived. With the money so borrowed from her he did purchase such a stock and engaged in such business shortly after December 1, 1910. What his former occupation was does not appear; but he had no other means with which to embark in such business than the loan so made from Mrs. Crocker, and she so knew. This venture of the bankrupt was not profitable, and before July, 1912, he had become indebted to the First National Bank of Clarence for borrowed money and overdrafts in the amount of some \$1,200, and to others for merchandise purchased. In the latter part of December, 1910, Mrs. Crocker went to Pasadena, Cal., and remained there until the last of August, 1912, when she returned to Clarence; and during such absence she was in frequent correspondence with her daughter, the wife of the bankrupt. About the middle of June, 1912, the bankrupt claims to have borrowed through his wife from Mrs. Crocker, while she was in California, and Mrs. Crocker claims to have then loaned to him through her daughter, another \$500, for which the bankrupt made to her a third note for \$500, dated July 1, 1912.

The evidence in regard to this transaction is substantially this: That the bankrupt, about the middle of June, 1912, was in need of more money to enable him to continue his business, and he requested his wife, the daughter of Mrs. Crocker, to write to her in Pasadena, asking for another loan of \$500, to carry him over until fall. The wife of the bankrupt says she wrote her mother as requested by the bankrupt; that the mother answered at once that she would make the loan, but thought she ought to have a mortgage to secure her, if anything should happen to the bankrupt. Mrs. Herman at once answered her mother that the mortgage would be made as soon as the \$500 was received. In a few days, and about July 1st, Mrs. Herman says she received by mail from her mother in Pasadena, in an ordinary business envelope, unregistered, \$500 in money, mostly in \$10 and \$20

bills, and a few \$5 bills. No word accompanied this money, but her mother's name was signed to a piece of paper and inclosed with the money. Mrs. Crocker says that she received the letter of her daughter asking for the loan; that she answered that she would make it, but that she thought she ought to have a mortgage; and upon receipt of the daughter's letter, saying a mortgage would be sent to her, she sent the \$500, in \$10 and \$20 bills and a few \$5 bills, in an unregistered letter to her daughter, with no word accompanying the same, other than her name upon a piece of paper, which she sent with the money. Mrs. Crocker had formerly been engaged in the millinery business in Clarence for a number of years, and at first testified that she sold this business for about \$1,000 in 1910, and that she carried this money upon her person from the time she received it, and with her to and while in California; and that the \$500 sent by her from California to her daughter was a part of this money. Later she testified that she was mistaken as to the time she sold her millinery business; that she sold it in 1905 or 1906, but was unable to say definitely which, and that she had carried the money received therefor upon her person ever since, except such part of it as she had used in traveling about the country; that she had sold some real estate in Clarence in 1906 or 1907, which she owned, receiving some \$2,600 therefor, a part of which she carried upon her person, and a part she loaned at interest, and deposited some in the bank, for which she received certificates of deposit bearing interest; and that the \$500 she sent from California to her daughter was a part of the money she had received from the sale of her millinery stock and this real estate. She also testified that the letters she received while in California asking for the last \$500 she had burned or destroyed soon after she sent the money. Mrs. Herman also testified that the letters she received from her mother, including the envelope in which the money was sent with her mother's name upon a piece of paper, she burned soon after the money was received, but for what reason such correspondence was burned neither states. The bankrupt also testifies that the wife received this \$500 from her mother while she was in California, and that his wife had paid it to him at different times in July, 1912, as he needed it; and the wife also so testified.

[1, 2] The testimony as to this last loan is so improbable that it at once challenges one's belief in its truth, and the referee says of it, "Of course, it is a matter in which there are grounds for doubt;" but he concludes that, inasmuch as there is no direct evidence contradicting the testimony of Mrs. Crocker, Mrs. Herman, and the bankrupt, he finds that the loan was made as stated by them. Of this it may be said that there is no way that it could be directly disputed, that direct evidence disputing them is not essential, and that their testimony could be disproved by the circumstances of the transaction and other circumstances as effectually as by direct testimony. *Quock Ting v. United States*, 140 U. S. 417-420, 421, 11 Sup. Ct. 733, 851, 35 L. Ed. 501. The fact of the destruction of the letters by Mrs. Crocker and her daughter relative to the loan may be considered as an admission that they were unfavorable to this part of the claim. 1

Greenleaf's Evidence, §§ 37-195a; 1 Wigmore on Evidence, §§ 278-291, and note.

Mrs. Crocker was 76 years of age at the time she testified, had been engaged in business as a milliner for a number of years in Clarence, and says that her net income from such business was from \$200 to \$300 a month. She was a business woman, acquainted with business affairs, and it seems incredible that such a person would carry upon his or her person from \$1,000 to \$2,000 in small bills traveling over the country, as she says she did, and send \$500 in \$10, \$20 and \$5 bills in an ordinary business envelope through the mails unregistered. Admitting, however, without deciding, that the \$500 was loaned by Mrs. Crocker to the bankrupt about July 1, 1912, as found by the referee, it does not follow that the mortgage of August 12th, securing that and the prior note for \$1,000, is not void under section 67e of the Bankrupt Act, within the ruling in *Coder v. Arts*, 213 U. S. 223-241, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, or voidable as a preference under section 60b of the act, as amended by the act of June 25, 1910.

The mortgage covers the entire stock of groceries of the bankrupt, those on hand, or that may thereafter be acquired by him during its existence, also the store fixtures and book accounts of every kind on hand, or that the bankrupt may afterwards have during the life of the mortgage, extends the time of payment of the prior notes, then past due for two years, and contains this provision:

"Privilege is given mortgagor to sell at retail said stock of groceries and merchandise in the ordinary course of trade, on condition that mortgagor maintains the stock up to its present aggregate value; also to collect said book accounts in the ordinary course of business and use the proceeds thereof."

There is no evidence of an agreement on the part of the bankrupt to make a mortgage upon anything but his stock of groceries, or that he should have the privilege contained in the mortgage, that the time of payment of the two notes should be extended, or that the bankrupt should file the mortgage for record for Mrs. Crocker or cause it to be so filed. There is much difficulty under the Iowa decisions and the decisions of the Supreme Court of the United States in holding that this mortgage is not violative of section 67e of the Bankruptcy Act. See *Day v. Griffith*, 15 Iowa, 104; *Cobb v. Chase*, 54 Iowa, 253, 6 N. W. 300; *National State Bank v. Morse et al.*, 73 Iowa, 174, 34 N. W. 803, 5 Am. St. Rep. 670; *Robinson v. Elliott*, 22 Wall. 513, 22 L. Ed. 758; *Means v. Dowd*, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. Ed. 429; *Egan State Bank v. Rice*, 119 Fed. 107, 56 C. C. A. 157. But, admitting that it is not so violative of said section, it is entirely clear under the testimony that it is a voidable preference under section 60b of the act as amended.

[3] The bankrupt testifies that when he borrowed the first \$1,000, and for which the first and second notes were given, he promised to give Mrs. Crocker a mortgage upon his stock of merchandise as soon as he got started in business; but he did not do so. Mrs. Herman also testifies that in her letters to her mother, soliciting the loan, she promised her mother that a mortgage would be given to her, but does not say upon what. The mortgage, however, was not made until the

12th of August, 1912, only three days before the filing by the bankrupt of his petition in bankruptcy. No part of the mortgage was therefore for a present consideration, but was wholly to secure an antecedent indebtedness owing by the bankrupt to his mother-in-law. That it was made pursuant to an agreement to make the same when the loans were made does not relieve it from operating as a preference, if the other essentials of a voidable preference required by the act are present. *Wilson v. Nelson*, 183 U. S. 191-198, 22 Sup. Ct. 74, 46 L. Ed. 147; *In re Great Western Mfg. Co.*, 152 Fed. 123-127, 128, 81 C. C. A. 341.

[4, 5] That the bankrupt was insolvent, when this mortgage was made, there is no room for doubt under the testimony. Nor is there any doubt that he intended by the mortgage to secure Mrs. Crocker in preference to his other creditors, though this is not essential under the amendment of 1910 to section 60b of the Bankruptcy Act; for if Mrs. Crocker had reasonable grounds to believe when the mortgage was made, or when it was delivered to her, that it would operate as a preference to her, it falls under the ban of section 60b of the Bankruptcy Act, as amended by the act of 1910. That Mrs. Crocker had reasonable grounds to so believe is entirely clear under the testimony. She had loaned the bankrupt the first \$1,000 to enable him to purchase a small stock of groceries and engage in the grocery business in Clarence. He had no means, other than the \$1,000 so borrowed from her, with which to purchase the stock and engage in such business, and this she knew. In June, 1912, without having paid any part of the principal of this loan, nor does she or the bankrupt testify that the interest had then been paid upon the \$1,000 (though Mrs. Crocker credited a year's interest upon the notes in her amended proof), he requested his wife to ask her mother for another loan of \$500 to carry him over until fall. The request for this loan and the promise to make the mortgage was made through Mrs. Herman, the bankrupt's wife. The fact that no part of the prior loan had been paid, though it was then nine months past due, with the request for an additional loan of \$500 to carry him over until fall, was sufficient to put her as a reasonably prudent person upon inquiry as to his then financial condition; and she was then chargeable with all the information that such an inquiry would have disclosed. If such inquiry had then been made, there can be no doubt that it would have disclosed that the bankrupt was hopelessly insolvent, that he was being pressed by the bank for the payment of its debt, that he was unable to do so, and that the mortgage was intended as a preference to Mrs. Crocker over the bank and other creditors of the bankrupt.

Again, Mrs. Herman acted for her mother in requiring the promise that a mortgage should be given by the bankrupt when the last loan was made (if it was made), and when the mortgage was recorded it was delivered to her to be forwarded to her mother. To hold that she had no reasonable grounds to believe, when she so received and forwarded the mortgage, that it was intended as a preference to her mother, would be to disregard the testimony and sanction a deliberate violation of the Bankruptcy Act. See *Dokken v. Page*, 147 Fed.

438-441, 77 C. C. A. 674; *McElvain v. Hardesty*, 169 Fed. 31-35, 36, 94 C. C. A. 399.

Section 60b of the Bankruptcy Act, as amended by section 11 of the act of June 25, 1910, so far as applicable, reads in this way:

"If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy, * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee. * * *"

Under the section as so amended, if the bankrupt be in fact insolvent, it is only necessary that the person receiving the transfer, or his or her agent acting therein, shall have reasonable cause to believe that the enforcement of such transfer will effect a preference, to render the transfer voidable by the trustee. See *Alexander v. Redmond*, 180 Fed. 92-95, 103 C. C. A. 446, where it was so held by the Court of Appeals, Second Circuit, prior to this amendment.

There is not the slightest doubt under the testimony that both Mrs. Herman and her mother had reasonable grounds to put them upon inquiry as to the bankrupt's financial condition when this mortgage was made; that he was then insolvent, and both knew or had reasonable cause to believe that if the mortgage was enforced it would operate as a preference, within the meaning of the Bankruptcy Act, in favor of Mrs. Crocker over the other creditors of the bankrupt. The conclusion is unavoidable that it is a preference under section 60b of the act as amended, and voidable at the instance of the trustee.

The order of the referee, allowing the claim of Mrs. Crocker as one secured by this mortgage of August 12th, is vacated, and the matter referred back to him, with directions to allow the claim only as an unsecured claim against the bankrupt estate.

It is ordered accordingly.

THE SILVER STAR.

(District Court, D. Maine. August 9, 1913.)

No. 208.

SALVAGE (§ 26*)—WRECKING SERVICES PERFORMED UNDER CONTRACT—COMPENSATION.

Where libellant performed wrecking services in raising a sunken steamer at the request of the owners, using in the work apparatus which was costly, expensive to maintain, and infrequently used, it is entitled to compensation at a rate beyond the customary charge for ordinary maritime services.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. §§ 57-64, 68, 84; Dec. Dig. § 26.*]

In Admiralty. Suit by the Snow Marine Company against the steamer *Silver Star*. Decree for libellant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Arthur S. Littlefield, of Rockland, Me., for libellant.
William H. Gulliver, of Portland, Me., for claimant.

HALE, District Judge. This libel is for salvage services rendered in raising and saving the steamer Silver Star. The libellant is an owner of lighters, towboats, and wrecking apparatus. It now waives its claim for salvage and seeks to recover only reasonable compensation for services in July, 1910, for the use of its wrecking apparatus in getting the steamer off a ledge where she was sunken and heeled towards deep water on the easterly side of the island of Isleboro. The Silver Star is a steamer of 75 gross tons and 42 net tons. On the morning of July 23, 1910, W. S. Pendleton, of Isleboro, agent of the steamer Silver Star, telephoned to Capt. Snow, president of the Snow Marine Company, to engage the company with its wrecking apparatus to get the steamer off the ledge. The proofs show that Capt. Snow told Mr. Pendleton by telephone that he would not enter upon the service for \$50 a day; that being the price he had charged for services in another case. Capt. Snow was then asked to bring his whole wrecking gear. He testifies:

"I told him I should charge him from the time I left Rockland until I got back and charge him for my wrecking outfit proportionately."

A letter from Capt. Snow to Mr. Pendleton, written December 22, 1910, shows something of the character and extent of the services:

"You called us at 8 a. m. June 23, 1910; we started at 9 a. m. to get our outfit and extra crew, left for Hewes Point at 12:15 p. m., arrived at wreck at 4:30 p. m. Worked until 8:45 p. m.; Friday June 24th, worked from 4 a. m. until 11:50 p. m.; Saturday left for Rockland 7 a. m. after taking up moorings and got the outfit put away at 10:45.

"This about uses up the 23d, 24th, and 25th. You had the use of our whole outfit and we worked with dispatch and almost continuously until the hull was where you wanted her. We dropped all our work and came to your work. We maintain this pump and wrecking gear at considerable expense, and those who use it must expect to pay something more than an ordinary service."

The case is to be determined upon the basis of reasonable compensation only for the services rendered. The libellant claims, however, that, in performing the services, it was necessary to put the lighter to unusual and unaccustomed strain; and that the libellant should have compensation commensurate with the difficulty and extent of the work undertaken. In *Gilchrist v. Godman* (D. C.) 79 Fed. 970, Judge Grosscup dealt with a case involving wrecking services. In the case before him he holds that the relation of libellants to the vessel in distress was not that of salvors at large, but that it involved a claim of a class of men who worked for certain customary wages and independently of the success or failure of their efforts; and that the claim is maritime in its character. He says:

"It will be observed that the relation of the libellants to the vessel in distress was not that of salvors at large. They did not offer their help or impose their services. * * * Their relation was not that of men coming at a venture to a vessel in distress but of regular wreckers and tug men, who were employed at a customary compensation to give assistance."

In finding what such "customary compensation" should be, it is necessary to consider some matters which do not enter into ordinary maritime services. The fact is worthy of note in wrecking services, as in salvage, that a "costly instrumentality" is brought into use. *The Blackwall*, 10 Wall. 1, 13, 19 L. Ed. 870. In *The Newaygo* (D. C.) 205 Fed. 178, 180, the District Court for the Eastern District of Michigan in a wrecking case allowed a claim in which the value of wrecking services was estimated at a rate beyond ordinary maritime services.

In the case before me, the time employed was about 30 hours, involving some night services and extending over a part of four days. It appears from the testimony that it cost \$31 a day for all the working days of the year to pay the running expenses of the lighter, aside from the use of the pump and all other wrecking apparatus. It is claimed by the libellant that it has sometimes let the pump for \$25 a day. The claimant admits that \$200 is a reasonable compensation but says he should not reasonably be expected to pay \$300.

There is a conflict of testimony as to the value of the services. It is unnecessary to discuss all the evidence in detail. The services were of an extraordinary character; and it is clear that a price should be charged higher than for ordinary services. The apparatus is of large value, about \$11,000, and is maintained at great expense, with only occasional opportunity to use it. Persons engaged in wrecking services ought to keep up proper apparatus and be ready at any time to use their best efforts. I do not think the charge is unreasonable under all the circumstances. A decree may be entered for the libellant for \$300. The libellant may recover costs.

RANKIN v. MILLER et al.

(District Court, D. Delaware. July 15, 1913.)

No. 231.

1. BANKS AND BANKING (§ 250*)—STOCKHOLDERS' LIABILITY—ACTIONS TO ENFORCE—NATURE AND FORM.

Under Rev. St. § 5151 (U. S. Comp. St. 1901, p. 3465), making the shareholders of national banking associations individually responsible for all contracts, debts, and engagements of such association, to the extent of the par value of their stock in addition to the amount invested in such shares, where, in a suit by the receiver of a national bank, the bill seeks a recovery, not of the total statutory liability, but only of a fractional part thereof as assessed by the Comptroller of the Currency, the suit is within the equitable jurisdiction of the court.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 932-939; Dec. Dig. § 250.*]

2. BANKS AND BANKING (§ 248*)—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

The Comptroller of the Currency has power to appoint a receiver for an insolvent national bank and to call for a ratable assessment upon stockholders without a previous judicial ascertainment of the necessity for such action.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913-915, 919-931; Dec. Dig. § 248.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKS AND BANKING (§ 248*)—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

The Comptroller of the Currency has power to decide whether the whole or only a part of the statutory liability of stockholders of insolvent national banks shall be enforced, and when, and to make more than one assessment as may be required, his judgment or decision in such particulars and on the question of insolvency being conclusive; and hence in a suit by the receiver of a bank to enforce such liability the Comptroller's order making the assessment sued on and reciting the necessity therefor was conclusive.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913-915, 919-931; Dec. Dig. § 248.*]

4. BANKS AND BANKING (§ 248*)—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

In an action by the receiver of a national bank to enforce an assessment made by the Comptroller of the Currency against the stockholders, it could not be shown that the enforcement of such assessment would be inconsistent with or would defeat the provision of Rev. St. § 5151 (U. S. Comp. St. 1901, p. 3465), making stockholders liable "equally and ratably and not one for another"; this question being concluded by the Comptroller's finding of the necessity for such assessment and order making it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913-915, 919-931; Dec. Dig. § 248.*]

5. LIMITATION OF ACTIONS (§ 2*)—APPLICATION OF STATE STATUTES—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

Actions to enforce the statutory liability of stockholders of national banks are governed by the statutes of limitations of the state where the suit is brought, so far as applicable.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4-8; Dec. Dig. § 2.*]

6. LIMITATION OF ACTIONS (§ 58*)—COMPUTATION—STOCKHOLDERS' LIABILITY.

Limitations will not run against the right of action to enforce the statutory liability of stockholders of national banks until the cause of action has fully matured through the making of an assessment and the arrival of the day when it becomes payable.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324-328, 346, 347; Dec. Dig. § 58.*]

7. BANKS AND BANKING (§ 250*)—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

Laches on the part of the Comptroller of the Currency in failing to collect an earlier assessment and in undertaking the collection of the one sued on was not a defense to a suit to enforce the statutory liability of stockholders of national banks, since these matters are committed exclusively to his judgment, and his action must be treated as seasonable and regular.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 932-939; Dec. Dig. § 250.*]

8. BANKS AND BANKING (§ 250*)—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

Under Rev. St. § 5151 (U. S. Comp. St. 1901, p. 3465), making stockholders of national banks liable for the debts of the bank to the extent of the par value of the stock, in addition to the amount invested therein, and section 5152, providing that executors, etc., shall not be personally liable, but that the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, etc., would be if living and competent to act and hold the stock, the receiver of an insolvent bank, before suing to enforce the liability of the estate of a deceased stockholder, was not required to establish his claim before the register of wills having jurisdiction over the settlement of the decedent's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

estate, to make demand upon the executors for payment, or to present to them an affidavit as required by the laws of the state.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 932-939; Dec. Dig. § 250.*]

9. LIMITATION OF ACTIONS (§ 22*)—BONDS—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

The laws of a state in which an executor was appointed, prohibiting the bringing of any action upon any testamentary bond against either principal or sureties more than six years from its date, did not prevent an action by the receiver of an insolvent national bank against the executors and legatees of a deceased stockholder to enforce the stockholder's statutory liability, although brought more than six years after the date of the bond; the action not being brought upon the bond or against the executors' sureties.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 100-111; Dec. Dig. § 22.*]

10. BANKS AND BANKING (§ 250*)—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

Demand of, or notice to, stockholders of an insolvent national bank by the Comptroller of the Currency or receiver is not a prerequisite to the maintenance of a suit to enforce the stockholders' statutory liability.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 932-939; Dec. Dig. § 250.*]

11. BANKS AND BANKING (§ 248*)—STOCKHOLDERS' LIABILITY—NATURE.

Under Rev. St. § 5151 (U. S. Comp. St. 1901, p. 3465), making stockholders of national banks liable to the extent of the par value of their stock, in addition to the amount invested therein, for the debts of the bank, this double liability is the resultant of the contract by which the stockholder acquires the stock and of the statute.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913-915, 919-931; Dec. Dig. § 248.*]

12. BANKS AND BANKING (§ 248*)—STOCKHOLDERS' LIABILITY—LIABILITY OF ESTATE OF STOCKHOLDERS.

Under Rev. St. § 5151 (U. S. Comp. St. 1901, p. 3465), making stockholders of national banks liable for the debts of the bank to the extent of the par value of their stock, in addition to the amount invested therein, and section 5152, providing that persons holding stock as executors, etc., shall not be personally liable as stockholders, but that the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, etc., would be if living and competent to act and hold the stock, where, after a stockholder's death, the bank became insolvent, the liability attached to the estate in the hands of the executor, and became a charge or lien thereon from the date the bank was declared insolvent, if not from the date of the stockholder's death, or the date of the executors' qualification, and not from the date of the Comptroller's order levying an assessment only.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913-915, 919-931; Dec. Dig. § 248.*]

13. BANKS AND BANKING (§ 248*)—STOCKHOLDERS' LIABILITY—LIABILITY OF STOCKHOLDER'S EXECUTOR.

Under Rev. St. § 5151 (U. S. Comp. St. 1901, p. 3465) making stockholders of national banks liable for the debts of the bank to the extent of the par value of their stock, in addition to the amount invested therein, and section 5152, providing that persons holding stock as executors, etc., shall not be personally liable as stockholders, but that the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, etc., would be if living and competent to act and hold the stock, where, before distribution of the estate of a deceased stockholder, the bank was declared insolvent, although no assessment against the stock was levied until after distribution of the estate,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the executors, with knowledge or means of knowledge of the estate's liability, fully distributed the estate, without requiring any refunding bond or other security from the distributees, the executors, although not liable as stockholders, were liable for their wrongful act in disposing of the estate in such manner as to deprive the bank's creditors of the benefit of the charge or lien thereon created by the statute, even though they did not in fact intend to defraud or wrong such creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913-915, 919-931; Dec. Dig. § 248.*]

14. BANKS AND BANKING (§ 250*)—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

In a suit by the receiver of an insolvent national bank against the executors and legatees of a deceased stockholder to recover the amount of an assessment against the stock levied by the Comptroller of the Currency, where it appeared that the estate had been fully distributed, a recovery could be had against the executors for their wrongful act in distributing the estate so as to deprive the bank's creditors of their charge or lien thereon, under the prayer of the bill for other and further relief.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 932-939; Dec. Dig. § 250.*]

15. BANKS AND BANKING (§ 248*)—STOCKHOLDERS' LIABILITY—LIABILITY OF STOCKHOLDER'S EXECUTOR.

Where executors of a stockholder of a national bank, which became insolvent before distribution of the estate, knew that the stock belonged to the estate, as evidenced by its inclusion in the inventory and appraisal, and in such inventory and appraisal valued it at one-tenth of its par value, showing that they had cause to suspect the bank's embarrassment or insolvency, they were put upon inquiry as to its financial condition, and charged with knowledge of the estate's statutory liability.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913-915, 919-931; Dec. Dig. § 248.*]

In Equity. Suit by George C. Rankin, receiver of the First National Bank of Alma, Kan., against Charles R. Miller and James Baily, executors of Robert H. Miller, deceased, and others. Judgment in favor of plaintiff against Miller and Baily.

See, also, 199 Fed. 342.

Ward, Gray & Neary, of Wilmington, Del., for complainant.

Willard Saulsbury and Hugh M. Morris, both of Wilmington, Del., for defendants.

BRADFORD, District Judge. This is a suit in equity brought by George C. Rankin, a citizen of Illinois, receiver of the First National Bank of Alma, Kansas, hereinafter referred to as the Alma bank, against Charles R. Miller and James Baily, executors of Robert H. Miller, deceased, and trustees under his will, the Equitable Guarantee and Trust Company, Annie M. Baily, Elizabeth M. Baily, and the said Charles R. Miller, citizens of Delaware, and Wilmer W. Miller and R. Miller Baily, non-residents of Delaware, whose residence is unknown to the complainant, for the purpose of collecting the amount of an assessment made by the comptroller of the currency upon certain shares of the capital stock of the Alma bank held and owned by the decedent at the time of his death. The material facts either admitted or proved beyond controversy are as follows: The Alma bank was incorporated in August, 1887, under the national bank act, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thereafter conducted business at Alma, Kansas, until November, 1890, when it suspended payment of its obligations and became insolvent and was so declared by the then comptroller of the currency. Miller, the decedent, acquired October 20, 1888, 150 shares of the capital stock of the Alma bank, each of the par value of \$100, and continued to hold and own the same until his death which occurred August 31, 1890; and thereafter his name continued on the books of the bank as owner of the shares in question until after the filing of the bill herein April 30, 1902. He left a will, proved and allowed in New Castle County, Delaware, October 28, 1890, on which letters testamentary were duly granted to the above named Charles R. Miller and James Baily December 22, 1890, who filed an inventory and appraisal of the personal property of the decedent, duly verified by them April 20, 1892, before the register of wills, specifically including therein the 150 shares of stock at a valuation of only one-tenth of their par value. They passed their first and final account October 3, 1892, showing a balance, after the payment of debts and expenses, of \$18,991.75 for distribution among the legatees under the will. This balance was paid in full to the legatees between October 5 and October 15, 1892, acquittances therefor being duly executed and delivered to the executors. Several months thereafter, namely, January 6, 1893, the comptroller of the currency caused an assessment to be made upon the stockholders and stock of the Alma bank for \$33,000, payable on or before January 20, 1893, being 44% upon each and every share of its capital stock, which amounted to \$75,000 at par. It subsequently appearing that the above mentioned sum of \$33,000 assessed as above stated, but not collected, was inadequate to discharge its debts, a second assessment was duly made by order of the comptroller of the currency November 22, 1900, for the sum of \$10,950, or \$14.60 upon each and every share of the stock of the bank, payable December 22, 1900. This second assessment upon the 150 shares held by the executors amounted to \$2,190, and it is for the collection of this sum with interest thereon from December 22, 1900, that this suit has been brought. The complainant was appointed receiver December 31, 1901, and the bill, as above stated, was filed April 30, 1902. It does not appear that at the latter date any part of the decedent's estate was in the hands of the beneficiaries, executors or trustees under his will. Nor does it appear that the 150 shares held by the decedent at the time of his death were at any time formally transferred to his executors or passed to them otherwise than by operation of law. Nor does it appear that the executors, or either of them, transferred to others those shares or any of them at any time. Nor does it appear that the executors required from the beneficiaries under the will before or after distributing the decedent's estate among them any refunding bond or other security which might be required for the payment of any assessment or assessments which might be made under the order of the comptroller of the currency.

The bill prays, aside from subpoena and answer, that the sum claimed under the second assessment on the shares in question, namely, \$2,190 with interest as aforesaid, be "declared a lien upon all the

estate of the said Miller that may have been received by the beneficiaries under the will of the said Robert H. Miller as aforesaid, or by the executors and trustees as aforesaid"; that such executors, trustees and beneficiaries be restrained from spending or disposing of any part of the said estate which "may be held by said executors, trustees or beneficiaries, and that an account may be had"; and further, that the defendants be decreed to be "collectively and severally indebted" to the complainant in the said sum of \$2,190, with interest thereon as aforesaid, and that they "jointly and severally" be decreed and ordered to pay the same to the complainant; and for "such other and further relief as the circumstances and nature of the case, and equity, may require."

The grounds on which the defendants resist the making of the decree against them are, in substance, as follows: (1) That the second assessment was unnecessary and unlawful; (2) that there was gross laches on the part of the complainant and his predecessors in office and the public officials connected with the ordering or making of the assessments; (3) that the comptroller of the currency had no authority to collect from the defendants, or any of them, or to call upon them, or any of them, to pay the second assessment upon the shares of stock in question; (4) that the executors have no assets in their hands belonging to the decedent's estate and have not had any since October, 1892, the executors having then fully administered the estate and made final distribution thereof, and the said estate having thereby become "extinguished"; (5) that prior to the distribution of the estate no demand was made upon the executors for the payment of any assessments, and "no affidavit as required by section 29, chapter 89, of the Revised Code, was ever presented to the executors"; (6) that it does not appear that the distributees of the estate of the decedent received any property capable of being followed and identified as part of such estate; and (7) that no action can under the laws of Delaware be brought upon any testamentary bond against either the principal or sureties after the expiration of six years from its date, and therefore the defendants are not liable as executors for the claim set forth in the bill.

The provisions of law upon which this suit is founded are sections 5151 and 5152 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3465). The former, so far as material to this case, provides:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Section 5152 is as follows:

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

[1] Preliminarily it should be stated that as the bill seeks the recovery, not of the total statutory liability of \$100 per share on the capital stock of the Alma bank, but only of a fractional part or percentage thereof, this suit comes within the equitable jurisdiction of this court. *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168.

[2, 3] It is well settled that the comptroller of the currency has power to appoint a receiver for an insolvent national bank and call for a ratable assessment upon stockholders without a previous judicial ascertainment of necessity for such action. *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *In re Chetwood*, 165 U. S. 443, 458, 17 Sup. Ct. 385, 41 L. Ed. 782; *Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598. He has power to decide whether the whole or only a part of the statutory liability shall be enforced, and when, for the benefit of the bank's creditors and to make more than one assessment as may be required for that purpose; his judgment or decision on the question of insolvency and in the above particulars being conclusive upon the stockholders. *McClaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500; *Studebaker v. Perry*, 184 U. S. 258, 22 Sup. Ct. 463, 46 L. Ed. 528; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Casey v. Galli*, 94 U. S. 673, 681, 24 L. Ed. 168; *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Studebaker v. Perry*, 102 Fed. 947, 43 C. C. A. 69; *Rankin v. Barton*, 199 U. S. 228, 26 Sup. Ct. 29, 50 L. Ed. 163; *Christopher v. Norvell*, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740; *Aldrich v. Yates* (C. C.) 95 Fed. 78; *National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Aldrich v. Campbell*, 97 Fed. 663, 38 C. C. A. 347; *Young v. Wempe* (C. C.) 46 Fed. 354; *Welles v. Stout* (C. C.) 38 Fed. 67; *Deweese v. Smith*, 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971. In *Kennedy v. Gibson*, supra, the court said:

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him."

In *Casey v. Galli*, supra, there was a demurrer to a plea in an action to enforce the stockholders' statutory liability to the effect that the comptroller was attempting to exact from only a portion of the stockholders, including the defendant, a sum sufficient to pay all the debts and liabilities of the bank without contribution from and regardless of other stockholders. The court said:

"It is a sufficient objection to this plea that the comptroller has ordered that each stockholder shall pay to the receiver the par of his stock. This order cannot be controverted in a suit against the stockholder. It is conclusive upon him, and makes it his duty to pay. *Kennedy v. Gibson and Others*, 8 Wall. 498 [19 L. Ed. 476]. What may be done or intended with respect to other stockholders is immaterial in his case."

In the same case there was another plea, demurred to, to the effect that the comptroller had decided to pay claims against the bank for which it was not responsible, and that, aside from those claims, he possessed sufficient means to meet the liabilities of the bank. With respect to this plea the court said:

"The same objection lies to this plea as to the preceding one, and the same authority applies. If the receiver intends to violate, or shall violate, his duty in discharging the trust confided to him, the remedy must be sought in another proceeding. It cannot avail the defendant in this action."

The orders of the comptroller of the currency for both assessments against the stockholders of the Alma bank, dated respectively January 6, 1893, and November 22, 1900, are on their face plain and unambiguous and entitled to conclusive effect in suits against such stockholders, under the doctrine established by the cases above cited and many others to which it is unnecessary to refer. In each order the comptroller, in substance, recites that upon a proper accounting by the receiver and a valuation of the assets it appeared to the comptroller's satisfaction to be necessary for the payment of the bank's debts to enforce the stockholders' individual or statutory liability to the extent therein mentioned, makes assessment and requisition for the same upon them, to be paid ratably on or before the day and year therein mentioned, and directs the receiver to take all necessary proceedings by suit or otherwise for the collection of the same; the first assessment being made payable on or before January 20, 1893, and the second assessment on or before December 22, 1900, and the order for the second assessment reciting that the amount of the first was inadequate to pay the debts of the bank.

On the part of the defendants some reliance seems to be placed upon *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216, where an application for a writ of mandamus against the comptroller of the currency to compel him to order a further assessment against the stockholders of a national bank was denied on the ground that the refusal by the comptroller to order such further assessment was "because the enforcement of such assessment would compel the solvent shareholders to pay the sums and proportions due from the shareholders who are insolvent." With respect to this case it should be noted, first, that the conclusion of the comptroller was upheld by the Supreme Court; secondly, that the proceeding was directly, and not collaterally, against the comptroller; and, thirdly, the court recognized the doctrine of the conclusiveness of the comptroller's findings in a suit brought by a receiver against a shareholder for the enforcement of the statutory liability, for it was pointedly declared:

"Nothing in this opinion is intended in any wise to affect the authority of *Kennedy v. Gibson and Others*, 8 Wall. 498 [19 L. Ed. 476], and *Casey v. Galli*, 94 U. S. 673 [24 L. Ed. 168]. On the contrary, we approve and reaffirm the rule laid down in those cases."

[4] An attempt was made during the taking of testimony in this case to show that the enforcement of the order for the second assessment, now sued on, would be inconsistent with and calculated to defeat the "equally and ratably, and not one for another" provision of

section 5151, and therefore it is claimed the order was invalid. But any such question is concluded by the finding and order of the comptroller. *Casey v. Galli* is decisive here. There the demurrer to the first plea admitted that the comptroller was attempting to exact from the defendant and some of the other defendant stockholders a sum sufficient to pay all the bank's indebtedness, without contribution from other stockholders. But as above stated the court said that "this order cannot be controverted in a suit against the stockholder. It is conclusive upon him, and makes it his duty to pay." There the objection overruled by the court was based upon facts admitted by demurrer. Here the objection is based only upon deductions made from a part of the testimony.

[5, 6] In the absence of any provision in the act of congress creating the double liability of stockholders of national banks fixing a period of limitation within which actions for its enforcement must be brought, the statute of limitations of the state where suit is brought governs, so far as applicable. *McClaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. But the period of limitation will commence to run only from the time the cause of action has fully matured through the making of an assessment and the arrival of the day when it becomes payable. *Aldrich v. Skinner* (C. C.) 98 Fed. 375; *Aldrich v. McClaine* (C. C.) 98 Fed. 378; *McDonald v. Thompson*, 184 U. S. 71, 72, 76, 22 Sup. Ct. 297, 46 L. Ed. 437; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Aldrich v. Yates* (C. C.) 95 Fed. 78; *Rankin v. Barton*, 199 U. S. 228, 26 Sup. Ct. 29, 50 L. Ed. 163; *McClaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. The second assessment for the collection of which this suit was brought was made November 22, 1900, and became payable December 22, 1900, a period of only one year, four months and eight days before the filing of the bill. It is thus clear that this suit is not directly or indirectly barred by any provision of the general statutes of limitation of Delaware. There is a broad distinction between the maturing of a liability as a prerequisite to the successful prosecution of an action for its enforcement, and the attaching of the liability upon the declaration of insolvency or the acquisition of the stock.

[7-10] Much has been said on behalf of the defendants on the subject of laches on the part of the comptroller of the currency in failing to collect the first assessment and in not sooner undertaking the collection of the second. But these were matters committed exclusively to his judgment and, involving careful ascertainment and collection of the assets and an account of the debts and liabilities of the bank over and above such assets, his action must be treated as seasonable and regular and cannot be questioned in a suit brought by the receiver against a stockholder. The law as settled by the authorities will not permit this court to assume or find that the second assessment could have been earlier made and declared payable. It is equally well settled that the receiver was under no obligation before suing in this court to establish his present claim either within or after a year from its full maturity before the register of wills having juris-

diction over the settlement of the decedent's estate. *Rankin v. Herod* (C. C.) 140 Fed. 661; *Rankin v. City of Big Rapids*, 133 Fed. 670, 66 C. C. A. 568. Nor is there any force in the contention that no action can under the laws of Delaware be brought upon any testamentary bond, against either principal or sureties, after the expiration of six years from its date, and therefore the defendants are not liable as executors for the claim set forth in the bill. This action is not brought upon the testamentary bond of Miller and Baily, or against their sureties therein. It is simply a corollary from the authorities previously referred to that there was and could be no obligation on the part of the receiver to sue within six years on the testamentary bond above mentioned, or to make demand prior to distribution of the estate, upon the executors for the payment of any assessments or to present to the executors an "affidavit as required by section 29, chapter 89 of the Revised Code." Nor as settled by the authorities is any demand of or notice to stockholders by the comptroller or the receiver a prerequisite to the maintenance of suit to enforce the double liability.

The more substantial questions in this case are raised or suggested by the contention of the defendants that the executors have no assets in their hands belonging to the decedent's estate and have not had any since October, 1892, the executors having then, as alleged, fully administered the estate and made final distribution thereof and the estate having thereby become "extinguished," and that it does not appear that the distributees of the estate of the decedent received any property capable of being followed and identified as part of such estate.

[11, 12] This suit was brought, not against the decedent, who had acquired and was the owner and registered holder of the 150 shares of the capital stock of the Alma bank at the time of his death August 31, 1890, but against the executors and trustees under his will, and his legatees. The double liability of a stockholder of a national bank is the resultant of the contract by which he acquires such stock and of the statute providing for such liability, and survives against his estate. *Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. In *Matteson v. Dent*, supra, the court said:

"The obligation of a subscriber to stock, to contribute to the amount of his subscription for the purpose of the payment of debts, is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by and relates to the contract from which it arises. This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder."

By force and virtue of the contract of purchase or assignment by which the decedent acquired the 150 shares, in connection with the provision of section 5151, he incurred a conditional liability to pay pursuant to the assessment and requisition of the comptroller, a sum of money not exceeding their par value, on account of the debts of the Alma bank, should it be declared insolvent by that official. The shares

of stock passed by force of law to the decedent's executors and his conditional liability survived and by virtue of section 5152 attached to his estate in their hands, and became a charge or lien thereon from the date when the Alma bank suspended and was declared insolvent in November, 1890, if not, indeed, from the time of the qualification of the executors.

[13, 14] The proper decision of this case requires careful consideration of sections 5151 and 5152 in their relation to each other. The former section, subject to an exception or qualification not germane here, provides, among other things, generally, that the shareholders of every national bank "shall be held individually responsible" for all its contracts, debts and engagements, to the extent of the amount of their stock at the par value thereof in addition to the amount invested in such shares. Section 5152, as before stated, provides:

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liability as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

Both sections deal with the subject of the double liability of stockholders of national banks, and each of them has for its purpose the enforcement of such liability. The variances between them are due to the essential difference in the circumstances under which they respectively are intended to operate. Considering them in their relation to a living stockholder, on the one hand, and, on the other, to the estate of a deceased stockholder, it is clear upon their face that Congress in their enactment had in view a practical, reasonable and consistent plan for the collection of assessments of the double liability. In the case of a living stockholder, the amount of the assessment against him was intended to be paid by him and suit could be maintained against him as a stockholder for its recovery whenever it matured. In the case of a deceased stockholder, who for the purpose of the payment of his share of the assessment was represented by his estate, it was intended that the statutory liability should attach to it in the hands of his executors or administrators as a charge or lien. And it fairly is to be assumed that as Congress intended individual responsibility of the stockholders to serve as security for the payment, in the case of a living stockholder, of his share of an assessment, so it equally intended such charge or lien to serve, in the absence of countervailing equities, as such security in the case of a deceased stockholder. Section 5152 expressly provides that "the estates and funds" in the hands of "persons holding stock as executors" shall be "liable in like manner and to the same extent as the testator * * * would be, if living and competent to act and hold the stock in his own name." This provision shows a legislative intent that the charge or lien upon the estate of a deceased stockholder in favor of the creditors of a national bank, shall, in the absence of superior countervailing rights or equities, be regarded and enforced equally as the individual responsibility of living stockholders. Further, section 5151 in providing for

double liability declares that the stockholders shall be "held individually responsible, equally and ratably, and not one for another," for the debts of a national bank; and that section when read in connection with section 5152 which, as before stated, also deals with the subject of the enforcement of the double liability, affords additional reason to support the conclusion that Congress intended the enforcement of the charge or lien upon the estate of a deceased stockholder equally with the enforcement of the individual responsibility of living stockholders to serve as means for the accomplishment of the purpose of the statute.

But it is contended on the part of the defendants that "the liability, if any, under the second assessment dates only from the order of the comptroller levying the assessment, and as there were [then] no funds in the hands of the executors, the executors were not liable," and further, that "as executors are not personally liable, but liable only to the extent of the estate and funds in their hands, it necessarily follows that they are not liable at all, if at the time the liability arose no estate or funds were in their hands." This contention is unsound and misleading. While the second assessment did not mature for the purposes of suit until December 22, 1900, when it became payable, the statutory liability for an amount covering that assessment attached as a charge or lien on the decedent's estate as early as November, 1890, on the declaration of insolvency of the Alma bank, if not as early as the date of his death. The double liability attached to the decedent's estate while in the hands of his executors, and, in view of this fact, it is unnecessary to discuss the second branch of the above contention. The real point involved in that contention taken as a whole resolves itself into the proposition that unless a decedent's estate or part of it is in the hands of his executors or administrators or under their control at the time an assessment of double liability becomes payable and when suit is instituted, there is nothing to sue for and consequently no decree can be rendered against them. Section 5152, it is true, expressly declares that "persons holding stock as executors * * * shall not be personally subject to any liabilities as stockholders," but "the estates and funds in their hands shall be liable," etc., but while it provides that persons so holding stock shall not be personally subject "as stockholders," it does not declare they shall not be liable personally as wrongdoers for breach of trust or violation of fiduciary duty in disposing of the estate in their hands in such manner as to deprive the creditors of the bank of the benefit of the charge or lien thereon created by that section for the purpose of securing payment to them of the statutory liability. The executors are trustees charged with the duty of disposing of the estate according to law and are guilty of a breach of trust in knowingly or negligently disregarding and defeating the right of creditors to the security conferred upon them by law with respect to the double liability. It is no answer to say that the statutory liability was the subject only of a charge or lien upon the decedent's estate, which was spent or dissipated or became "extinguished." One cannot take advantage of his own wrong, and such an objection does not lie in the mouth of the

wrongdoer. Executors are under an obligation to see to it that the funds in their hands shall not be squandered, wasted or otherwise improperly disposed of without payment of the double liability for which such funds are subject. If this be not the law one cannot readily perceive why an executor could not with perfect immunity from suit cast the most valuable part of an estate represented by him into the ocean knowing that it was subject to the statutory liability, and then claim immunity on the ground that it was not in his hands at the time an assessment became payable or when suit was instituted. The law will not countenance such a palpable evasion and absurdity. To compel an executor to account personally and individually for and pay to the receiver the amount of double liability represented by a charge or lien on the decedent's estate, lost through the wrongful act or negligence of the former, is to enforce payment of the double liability for the benefit of the bank's creditors within the broad intent of the statute, effects its purpose, and comes within the prayer for other and further relief. To hold the contrary would, it seems to me, stamp section 5152 as a lame and impotent piece of legislation, and present a *reductio ad absurdum*. It would logically result from the acceptance of the doctrine contended for that the enforcement of the charge or lien created by section 5152 could as above indicated be defeated through the mere whim of an executor, without liability on his part and regardless of disastrous consequences to creditors by transferring the estate held by him in a fiduciary capacity to third persons in such manner that its identity could not be established. Such a doctrine is an affront to right reason and shocks one's sense of justice. I do not know of any authority upholding it.

On the facts admitted or clearly proved there can be little or no doubt that the executors are jointly and severally liable to the receiver for the amount of the second assessment on the 150 shares of stock in question, together with interest as claimed, running from December 22, 1900, when the assessment became payable.

[15] The executors prior to the distribution of the estate had actual knowledge of the fact that these shares of stock belonged to that estate; for they charged themselves with them in the inventory and appraisal, verified April 20, 1892. They knew they were shares of a national bank. Knowing they were such shares and belonged to the decedent's estate they were put upon inquiry. They were bound to know the law and were chargeable with knowledge that the estate was subject to double or statutory liability as a charge or lien for the benefit of the creditors of the Alma bank. That the executors had cause to suspect the embarrassment or insolvency of the bank fairly may be inferred from the fact that the value assigned to the shares in the inventory and appraisal was only one-tenth of their par value. Although the executor, Miller, was examined as a witness, it does not appear from his testimony, or that of any other witness, that either he, or his co-executor, Baily, notwithstanding the above circumstance, at any time prior to the distribution of the estate made any inquiry as to the financial condition of the bank. They distributed in October, 1892, five months after charging themselves with the stock in ques-

tion, the net balance of the estate, amounting to \$18,991.75, according to the terms of the decedent's will, without requiring either refunding bond or other security from those to whom such balance was distributed; the defendant Charles R. Miller receiving from and receipting to the estate for the sum of \$4,747.44 on his own individual account October 6, 1892; the total amount of the second assessment against the estate involved in this suit being only \$2,190, with interest from December 22, 1900. It may be noted in passing that while Miller testified that he had spent the share thus received by him he did not state when his share was so spent. But however this may be, the executors recklessly and at their own peril, without regard to the rights of the creditors of the Alma bank, and although possessing knowledge that the decedent's estate was chargeable with its share of the amount of any assessment which should be made by direction of the comptroller of the currency, disposed of that estate in the same manner as if they had never known that the decedent had been the owner of the 150 shares of stock, or that the same had passed to and were held by them as part of the estate, or that the Alma bank was embarrassed or insolvent. As between the innocent creditors of the Alma bank, on the one hand, and, on the other, Miller and Baily, who made such improper use of their office as executors without requiring security the equities of the case are wholly on the side of the former. Nothing that is here said is intended to convey the idea that either Miller or Baily intended in fact to defraud or wrong the creditors of the Alma bank. This court does not impute to them, or either of them, such a dishonorable or unworthy motive. But the course of conduct pursued by them, without actual wrongful intent, nevertheless constituted them wrongdoers and tort-feasors and as such jointly and severally liable, under the prayer for other and further relief, to the receiver for the benefit of the creditors of the Alma bank for the amount of \$2,190 with interest as claimed.

I can perceive no reason why the law of devastavit is not as applicable to executors, holding them personally liable to those entitled to the benefit of the double liability on account of misapplication of the estate of a decedent, as it would be to executors for squandering or mismanaging a decedent's estate in cases not involving the enforcement of double liability. To draw a distinction between the two would establish a mischievous and hurtful precedent.

Counsel for the receiver have contended that under the second assessment the legatees and beneficiaries under the will of the decedent are, within the limits of the value of the portions of the estate respectively received by them, liable to pay to the receiver the several sums chargeable under that assessment against those several portions of the estate. But in view of the conclusion heretofore reached it is unnecessary now to enter into this inquiry. There is no evidence that any of the property of the decedent can now be traced to the possession of any of the beneficiaries under his will. Whether there may be a claim on the part of the executors for contribution from such legatees or beneficiaries is unnecessary now to consider. Their equities probably are wholly different from those of Miller and Baily. That under certain circumstances creditors of a decedent may, after final settlement

of his estate, proceed with all proper expedition for satisfaction of their claims out of portions of his estate in the hands of legatees or devisees is an old and well settled doctrine. This case, however, is concerned not with a claim originating at common law or under general principles of equity, but solely with the enforcement of the purely statutory right of double liability, and it may be material to observe in passing that none of the legatees or devisees of the decedent, excepting the executors, Miller and Baily, appear to have held any part of the 150 shares of stock of the Alma bank, and further that section 5152 refers to estates and funds in the hands of "executors, administrators, guardians, or trustees" but does not mention legatees or devisees.

Under the foregoing circumstances this court would not feel justified in decreeing against the legatees or devisees as such, but only against Miller and Baily jointly and severally as tort-feasors. Should they conceive they have a right to compel contribution, the decree to be entered in this case may be so framed as not to prejudice such right, if any they have. A decree must be entered against Charles R. Miller and James Baily holding them jointly and severally liable to the complainant in the sum of \$2,190, together with interest thereon from December 22, 1900, at the rate of 6 per cent. per annum, and further requiring the said two defendants to pay within thirty days from the date of such decree the costs of this suit and the moneys and interest thereby decreed to be paid, or attachment.

HITNER et al. v. DIAMOND STATE STEEL CO.

(District Court, D. Delaware. August 8, 1913.)

No. 260.

1. EQUITY (§ 409*)—REPORT OF MASTER—EFFECT GIVEN TO FINDINGS.

Where an equity suit is referred to a master to make findings by consent of the parties, his findings, so far as they involve questions of fact, if supported by any competent evidence, are conclusive on the parties. Where the reference is by the court, and not by consent, the same rule does not apply; but in such case the findings are presumptively correct, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on the part of the master.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904, 920-923; Dec. Dig. § 409.*]

2. EQUITY (§ 404*)—HEARING BEFORE MASTER—WEIGHT OF TESTIMONY.

The fact that the testimony of a witness before a master is uncontradicted does not require the master to accept it as true and treat the case as one of pure law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 886-892; Dec. Dig. § 404.*]

3. RECEIVERS (§ 190*)—MANNER OF KEEPING ACCOUNTS.

It is the duty of receivers to keep their accounts with such fullness and particularity that the source of all receipts and the purpose of all expenditures may be clearly ascertained therefrom.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 381; Dec. Dig. § 190.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. RECEIVERS (§ 99*)—ACCOUNTING—EXPENDITURES ALLOWABLE.

Receivers for a corporation are not entitled to credit in their accounts for expenditures made in an effort to reorganize the corporation or to effect a private sale of its property, when neither of such things was authorized by the court.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 183-186; Dec. Dig. § 99.*]

5. RECEIVERS (§ 83*)—MANAGEMENT OF PROPERTY.

While receivers are necessarily clothed with a considerable discretion in the management of the trust property, that fact does not excuse them for dealing with it carelessly or extravagantly.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 153; Dec. Dig. § 83.*]

6. RECEIVERS (§ 99*)—ACCOUNTING—SURCHARGING ACCOUNT.

Receivers *held* properly surcharged in their accounts by a master with expenditures made without authority.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 183-186; Dec. Dig. § 99.*]

In Equity. Suit by Henry A. Hitner and Joseph G. Hitner, trading as Henry A. Hitner's Sons, against the Diamond State Steel Company. On exceptions to master's report. Overruled, and report confirmed.

See, also, 197 Fed. 850.

Ward, Gray & Neary, of Wilmington, Del., for receivers.

William Clarke Mason, of Philadelphia, Pa., and Anthony Higgins, and Horace G. Eastburn, both of Wilmington, Del., for bondholders and creditors.

BRADFORD, District Judge. This case has been heard on exceptions taken, on the one hand, by James P. Winchester and Howard T. Wallace, receivers of the Diamond State Steel Company, hereinafter referred to as the steel company, and, on the other, by sundry bondholders and general creditors of that company, to the report of William G. Mahaffy, special master, to whom the accounts of the said receivers and certain matters relating to the adjustment, settlement and distribution of the estate of the steel company were referred. The order of reference to the special master was made July 27, 1910, in consequence of certain petitions filed in this case by the receivers, as follows:

(1) A petition filed June 20, 1910, for an apportionment of the expenses of the administration of the estate of the steel company between the funds arising from the sale of its real estate and its general assets; (2) a petition filed also June 20, 1910, for a further allowance to the receivers as compensation for them and their counsel; and (3) a petition, filed July 27, 1910, for the appointment of a special master to audit the accounts theretofore filed by the receivers, etc. On the day of the filing of the last mentioned petition Mahaffy was appointed special master, and it was ordered by the court as follows:

1. That said receivers shall forthwith file in this court their twenty-third and final account, [being subsequent to the accounts referred to in the last named petition] showing their receipts and disbursements since the date of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

their twenty-second, being their last, report and account, and showing the net amount of money then remaining in their hands as receivers as aforesaid.

2. That William G. Mahaffy be and he is hereby appointed special master of this court, with the usual powers and for the following purposes:

(a) To audit the accounts of said receivers now filed and of record in said cause, together with the account above provided for in this order. And it is further ordered by the court that said receivers shall forthwith file with said master all vouchers showing expenditures made by them as receivers during the term of their said receivership.

(b) To take evidence in respect of, to consider and state an account upon said petition praying for an apportionment of the expenses of said cause and receivership between the fund representing the proceeds of sale of the real estate and plant covered by the mortgage and bonds of said company and the fund constituting the general assets derived from the balance of the estate of said company.

(c) To take evidence in respect of, to consider and report upon said petition of said receivers for an allowance to said receivers for their compensation and compensation of their counsel.

(d) To ascertain and report the docket and all other costs in said cause.

(e) To state an account showing the net amount of money belonging to the estate of said receivership after the payment of all proper expenditures therefrom in view of his findings upon the matters hereinbefore referred to him, and to state an account showing the distribution of said net balance of the funds of said estate among the persons entitled thereto.

(f) With all convenient speed to report his findings and awards upon the several subject-matters herein referred to him.

3. It is further ordered by the Court that the said master shall, before proceeding to hearings upon this reference, give public notice to all creditors, stockholders and bondholders of said the Diamond State Steel Company, and all other persons interested therein, by advertisement inserted in the Morning News, a daily newspaper published in the city of Wilmington, Delaware, once a week for four successive weeks, of the time and place of his commencing proceedings and hearings hereunder, and of the day on or before which all persons will be required to file exceptions or objections, if any, to the accounts of said receivers.

4. For the purposes of this reference the three above recited petitions of said receivers are referred to the said matter, together with the said reports, accounts and vouchers of said receivers.

After duly giving notice as required by the order the master proceeded with the taking of evidence, oral and documentary, touching the matters referred to him. The evidence is voluminous, filling between 3,400 and 3,500 typewritten pages, wholly aside from a large mass of documentary evidence consisting of books, vouchers and other papers. The taking of evidence began October 6, 1910, and was finished April 4, 1911, sessions for the purpose having been held by the master on forty-eight days. After the conclusion of the evidence the master proceeded to consider the same, hearing protracted arguments from counsel, consuming four full days. After laboriously considering the evidence in connection with the arguments, and ruling upon numerous objections taken to his draft report, not only by the receivers, but sundry bondholders and general creditors of the steel company, the master filed the same as his report, embodying therein his findings, conclusions and recommendations November 15, 1912. To the report as filed the receivers and the said bondholders and general creditors respectively filed exceptions in this court December 13 and 14, 1912. At the time appointed for the hearing of these exceptions, objection having been taken by the said bondholders and general creditors to the generality and form of the exceptions of the re-

ceivers, leave was asked and obtained to file amended exceptions on both sides. This was done by the general creditors March 3, 1913, and by the bondholders and receivers March 8, 1913. The amended exceptions contained certain specifications not set forth in any objections theretofore taken before the master to his report, and the same were referred to him for consideration, disposition and further report in connection with his original report filed November 15, 1912. Thereafter the master reported his findings and conclusions upon the amended exceptions April 4, 1913; and final argument was heard upon the master's report as amended in connection with the amended exceptions April 28, 1913, and the three succeeding days.

Generally speaking, and without going into details at this point, the master in his report concluded and recommended (1) that the unpaid taxable costs of this cause be apportioned equally between the fund representing the proceeds of sale of the real estate and plant covered by the mortgage and bonds of the steel company and the fund constituting the general assets derived from the balance of the estate of that company; (2) that the expenses of the administration of the estate of the steel company should be apportioned between the two above mentioned funds in manner as therein recommended. To the above two findings and recommendations no objection or exception has been interposed by anybody, and those findings and recommendations are unobjectionable. The master in and by his report further finds that the receivers be surcharged in their account in the sum of \$21,467.85, representing credits claimed by the receivers for expenditures held by the master to have been improperly, unnecessarily and extravagantly made for wages and salaries, office expenses, rents, travelling expenses, and divers other items unnecessary to enumerate. And he further finds that the receivers are not entitled to compensation in the amount claimed for them by their counsel. July 6, 1907, they received for their own services and those of their counsel \$25,000, of which \$6,250 was paid to their counsel; the remaining \$18,750 being retained by them for their own benefit. In their petition of June 20, 1910, above referred to, they pray for a further allowance of "fifty thousand dollars or such other sum as to the court may seem proper" for the compensation of themselves and their counsel. The master finds and recommends that a total allowance of \$37,000 be made to the receivers for compensation of themselves and their counsel, of which \$20,000, including what they had retained for their own benefit as above stated, should go to the receivers, and \$17,000, including what their counsel had already received as above stated should go to such counsel; the result being that were it not for the surcharges made by the master against the receivers they would receive in addition to the sum already paid to them for their own benefit the additional amount of \$1,250, while they would receive for the benefit of their counsel the sum of \$10,750, in addition to what they had already received for the benefit of such counsel. To the findings and recommendations of the master touching surcharges as above mentioned and his failure to find that the receivers were entitled to the amount of compensation claimed for them and their counsel, exceptions have been filed on the part of the receivers. On the other hand, the said bond-

holders and general creditors have excepted to the findings and recommendations of the master in that, as claimed, he did not surcharge the receivers in a sufficient amount, and also in that he allowed to the receivers for the benefit of themselves and their counsel a larger sum than was justifiable under the circumstances.

[1] A question which should be preliminarily disposed of relates to the conclusiveness or weight which attaches to the findings and conclusions of a master in chancery upon disputed questions of fact or mixed law and fact. On this subject a number of cases have been cited by the counsel for the respective parties. It is unnecessary to review them in detail. They recognize a clear distinction between a reference to a master by the consent of the parties, on the one hand, and, on the other, a reference to a master solely by the action of the court. In the former case the parties virtually constitute the master an arbitrator to decide between them and his findings on questions of fact or of mixed law and fact, where the testimony or other evidence is conflicting, unless under exceptional circumstances, are conclusive upon them. In *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289, where the reference to the master was by the consent of the parties, the court said:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of the finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. Stat. § 649 [U. S. Comp. St. 1901, p. 525], or in an admiralty case appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is testimony consistent with the finding, it must be treated as unassailable."

Where the reference is by the court, and not through the consent of the parties, a different rule applies; the finding of the master on questions of fact carrying with it less weight than in the former case. It has been said that in such case the findings and conclusions of a master are merely advisory to the court leaving the case open to be determined by the court upon the weight of the evidence. The weight of authority, however, and the better reason clothe the findings and conclusions of the master with a presumption of correctness, not lightly to be disregarded. Unless in a clear case the findings and conclusions of the master based upon conflicting testimony and evidence should not be disturbed; for the witnesses, not appearing before the court, but testifying before the master, the latter is in a more advantageous position from personal observation of the witnesses, their demeanor and their manner of testifying, to form a reliable opinion of the weight of the testimony than the court, not enjoying such an advantage. Hence the findings of the master even where the reference is not by the consent of the parties are *prima facie* correct. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Metzker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363;

Cimiotti Unhairing Co. v. American Fur Refining Co., 168 Fed. 529, 93 C. C. A. 546.

In *Tilghman v. Proctor*, *supra*, the court said:

"We are then brought to a consideration of the exceptions taken to the master's report in matters of fact, affecting the accuracy of his conclusions in respect to the amount of those profits, gains and savings. In dealing with these exceptions, the conclusions of the master, depending upon the weight of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

In *Camden v. Stuart*, *supra*, the court said:

"In cases of this kind, referred to a master to state an account, depending, as they do, upon an examination of books, upon the oral testimony of witnesses, and, perhaps, as in this case, upon the opinions of an expert, 'his conclusions have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part.' This was the rule laid down by this court in *Tilghman v. Proctor*, 125 U. S. 136 [8 Sup. Ct. 894, 31 L. Ed. 664]," etc.

In *Cimiotti Unhairing Co. v. American Fur Refining Co.*, *supra*, the court of appeals for the third circuit, in 1909, approved the following proposition laid down by the court below:

"The well-settled rule is that the conclusions of a master on matters of fact have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part."

[2] But it is insisted by the counsel for the receivers that inasmuch as the receiver Wallace and Frank W. Todd have given oral evidence touching a number of material and important matters and transactions, and have not been directly contradicted or discredited by other oral evidence, their statements should have been deemed by the master absolutely true, and that he should have treated the case in so far as testified to by these witnesses without direct contradiction as one of law and not of fact. There is a palpable distinction recognized by the authorities and founded in reason between the force of the findings of a master on questions purely of law, on the one hand, and, on the other, questions purely of fact, or of mixed law and fact. This case is not included in the former class; for while the receiver Wallace and Todd have not been directly and categorically contradicted with respect to a number of facts and transactions of a material nature by the oral testimony of other witnesses, their testimony with respect to such facts and transactions has been shaken and largely discredited by divers proofs in the case, including not only papers and documents, but circumstantial evidence in the oral testimony of other witnesses. Not only so, but in a number of instances the circumstance that the books kept under the supervision of the receivers, and of the contents of which Wallace and Todd must be presumed to have had knowledge, fail to disclose facts and conditions testified to by them which had they existed would or should have been disclosed in the entries therein, further tends to render their testimony unsatisfactory and questionable. Nor does it necessarily follow that where oral testimony on one side of a case is wholly uncontradicted it must be accepted as true and the case treated as one of pure law. For those so

testifying may either be mistaken or testify falsely. The probability or improbability of their statements must be taken into consideration. A sworn and uncontradicted statement that the moon is made of green cheese, or that a witness had run a mile in a minute, cannot establish the truth of either affirmation as matter of law or, indeed, of fact. So, a plaintiff who gives uncontradicted testimony in support of a claim asserted by him is not as matter of law necessarily entitled to recover. I do not perceive any ground on which this case can be excepted from the general rule that a master's findings on disputed questions of fact are presumptively correct and should not lightly be set aside by the court.

But were it otherwise, the evidence in connection with the briefs of counsel and an independent examination of the law of the case, have satisfied me that the findings, conclusions and recommendations of the master were proper and that his report should not be disturbed.

[3] There are certain prominent features of the case strongly tending to establish neglect and mismanagement of the estate of the steel company by the receivers. In the first place from the manner in which they kept their accounts it is apparent that they did not adequately realize the obligations they had assumed as trustees for the bondholders and general creditors of the steel company. If there was one duty more incumbent upon them than another it was to keep or have their books and vouchers kept in such manner as to furnish an intelligible and perspicuous account of their acts and transactions in order that the bondholders and general creditors, as well as the court, might at any time as occasion required promptly and readily ascertain the true condition of affairs. But this to an inexcusable extent they failed to do. It is true that in the seventh paragraph of the original order of their appointment December 12, 1904, they were required to "make and file quarterly returns of their receipts and disbursements during their continuance in office," but in the same section it was also provided:

"That said receivers are hereby directed and required to keep proper books of account wherein shall be stated the earnings, expenses, receipts and disbursements of the said trust under this order of their appointment, and preserve vouchers for all payments made on account by them thereon."

It goes without saying that the quarterly returns of merely receipts and disbursements were wholly inadequate to furnish the data requisite for the final settlement and adjustment of the affairs of the steel company, and could not be deemed a compliance with the obligation resting upon them as trustees to keep proper books of account and vouchers as above stated. The fact that the quarterly accounts of the receivers largely failed to specify with particularity the items or classes of items for which expenditures were made, and the items or classes of items for which moneys were received by them, rendered it all the more important that the books and vouchers, in contradistinction to the quarterly accounts, should be full, detailed and explicit. Had their books and vouchers been properly kept the reference of July 27, 1910, would have entailed but little trouble and the consumption of but little time for the ascertainment and determination by the master of the matters submitted to him on the reference. But owing

to the failure of the receivers to make intelligible and sufficiently particular entries in their books of account and vouchers as they should have done under the duty which they as trustees owed to the bondholders and general creditors, a complicated problem confronted those conducting the proceedings before the master to supplement and explain the entries in the books and vouchers by oral and documentary evidence. This necessitated the taking of a large amount of oral testimony besides the production of documentary evidence, involving a delay of several years and the incurring of heavy costs and expenses and the loss of interest to the bondholders and general creditors whom the receivers were in duty bound to protect. The loss thus occasioned resulting to the bondholders and general creditors will amount to many thousand dollars and is largely attributable to the negligent omission by the receivers to keep their accounts in such form and with such particularity as to be intelligible to those for whom they were trustees.

[4] Further, the receivers claim credit for large sums improperly expended by them without authority of the court in an unsuccessful effort to reorganize the steel company or "sell the plant as a whole at private sale," before receiving any authority for either of these purposes. The court never authorized a reorganization of the steel company or a disposition of its plant at private sale, nor did it authorize the sale of the plant until September 21, 1906, when it ordered that it be exposed to public sale. Yet the receivers claim credit for various sums for travelling expenses including a large amount improperly expended from time to time by the receiver Wallace within the period of eighteen months next following the appointment of the receivers December 12, 1904, by way of his travelling expenses and the entertainment of sundry persons whom he consulted on the subject of the disposition of the plant. In many instances travelling expenses were incurred for different purposes, some legitimate and others illegitimate, and were included in a single voucher, and were so expressed as not to be susceptible on their face of an ascertainment of the relative amounts of the legitimate and illegitimate expenditures and in such cases it was necessary to resort to evidence aliunde.

Although the receivers were not or might not have been entitled to any credit by reason of the confusion of their accounts, the master using whatever light he could obtain upon the subject has erred, if erring at all, in treating the receivers with undue liberality in his determination of the amount to which they were entitled to credit by way of travelling expenses. And a statement similar to the above is applicable to the case of credits claimed by the receivers for travelling and other expenses of various officers employed by them with the difference that in the case of such subordinate officers the expenditures were usually stated with greater particularity and were in smaller amounts. The witness Frank W. Todd was permitted to draw from the "petit cash drawer" from time to time considerable sums of money upon depositing in the drawer receipts for the same specifying only that the sums therein mentioned were for "expenses," without any itemization whatever.

Further, the evidence shows that the receivers were extravagant and at fault in employing and paying an unnecessary number of clerks

and employees and renting an unnecessary number of offices at a large expenditure until after the sale and delivery of the real and personal property of the steel company, and retaining thereafter, and at least until the order of reference to the master July 27, 1910, two clerks on substantial salaries when there were no sufficient receipts or need for clerical assistance to justify that course.

Further, the receiver Wallace was the owner of bonds and capital stock of the steel company to the amount of about \$200,000. It does not appear that the receiver Winchester owned either bonds or stock of that company. A given plan for reorganization might be very advantageous to a large bondholder and stockholder, and at the same time detrimental to other bondholders and general creditors. The evidence points unmistakably to an effort on the part of the receivers to secure a reorganization of the steel company without any authority on their part so to do. The large amount of travelling expenses together with other evidence in the case cannot be reconciled with a mere intent on the part of the receivers to effect a sale in contradistinction to a reorganization of the company. And this accounts for much of the delay in the performance of their duties as receivers and in their settlement of the estate.

The evidence shows that the receivers with respect to a number of matters affecting the interests of the bondholders and general creditors proceeded without due consideration of their authority, or any application through their counsel for instructions, and they seek to justify themselves for entering into sundry unauthorized transactions upon the ground that no loss resulted to the estate. This is particularly true of what was designated in the argument as the "trading account." The receivers on their petition to the court had received authority to manufacture certain portions of unmanufactured materials as in their judgment would facilitate or render more profitable the sale and disposition of the product, and to purchase from time to time such materials as would "enable them to carry on such limited manufacture as above authorized, and to purchase such manufactured materials in the open market as in their judgment would be profitable to complete lots of manufactured products of said company for the purpose of the sales thereof hereinbefore authorized." Instead of confining themselves within the limits of the authority thus conferred the receivers used the funds of the estate for the purchase of manufactured material to a large amount, not within the scope of their authority, and resold the same claiming that they had thereby made a profit of about \$3,000, but without taking into consideration any expenses for carrying on the operation. The evidence in fact shows that the receivers improperly conducted the "trading account" prior to receiving any authority under their above mentioned petition.

Further, the management of the estate of the steel company by the receivers displays much improvidence, irregularity and negligence. This court does not impute to either of the receivers a dishonest or immoral intent. But solely as illustrative of the laxity which marked their dealings with the property of the estate, it appears from the evidence that the receiver Wallace made use of its funds for the purchase of certain coal for himself and sundry employees of the receivers

without causing any charge therefor to be made on the receivers' books, although admitting before the master on the reference this irregularity. Doubtless this was an innocent error but, occurring on the part of a receiver, discloses a degree of inattention or negligence not compatible with a proper discharge of the fiduciary duties attaching to the position. No case can be marked by such delay, irregularities and loss to creditors largely through the inattention or negligence of the receivers as have been here displayed without causing reproach to the administration of justice. It is impossible to read the evidence, the briefs of counsel and the report of the master without being impressed with the conviction that the receivers largely dealt with the property of the steel company without any just recognition of the obligation they were under to act only according to their authority, but in the same manner as if they and not the court had sole jurisdiction and power over the administration and disposition of the estate.

[5] It was urged with much insistence by the counsel for the receivers that from the nature and circumstances of their appointment they were clothed with a discretion in the exercise of their official duty and could not be held accountable for any loss or damage resulting to the creditors of the steel company from an honest exercise of that discretion. This is true, subject to the important proviso, that in the exercise of their discretionary power they were not guilty of carelessness, negligence, extravagance, or other fault resulting in loss, which would and should have been avoided by reasonably prudent men in the discharge of their duty as trustees. In the present case the receivers in their management of the estate clearly did not satisfy the proviso.

It is claimed that the receiver Wallace is entitled to consideration and commendation by reason of the fact that he succeeded in collecting from certain pools the sum of \$62,791.62, and turning it over to the receivers and that while he in his private capacity had no title to the above sum, or any part of it, yet it was solely on account of his personality that it was possible to collect the same. It should be said with respect to this matter that the evidence, documentary and circumstantial, shows to a moral demonstration that as between Wallace and the estate of the steel company whatever right there was to receive the above sum was vested, not in Wallace, but in the estate and that it was obtained by the receivers by virtue of their receivership.

Wallace was the managing receiver and to him mainly attaches such culpability as is shown in the settlement of the estate of the steel company. But at the same time Winchester as a co-receiver who failed to scrutinize more closely what was done cannot be exonerated. If he be the victim of misplaced confidence he must nevertheless bear the consequences.

In the decision of this case the court is bound to consider the interests of the creditors of the steel company as well as those of the receivers, and it would be grossly at fault were it without sufficient cause to permit itself to lean in favor of the receivers and against the creditors who are the beneficiaries for whom the receivership was constituted.

[6] It is impracticable, as it is unnecessary, to discuss in detail the various exceptions taken by the respective parties to the master's findings. He has with unusual assiduity and ability treated and disposed of the subject-matter of the exceptions in his voluminous and well considered report. He was confronted with a duty most embarrassing in some respects, calling for the exercise of sound judgment, especially in the matter of making partial allowances of credits claimed by the receivers where through omission by them in their books and vouchers to separate proper from improper items there was no means of reaching a clear and mathematical division or apportionment. In the discharge of this delicate and difficult duty he has displayed sound judgment and zeal to reach proper results.

I am satisfied after an examination of the record and of the arguments of counsel that his findings, conclusions and recommendations should not be disturbed. It may be that the court in the absence of a reference might have been less liberal to the receivers and their counsel, but on the whole I think there is no substantial ground of objection.

With respect to the disposition of the costs and expenses of the reference in question I am not prepared to overrule the finding of the master that they should be borne equally by the receivers and the estate.

The exceptions to the findings of the master must be overruled and his report in all respects approved and confirmed. Let a decree in accordance with this opinion be prepared and submitted.

THE ROBERT H. COOK (two cases).

(District Court, N. D. New York. August 18, 1913.)

1. TOWAGE (§ 12*)—DUTY OF TOWS TO FOLLOW TUG.

It is the duty of those in charge of boats making up a tow to do what they reasonably can, in the exercise of ordinary care, to see that they follow the tug.

[Ed. Note.—For other cases, see Towage, Dec. Dig. § 12.*]

2. TOWAGE (§ 12*)—INJURY TO TOW—LIABILITY.

When a tug with 29 coal-laden boats in tow in 14 tiers of two each and one in the rear was passing around Pulpit Point in Lake Champlain where the channel is winding, going north, a canal boat on the port side of the tow sagged against the government boom placed to keep boats off the rocks and was injured, increasing her leak. There was considerable wind from the south and a strong current. The master of the boat was not using her tiller. He knew of the injury but after pumping her out several times went to sleep at night when the tow was more in the open lake and the water was rough, leaving no one on watch. He was awakened by the coming in of the water and he and the master of the boat alongside started to pump, but she soon sank. He did not notify nor signal the tug of her condition. *Held*, that the master of the tug was negligent in attempting to pass the point with such a tow under the weather conditions prevailing and in not directing those in charge of the tows to use their tillers; that the master of the canal boat was also in fault for not keeping watch and giving notice of her injury, in which case the tug

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

might have saved her or lessened the damage; and that the damages should be divided.

[Ed. Note.—For other cases, see *Towage*, Dec. Dig. § 12.*]

In Admiralty. Libels by the Western Assurance Company and by the British & Foreign Marine Insurance Company, Limited, against the steam tug Robert H. Cook. Decrees for libelants for half damages.

Carpenter & Park, of New York City, for libelants.

O. A. Dennis, of Whitehall, N. Y., for claimant.

RAY, District Judge. As both the above cases arise out of the same accident, they will be considered together.

April 27, 1909, at about 9 a. m., the canal boat "Fred Grube," laden with a cargo of coals with some 28 other loaded boats, was taken in tow by the steam tug Robert H. Cook, owned by Lake Champlain Transportation Company, at Whitehall, N. Y., bound north for the port of Quebec, Canada. The tow was made up in 14 tiers, two boats abreast, with a single boat in the rear of the line. The "Fred Grube" was the outside port boat of the tenth tier. When the tow started out the wind was blowing some from the south and increased during the forenoon, although this is denied by the claimant. The water was running high with quite a current. There was some dragging at times on points of land, as the channel was narrow and crooked when passing what was known as the "Marshes," and at or opposite Pulpit Point, on the west side of the channel and lake, some nine miles from Whitehall, the Fred Grube sagged outwardly and over towards the shore and struck a boom placed there to prevent the collision of passing boats with the rocky shore. The Fred Grube sustained some damage in this collision. The pumps were sounded but no leak of consequence then appeared. The tow was not halted, it is claimed, and that something like a half mile further on some of the foremost boats took the ground at a point separating what are known as the East and West channels. This caused a stop and the tug went back to pull the grounded boats off. It is claimed that at this time the master of the Fred Grube notified the captain of the steam tug Robert H. Cook of the said damage to the canal boat, but that no attention was paid, and that nothing was done to ascertain the extent or nature of the damage or secure the safety of the damaged boat. The tow was in shape to proceed about midnight, and some time thereafter, it is claimed, the Fred Grube, because of such damage, commenced to leak badly and soon filled and sank. That she leaked and sank is not denied but that the steam tug was in any way at fault is most strenuously denied. The libellant alleges fault and negligence in seven particulars, viz.: Not having a proper lookout; not having a shorter tow by putting more boats abreast in a tier, thereby shortening the tow and bringing it more under the control of the tug; not having a competent master and pilot; the steam tug being of insufficient power to handle such a tow; not having sufficient help on the tug and tow to keep such tow in the wake of the steam tug and consequently in the channel; in negligently permitting the Fred Grube to sag to the shore and collide

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with the boom; in not coming to the assistance of the Fred Grube knowing her to be in danger or injured and taking proper and timely measures to insure her safety.

Red Rock Bay is south of Pulpit Point, and in going north the course is first northwest towards the point and then bends quite sharply towards the east and then to the north. It is here that the United States government for many years has maintained the boom mentioned to protect boats from going on the rocks. It is recognized as a more or less dangerous place. This boom was known, properly constructed, and located in a circular form around the point. The tendency of a boat going against it was to sag away therefrom if being drawn ahead. The tug was manned by a captain, a pilot, two engineers, two firemen, a deck hand, and a cook; was of 600 horse power and fitted with a steam pump having a capacity of 1,600 gallons per minute. Both the captain and the pilots were duly licensed. The western shore of the lake is mountainous with openings in the hills, and the claimant asserts that on arriving at this point there was a sudden rising of the wind or exposure to it which was unsuspected but that the tow was slowed down to some $1\frac{1}{2}$ or 2 miles per hour. The master of the boat Grube does not complain of the speed; says it was going slow enough. Nine tiers of these boats passed the point without colliding with the boom, but the Grube sagged outwardly and struck and slid along the boom as did the boat in her rear. The next boat in the tow was a scow with irons at the sides and this caught in the chain holding the boom and dragged it loose. The next boat in line, the Riley, ran on the rocks. The captain of the Riley signaled the tug, which drew in its hawser and came back to give any necessary aid. The master of the Grube was then on the Riley assisting in pumping. The claimant contends that it was while this was being done that the tow drifted ahead and that some of the boats grounded. The master of the Grube says that she struck the boom, port side forward of its cabin, with such force that:

"I stood on the deck and it raised me up about six inches in the air on the deck."

He explained this later as an upward bulge of the deck where he stood. He was not thrown down. As to the effect it had on the side of the Grube, he said it "opened her up about three inches." He had about $2\frac{1}{2}$ feet freeboard and:

"Q. Was this damage to the boat above the water line? A. It was right below the water. Q. At the point where the boat struck the boom? A. Yes, sir. * * * Q. Did you sound your pumps after striking the boom? A. Yes, sir. Q. Find any leaking? A. Just a trifle."

Later he said this injury was some two feet above the water line. He then testifies that this collision occurred about noon, and that the tow went aground at about half past 12 or 1 o'clock and was straightened out about 5 o'clock, and that while aground the tug came back as far as his boat, and that:

"I told Capt. Rockwell (in charge of the tug) he damaged the boat and he better come over and look at her, and he never answered me, went on with his boat."

Says he tried his pumps after that during the rest of the day and the last time, about half past 10 in the evening, found about four inches of water and pumped her out. He conveyed no information as to this to the master of the tug. Capt. Prior was in charge of the boat alongside of the Grube, and Gordon says he and Prior talked they would lie down and the first one to wake should call the other *if anything happened*.

"Q. What was the next thing that happened? A. When I waked up, there was about three inches of water on the floor; I called Capt. Prior and he came over and I got Victor Jandreau up on the boat behind and we casted his lines on the J. G. Lafayette [the boat alongside the Grube]."

He then says the boat sank before the remainder of the tow, four tiers, had passed. On cross-examination he says they went slow enough through the marshes and at Pulpit Point were going 3 or 4 miles an hour; that his boat sagged up against the boom sideways which he had stated projected 3 or 4 inches above the water; that the seam opened up *was not* below the water line and that the boom did not strike the sheer plank; that the seam he testified to on his direct examination as caused by the collision was a foot or two above the boom, and later he said two feet; and that so far as he could see there was no seam or injury below the water line. He was asked if he told the captain of the tug that he was leaking, and his answer was:

"I don't remember. I don't believe he ever said a word. I know he didn't."

He also testified that the boat leaked when loaded and that after that he tried his pumps. Then:

"After you sagged against the boom did you try her? A. Yes, sir. Q. Any water? A. A little. Q. How much? A. About 1½ inches or 2 inches. Q. Where after that did you try her? A. Now and then all the way down. Q. Well, when? A. I should say probably every half hour. Q. Did you discover any water in her? A. Just leaking right along. Q. Any more than what the general leak had been prior to that time? A. Well, she leaked a little more after she struck the boom. Q. How much? A. Half an inch an hour."

He made no signals to the tug, although he says he knew what the signals were and how to give them. He was alone on the boat and no one was left on watch when he went to bed.

This was an old boat, built in 1891, but since some new timbers had been put in without changing the old ones. When the boat sank the tow was more out in the lake; that is, where the lake was wider. Gordon also says the wind had increased, was increasing all the time; there was a strong wind and the sea was rolling pretty heavy at the time the boat sank, and that the boats rolled. He also says that he went to bed at half past 10, laid awake an hour and a half, and at half past 10 felt the sea shaking him up but went to sleep and was awakened by the water coming in at half past 12 or 1 o'clock.

"Q. What around you? A. The water. Q. Touch you? A. No, I *heard* it coming in. Q. Waked you up? A. Yes, sir. Q. How much water was there? A. About three inches."

This tow was about 1,800 feet from tug to rear boat and it was about 1,100 feet from the tug to the Grube. Capt. Prior makes no

claim to a heavy wind or to much of any wind when the tow started out, but says they felt it more as they got further out and in the vicinity of the point where it has a sweep around the point. Gordon told Prior at the time:

"If he had any damage it was in the forward of his cabin; he didn't know whether he had any damage or not."

Prior also says that Gordon did no more pumping after the collision with the boom than usual and that he had been pumping all the way down. Prior also says the tug was just drifting as they passed Pulpit Point and that the wind was on the starboard side and that the current set in towards the point. Rockwell, the captain of the tug, says he was going slow at the point; that the channel was narrow and crooked; that a helper would have been of no assistance; that it could not have maneuvered alongside the tow; and that at the rear it would not have been of any assistance. He also says:

"Q. Was it the effect of the wind and current that sagged the boat up against the boom? A. Yes, sir."

That he then slowed down and as soon as he reasonably could went back on the signal of the Riley, inquired if damage had been done, and in substance informed all of them that if damage was discovered to inform him. Riley corroborates this. He sat up all night watching for leaks, although he had stopped the leak in his boat soon after the accident. Substantial evidence was also given that some considerable time elapsed after the captain of the Grube discovered the water coming in and the sinking of his boat, and that the tug could have gone to its assistance and pumped her out or grounded her before sinking if he had been notified by signal. There is also evidence that if the men on the boats had been at their tillers they could have kept the boats away from the boom. There was also evidence that if the tow had been made with the boats three abreast it would not follow as well, especially around bends, and could not meet at all places in the marshes. It was also testified that Gordon after the accident told Mr. Holden of the transportation company that he had no fault to find with the tug and that Capt. Rockwell did all that any one could. There is also evidence that the side of the Grube as she lay at the loading place, or in that vicinity, was bulged in and that the deck bulged upwardly.

I am very well satisfied from this evidence, a brief outline of which has been given, that there was negligence on the part of the captain of the boat Fred Grube as well as on the part of the captain of the tug Robert H. Cook. It is quite impossible from this evidence to determine whose negligence caused the Grube to go on the boom, but it is quite certain that due care and watchfulness on the part of her captain after the collision would have averted the sinking or would have enabled the tug to come to her rescue and to have beached her at least.

If, when boats are taken in tow as these were, the persons in immediate charge of them owe no duty to the tug or its owner, then it was in law the sole negligence of the tug that caused such damage to the Grube as she actually received when she struck the boom. If she

was injured in that collision, as Gordon claims she was, and was leaking thereafter constantly, and the wind was increasing and the waves running high and rolling and tumbling the boat, it is unaccountable that he should have gone to bed and to sleep on this very dark and misty night. It was gross negligence to do so. It is also very strange that Gordon did not give a signal when he awoke and found the water coming in, was awakened in fact by the inpour of the water. It appears that the owner of the Grube, Gordon, her master, had offered to sell her for less than the insurance. The captain of the tug knew that this lake at the point was a dangerous place to navigate and that he had a very long and heavy tow as most of the boats had a double load; and while, of course, her captain could not know how much the wind would blow on Lake Champlain during the voyage, or until he reached a wide channel and deep water where there would be no danger of running ashore or on the rocks in rounding points, he did know that April is a very uncertain month as respects the currents of air and their velocity; and I think it was negligence to attempt to take the long tow of double-loaded boats through that crooked channel and around that dangerous point without taking extra care and precaution. The tow could have been divided until that point was passed in charge of two tugs, or if two tugs were not obtainable then a part of the tow should have been left behind. Capt. Rockwell could have instructed the masters on the boats to use their tillers to keep the boats off. I do not think he was proceeding too rapidly; if there was any fault in respect to speed at this point, he was going too slow, as boats will follow better if the towline is kept taut at such a point. If the tow is left to drift, wind and current will take it ashore unless moving out to sea. I am convinced that the Grube was in poor condition, an unsuitable condition for such a voyage loaded as she was, and that a very slight shock was sufficient to so open or weaken her seams as to make further progress dangerous to her. She was old; this was her first voyage that spring; she was more or less damaged, etc. But all this was unknown to the captain of the tug except as he looked her over generally. All this was known to her master. After the collision and increased leaking it was his duty at once to notify the captain of the tug of her *actual* condition, which, on his own evidence, he did not do, and to keep a constant all night watch, as they were going out into deeper and broader water in a very dark night and with increasing wind which rocked or tumbled the boat and made a heavy sea. There is grave suspicion that the master of the Grube did not care whether she sunk or swam, survived or perished, so long as he himself survived. At best he was lazily indifferent. He had reason to apprehend trouble in those troubled waters after the collision, taking his own statement as true. It is evident that under ordinary conditions the Grube would not have struck the boom, and it is equally evident that this boom was placed there with the expectation that under some conditions boats would swerve or sag from the channel and strike it. The boom was there to be struck on occasion and keep the striking boat off the rocks. But all this does not excuse the want of suitable care and precautions on the part of the tug having the boats in tow, including the proper make-up of the tow, to meet conditions

known or reasonably to be apprehended. It would have been a wise thing for some one to have provided fenders for these boats when rounding such a point where a dangerous situation was recognized and had been for some ten years.

[1] It was the duty of the tow to follow the tug and of those in charge of the boats making up the tow to do what they reasonably could, in the exercise of ordinary care, to see that this was done. *The Stranger*, 1 Brown, Adm. 281, Fed. Cas. No. 13,525; 1 Asp. M. L. C. 19; *The Ciampa Emilia* (D. C.) 46 Fed. 866; *The Jacob Brandow* (D. C.) 39 Fed. 831, 832; *The Thomas Wilson* (D. C.) 124 Fed. 649; *The Henry O. Barrett* (D. C.) 156 Fed. 417; *The W. G. Mason* (D. C.) 131 Fed. 632. This is not a case where a presumption arises from the mere collision of the *Grube* with the boom that the tug was negligent, for here was a point to be rounded and a danger signal in the form of this boom which told all navigators passing that there was liability to get out of the channel and that the boom was there to prevent going on the rocks in case they did or in case they were forced towards the point by wind or current or both.

I am satisfied from the whole evidence and find:

[2] I. That the captain of the *Robert H. Cook* was guilty of negligence in attempting to take this long tow out into the main part of the lake and around Pulpit Point under the prevailing weather conditions and other known conditions, currents, etc., perils to navigation, without a helper and without notifying those in charge of the loaded boats to be on the watch and use their tillers to keep off the boom and dangerous points. He had reason to apprehend that some part of such tow, made up as this was and extended to such a length, was liable to be thrown by wind and current against the boom, with what force he could not foresee, but with sufficient force to cause damage to the weaker boats especially. While a short tow on a short tow-line will follow the tug and in its wake in a reasonably straight channel, the rear portion of such a long tow as this in a crooked channel bending as this did at and in the immediate neighborhood of Pulpit Point will not, especially if there be winds and currents, as there was here, tending to deflect the tow and carry it on the obstruction or rocks. The captain of the tug of course knew that any sudden and at all violent contact of any boat in the tow with the boom would be liable to do damage and that such damage might result in sinking the boat. It was therefore his duty to exercise greater care and caution than he did in rounding or passing this point, with this tow, by either using a helper or by notifying the masters of the boats to use their tillers or fenders and seeing that it was done.

II. This negligence on the part of the captain of the tug resulted in the collision or a collision so violent that, in view of her condition, damage was done to the *Fred Grube* which eventually resulted in her increased leaking and eventual filling and sinking.

III. The *Fred Grube* was old and in a weak condition and liable to serious injury from a comparatively light shock or blow, and this condition was well known to her master and owner and was not known to the captain of the tug.

IV. It was the duty of the several masters of these boats which made up the tow, in the presence of the wind and current, tending to set or drift them in on this boom, and the boom and in the absence of a helper, all of which was known to them, to use their tillers to keep, or aid in keeping, the boats off or away from the boom; but the master of the Fred Grube, located as he was in the tow, with only 12 feet of line between his boat and the boat ahead and the same length of line between his boat and the one in the rear, could not alone and of himself by the use of his tiller have kept off the boom, but he might have lessened the severity of the collision to some extent.

V. The collision did more damage to the Fred Grube than was known and apprehended at the time by its master in charge, and he did not notify the captain of the tug of his real condition, of the character of the boat as to age and weakness, or of the severity of the collision or of his increase in leaking. He conveyed no information to the captain of the tug which made it the duty of that officer to go on board the Grube and examine her injuries or not proceed on the voyage with her in tow. He was not then called on or required to cut her out from the tow or beach her in shallow water and was not guilty of any negligence in not then examining her or removing her from the tow and beaching her. The master of the Grube did not apprehend or realize the extent of the damage or effect of the blow in weakening her. Ordinary inspection at that time would not have disclosed the full extent of the damage.

VI. But the master of the Grube did know that the shock of the collision was severe; that it had done some damage; opened up a seam above the water line; bulged the deck more or less and caused some considerable increase in her leaks and that they were liable to still further increase; and he was negligent in not informing the captain of the tug of these facts.

VII. If the captain of the tug had been informed of the actual and visible conditions, he could have taken proper measures to remedy the leaks, plan a watch, or even beach the boat then or at the first favorable opportunity. He was misled into inaction by the carelessness of the master of the Grube. It is presumed he would have done his duty in these regards had he been fully informed of the conditions known to the master of the Grube.

VIII. In view of the actual condition of the Grube known to its master after the accident, he was negligent not only in failing to notify the master of the tug fully but in going to bed and to sleep at half past 10 that evening under the known weather conditions and in failing to keep a watch, or calling for assistance to keep a watch, and in failing to keep his boat with such a leak pumped out. He knew, or should have known, what the master of the tug did not know and had no reason to apprehend, that the Fred Grube was liable to gradually fill; that under the strain of the heavy seas in the more open parts of the lake the leaking was liable to increase, the boat fill and sink. The master of the Grube was negligent in not keeping on watch himself or keeping a watch so as to give timely warning to the tug by signal or otherwise in case of a dangerous increase in the leaks.

IX. If a proper watch had been kept, the increased leaking would have been discovered in time and the tug could have been notified easily by signal and the Fred Grube beached in shallow water and most of the cargo saved as well as the boat itself. In short, by the exercise of due and even ordinary care on the part of the master of the Grube, the damage could and would have been much decreased.

X. The evidence shows the character of the shores of the lake to have been such that beaching in shallow water was practicable.

XI. The evidence does not justify a finding that the damage to the Fred Grube in the collision was such, or of such a nature or character, that her sinking was inevitable. If a proper watch had been kept and the increased leaking observed, as it must have been, and a proper signal given to the tug, the captain of the tug could and presumably would have come back and assisted in pumping the Grube out in case her master was unable to keep the water down. If pumping would not have saved her, then beaching would have lessened the damage or loss.

XII. I find that it is negligence for the master of a boat forming one of a tow in deep water and quite a sea, and which boat has been quite recently injured so as to considerably increase her leaks and bulge her decks and open her side above the water line, to go to bed and to sleep, leaving no watch and no one to care for the boat.

XIII. Under the circumstances disclosed in the evidence, the captain of the tug was not negligent in not placing a watchman on the Grube, and on that dark and misty night no watchman on the tug could have discovered the danger of the Grube because of the increased leaks.

The remaining question is: Who must bear the loss? I think it a case where the master of the tug was primarily in fault, the damage to the boat resulting mainly therefrom, but that the negligence of the master to some extent contributed to and increased such injury; and that the loss and damage to the owners of the cargo and to the owner of the boat and consequently to the insurers was largely contributed to and increased by the negligence of the master of the Grube, for which the captain of the tug was in no way responsible. It is a case where the loss of the boat ought to be divided and part borne by the transportation line, the tug, and part by the owner of the boat. I can see no justice in placing the whole burden on the tug or its owners. As to the cargo of coal, the transportation line, the tug, must bear a part of the loss in any event. Should it bear the whole loss? Must it bear the consequences of the negligence of the master of the boat on which was placed this coal for transportation?

It seems that Charles Gordon, the owner of the Fred Grube under a contract of sale, not paid up in full, was insured with the Western Assurance Company of Toronto, Canada, libellant, in the sum of \$900 on the boat, "loss if any, payable to J. P. Tyler as his interest may appear," and that claim was made and \$775 paid by the insurance company. It also seems that Gordon received from the Delaware & Hudson Company on board this boat 191½ tons of egg coal April 23, 1909, which he promised to deliver in good order (dangers of the

sea excepted) to Carbray Son & Co., at Quebec, Canada, and that the British & Foreign Marine Insurance Company, Limited, of Liverpool, libellant, insured for account of Carbray Son & Co., owner, said cargo of coal loaded on said Fred Grube in a sum equal to the value thereof. That claim of loss was made and that said British & Foreign Marine Insurance Company paid the value of such cargo, \$1,082, less \$82.30 net salvage on such cargo, or the sum of \$999.70.

The claim in the respective libels is that, by reason of such loss, insurance, and payment, the libellant became subrogated to the rights of the owner. The claimant Lake Champlain Transportation Company is the owner of the Robert H. Cook, and, in regard to loading the boat Fred Grube with this coal, the evidence shows that J. J. Manville was in the employ of the Lake Champlain Transportation Company as its shipping clerk to look after the shipping, and that Gordon, owner of the Grube under the contract of purchase, and Tyler, the real owner, applied to him to load the boat. Manville inquired if the boat Grube was insured and was informed that she was. He then gave orders to load her, and this was done. Manville had no other knowledge of the condition of the boat and made no examination or further inquiries. The transportation company was furnishing the boats to transport this coal going in this tow then being made up. Still the actual relations of the parties is not apparent.

The Robert H. Cook has made no offer or tender, so far as appears, but has denied all liability in each case. I think the steam tug Robert H. Cook is properly liable for one-half the loss on the cargo, \$999.70, or \$499.85, with interest thereon from the date of such payment and possibly for the whole thereof, and for one-half the \$775 paid as loss on the boat Fred Grube, or \$387.50, with interest from the date of such payment in case it is conceded those sums respectively were the face value of cargo, less salvage and boat. But of course the claimant is not bound by such payments made by the libellants and may contest such values. As no offer was made, I think the Robert H. Cook properly charged with taxable costs.

If the parties do not agree on *such* damages or *the* damages, it may be referred to J. Ward Russell, Glens Falls, N. Y., as master to take proof thereof and report, and also as to the actual relation between the Robert H. Cook, or the said transportation company, and the owners of the coal and the insurer and the owner of the boat in the matter of transporting this coal.

In the case *The Transfer* No. 8 (D. C.) 88 Fed. 551, the barge M. in tow of the W., by the mutual fault of the W. and transfer 8, was so damaged as to be in a sinking condition and was thereafter taken by the W. into deep water, where she sank. Judge Brown held the W. solely liable for the damage to cargo after the collision to the extent of \$1,000 on the ground that the W. had actual notice or knowledge of the sinking condition of the barge. I do not find anything in this case to change the conclusion to which I have come.

In re WRIGHT-DANA HARDWARE CO.

(District Court, N. D. New York. September 8, 1913.)

BANKRUPTCY (§ 165*)—PREFERENCES—BANK DEPOSIT—SET-OFF.

Prior to January 1, 1912, the bankrupt and claimant bank did business in the ordinary way; the bank receiving the bankrupt's deposits and discounting its paper with knowledge of the bankrupt's insolvency, applying deposits from time to time on the indebtedness by direction and consent of the bankrupt. On that date, however, the bankrupt's treasurer ceased actively to engage in the business, and the person in charge was told by the bank's attorney, who was also attorney for the bankrupt and vice president of the bank, that he should sell the goods of the bankrupt as fast as possible, even at cost, placing the proceeds on deposit in the bank for a space of 10 days which would be consumed in making an application for bankruptcy adjudication, which was filed January 17th. No checks were paid by the bank during this period with the exception of one for \$14.35 for new goods, which it was necessary for the bankrupt to have and the drawing of which was consented to by the bank. On January 16, 1912, the bank transferred to one of the clerks in the office of its attorney two notes of the bankrupt aggregating \$5,200, with interest, taking the clerk's note therefor with the notes of the bankrupt as collateral; the transferee testifying that he did not expect the bank would claim to hold him on his note for an amount larger than he could collect from the bankrupt's estate. *Held*, that the bank was entitled to the benefit of the set-off of deposits against the bankrupt's indebtedness made prior to January 1, 1912, but that the deposits applied after that date constituted a preference, and that the claims of the bank and of the transferee of the notes were not entitled to allowance except on surrender of the amount so applied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Wright-Dana Hardware Company, to review a referee's order disallowing a claim of the Utica City Bank unless the bank should surrender and pay over the amount of an alleged preference, and also disallowing the claim of one Robert L. Kinne unless he should surrender and pay over the amount of an alleged preference. Modified and affirmed.

See, also, 199 Fed. 632; 205 Fed. 335.

Martin & Jones, of Utica, N. Y., for trustee.

Lynch & Willis, of Utica, N. Y., for claimants.

RAY, District Judge. The petition in bankruptcy was filed against Wright-Dana Hardware Company of Utica, N. Y., on the 17th day of January, 1912, and it was adjudicated a bankrupt on the 5th day of February, 1912. The referee has found as follows:

(1) That for several years prior to the filing of such petition the said Wright-Dana Hardware Company had kept an account with the said Utica City National Bank.

(2) That September 17, 1911, the said bank was the owner and holder of certain promissory notes made by the said company aggregating over \$14,000, and also the owner of other promissory notes

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made by other parties on which the said company was liable as indorser.

(3) Thereafter the said company made payments on the said notes or renewals thereof as follows:

1911.		
Dec. 18.	Interest	\$ 30 11
" 20.	Principal	723 55
" 26.	Principal	376 45
" 26.	Interest	76
Oct. 7.	Principal and Interest.....	100 42
1912.		
Jan. 4.	Interest	48 77
" 8.	Principal	200 00
" 8.	Interest	1 27
Total		\$1,481 33

(4) For the two years prior to January 1, 1912, one Lowery, the treasurer of the company, had sole charge of its business.

(5) From that time on, having engaged in other business or duties, said Lowery ceased to be at the store of said company or *actively* engaged in the business of said company.

(6) Thereafter one Samuel Bennett, an employé, was in charge of the store of the company, and one Mabel E. Denslow, bookkeeper, had the charge of depositing its funds received in conducting the business. She had no authority to draw checks on or against the bank account of said company.

(7) For several years prior thereto Lynch & Willis, a firm of attorneys at law, had been the attorneys for said company and also the general counsel for the said bank, and these attorneys prepared and filed the petition in involuntary bankruptcy which was signed and executed by said Utica City National Bank, said Robert L. Kinne, and one George S. Dana.

(8) On said 15th day of September, 1911, said company was insolvent and unable to pay its debts and continued in that condition down to the time the said petition was filed.

(9) When Lowery ceased actively to attend to the management of the affairs of said company, January 1, 1912, no other officer of the company assumed or took charge of its affairs or business or arranged to continue same. At about that date the preparations were commenced for having said company adjudged a bankrupt.

(10) Said Bennett, however, continued in charge of the store and continued to sell the goods of the company and on or about January 1, 1912, was told by Mr. Lynch, one of the firm of Lynch & Willis, the attorneys for said company, and who was also the vice president of said Utica City National Bank, that it would be a matter of some ten days before the application for adjudication in bankruptcy would be made, and to continue to sell the goods of said Wright-Dana Hardware Company until final arrangements were made to get out, and to hurry matters along and to get in as much money as possible and sell, if necessary, at cost prices.

(11) Thereafter the selling of goods continued, the price for which the same were sold was received, and accounts due were collected and

the moneys so received and collected were deposited in said Utica City National Bank down to February 5, 1912; the last deposit having been made February 2, 1912.

(12) When Lowery, the treasurer of the company, so abandoned the business as above stated, there was an understanding arrived at or had between him and the said Utica City National Bank that no checks would be drawn upon or against the deposit of the said company in the said bank.

(13) Thereafter, and up to January 11, 1912, no check was drawn on or against such deposits, so far as the evidence shows, and thereafter only one check was drawn against it, viz., one for \$14.35 January 12, 1912, payable to the order of Sargent & Co. of New York City, which was drawn with the express assent and approval of said Lynch, then one of the attorneys for the said company and also attorney for and vice president of said bank, and was drawn to obtain certain goods from the said Sargent & Co. and which could not otherwise be obtained.

(14) At the close of business January 10, 1912, the amount on deposit in said bank to the credit of said company was \$52.69. Thereafter, the same year, the following sums were deposited pursuant to such understanding and from such sales and collections, viz., January 11th, \$109.55; January 13th, \$300.73; January 15th, \$166.07; January 16th, \$100; January 18th, \$271.42 and \$100; January 19th, \$123.14; January 22d, \$174.81; January 24th, \$78.94; January 27th, \$220.29 and \$95.75; January 30th, \$121.36; and February 2d, \$132.33.

(15) The total of such deposits during said times, less said check, was \$2,032.73.

(16) January 16, 1912, the day before the petition was filed, the said bank applied \$639.04 of such deposit then standing to the credit of said Wright-Dana Hardware Company to the partial payment and satisfaction of one of the said notes still held and owned by the bank and made by the said company, and on the 26th day of January, 1912, the said bank applied and credited \$75 of such deposit standing to the credit of said company in such bank to the payment of a note, made by Doti and Pandolfi and indorsed by said company, and which note was owned by the bank. These applications of this deposit on these notes was not authorized by the Wright-Dana Company.

(17) February 5, 1912, the day the adjudication in bankruptcy was made, the deposit to the credit of said bankrupt in said bank, not deducting or allowing such sums, \$629.04 and \$75, was \$2,032.73.

(18) That the said City National Bank had cause to believe that the said payments aggregating \$1,481.33, made between December 18, 1911, and January 8, 1912, on said notes and renewals thereof, mentioned in finding 3 would effect a preference in its favor out of the assets of said company.

(19) That said bank had reasonable cause to believe the receipt and retention of the said sums mentioned in finding 14, and aggregating, less the check, \$2,032.73, would effect a preference in its favor from the assets of said company.

(20) That the claim of said Robert L. Kinne is based on certain of said promissory notes which were transferred by said City National Bank to the said Kinne formally merely and only for the purpose of permitting or enabling Kinne to enforce the claim thereon for the bank, and in effect that said bank was and is the real owner of said notes so transferred.

The referee finds as a conclusion of law that such claims should not be allowed until the bank has surrendered and paid over to the trustee in bankruptcy said sum of \$1,481.33 and the amount of such deposits, less the check paid, or \$2,032.73.

Note of \$1,300.

As to the payments mentioned in finding 3, the facts are as follows: June 7, 1911, the Wright-Dana Hardware Company gave the Utica City National Bank its note for \$1,300, due December 18, 1911, and on that day, by direction of Lowery, the treasurer of the company, the bank credited on the note \$30.11 and charged the account of the company that sum and took a renewal note of \$1,300, due in two days or December 20, 1911. On December 20, 1911, the company held the note of one Fenton W. Johnson for \$700, which the company turned over to the bank, which discounted same and credited the account with the proceeds and by direction of Lowery charged the account \$723.55 to apply on such note of \$1,300, thereby reducing it to \$576.45, for which sum a new note was given, due December 26, 1911. December 26, 1911, when this note fell due, Lowery instructed the bank to charge the account \$377.12 to apply on the note, which was done, and a new demand note of \$200 was given. This left the note of \$200, dated December 26, 1911, outstanding and it forms part of the claim.

Note of \$100.

October 7, 1911, the bank held a note of the company, dated September 7, 1911, which fell due that day, and Lowery instructed the bank to charge the account of the company \$100.42 in payment thereof, which was done.

Note of \$1,900.

January 4, 1912, the bank held the note of said company for \$1,900, on which \$48.77 interest was due, and the account of the company was charged that sum and a new note of \$1,900 given due January 6, 1912. January 8, 1912, this note was reduced \$201.27 by charging the account of the company that sum with the assent of the company, which gave a new note of \$1,700, and it, less credits, forms part of the claim.

The claims presented by the Utica City National Bank are: Note \$3,300, dated May 3, 1911, on demand with interest from August 1, 1911. Note \$2,300, dated August 9, 1911, on demand, interest from date. Note \$200, dated December 26, 1911 (before mentioned), on demand, interest from date. Note \$1,700, dated January 8, 1912 (before mentioned), and interest on which is credited \$629.04, January 16, 1912. This credit on this note was made by the bank the

day before the petition in bankruptcy was filed by charging the account of the company \$629.04 and crediting same on the note. December 26, 1911, Michele Pandolfi and Rocco Dole gave said company its note of \$75, due January 26, 1912, and same was discounted by the bank for the company which indorsed it. January 26, 1912, when said note became due, the bank charged the account of the company the amount of such note. No authority was given the bank to charge the account either this sum of \$629.04 or \$75. The bank also files a claim of \$220.29 on a note made by said Doti and Pandolfi and indorsed by said company and which fell due March 26, 1912.

Robert L. Kinne files his claim on two notes made by said Wright-Dana Hardware Company and indorsed by it, viz., one dated June 27, 1911, for \$2,400, and interest from August 1, 1911, and the other for \$2,800, dated May 23, 1911, and interest from August 1, 1911.

As to the relations of the Utica City National Bank and the Wright-Dana Hardware Company and the individual members of the respective corporations, the facts seem to be as follows: Arthur J. Lowery was one of the incorporators of the Wright-Dana Hardware Company, a director and its treasurer. When the company was organized, Charles Symonds and De Puyster Lynch were stockholders, but Mr. Symonds ceased to be a stockholder in 1904. He is the president of the Utica City National Bank, and Mr. Lynch has been its vice president since 1910. The Wright-Dana Hardware Company made its deposits with said bank and no other. Mr. Lynch has been assisting in the management of the bank and was also the attorney of the Wright-Dana Hardware Company, being one of the firm of Lynch & Willis, which firm was general counsel for the said bank. Mr. Kinne seems to have been in the office of Lynch & Willis.

The evidence is sufficient to show that, from September, 1911, on, the bank was familiar with the involved financial affairs and condition of the Wright-Dana Company. August 31, 1911, the indebtedness of the company was \$32,561.79. In 1909 its loss was \$9,123.92; in 1910 its loss was \$7,466.97; and in 1911 its loss was \$5,481.79—in all about \$22,000. The main portion of the indebtedness of the company to the bank had existed for several years. The cause of change from time to demand notes was that Mr. Symonds, president of the bank, wanted the line of credits reduced, and from time to time Lowery had conferences with Mr. Symonds as to the indebtedness of the company, and in a general way Lowery told him that the company needed some money; that they were trying to interest additional capital and did not want the bank to crowd them. Lowery says, and Mr. Lynch does not contradict, as follows:

"Q. Had you, after summer and spring of 1911, conferences from time to time with Mr. Lynch in respect to your financial affairs? A. Yes. Q. Gone over those matters with him? A. Yes."

I think it is presumed, or at least fairly may be assumed or inferred from this uncontradicted evidence, that Lowery told Mr. Lynch the truth and disclosed the situation. As to the assets of the Wright-

Dana Company, Lowery says, and the evidence is not disputed, that the same consisted of fixtures, accounts receivable, and stock. The stock was diminished from September 11, 1911, to February 5, 1912, but it varied only as the ordinary sales would vary it, and the sales were not large. The fixtures did not vary much, and the accounts receivable did not vary more than about \$1,000. At the time of the bankruptcy the accounts receivable were \$2,621.74 good and \$2,178.83 bad. Of these accounts the trustee has collected \$2,212.17, and the value of the uncollected accounts is about \$150. The stock and fixtures of the company at the time of the bankruptcy sold for \$8,750. As the indebtedness of the company September 1, 1911, was over \$32,000, and there is no evidence of any substantial decrease, if we assume that the company, Mr. Lynch, and Mr. Symonds considered the bills receivable to be worth \$5,000 and that the stock and fixtures were worth about \$10,000, making allowance for decrease by sales, it seems certain they knew from September on that the Wright-Dana Company was hopelessly insolvent. There is no evidence that bankruptcy was contemplated prior to January 1, 1913, unless we are at liberty to infer that it was in mind prior to that date.

When Lowery left the store January 1, 1912, he left Bennett in charge and told him to keep the store open and go along as before. Mr. Lynch told Bennett to "hurry matters along and get in as much money as possible and sell even if I (Bennett) had to sell at what articles cost." After Lowery left, Bennett went to Mr. Lynch and had an interview with him. Lynch told him to stay and continue until something further developed. Bennett also says:

"I asked whether or not it would be a good plan to sell every one that came in the store at what an article cost, and he said to get price (cost?) of article rather than let the party go. Q. To make a sale if possible? A. Yes. * * * I wanted to know just what to do, and he (Lynch) told me it was a matter of ten days until they applied to the courts for bankruptcy and told me to continue to sell goods until final arrangements were made to get out. * * * Q. Did you have any talk with anybody in the office of Lynch & Willis? A. Yes, Mr. Kinne. Q. What conversation with Mr. Kinne? A. Along the same lines; he was of the same opinion. * * * Q. Was there anything said by Mr. Lynch or Mr. Kinne as to deposits being made frequently? A. There was something said; if there was no deposit made for two or three days some one from the bank would send word down as to why deposits were not made."

He also testified that creditors wanted their pay but Miss Denslow told him not to pay.

Robert Kinne says he was in the employ of Lynch & Willis and personally had charge of getting up the petition in bankruptcy. This was executed by the Utica City National Bank, said Kinne, and Geo. S. Dana. As to the notes transferred to him, Kinne says that he is an attorney at law with the firm of Lynch & Willis, and that he acquired the notes on which he bases his claim from the Utica City National Bank. He says:

"The transaction took place January 16 (1912), and the bank transferred to me two notes aggregating \$5,200, with interest that was unpaid, and I gave my promissory note to the Utica City National Bank for that amount; also placed those two notes with the Utica City National Bank as collateral securi-

ty for my note and they retained the notes. Q. As matter of fact the bank would only claim under the note it holds against you the amount that may be collected on these two notes? A. I assume that to be the case; I never thought they (the bank) would try to collect the \$5,200."

The evidence also shows that it was understood that no checks should be drawn against the deposits, and that it was the purpose of the bank and these irresponsible persons left in charge of the place of business of the Wright-Dana Hardware Company, with the acquiescence of Lowery, the treasurer, to convert the assets of the company so far as possible into money and deposit it in the Utica City National Bank to the end that the bank should apply it on the notes held by it and claim to offset under the authority of *New York County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380. In effect the bank took and had control of the company and the possession of its property from and after January 1, 1912, and in effect those assets were being disposed of and the proceeds of sales and collections turned over to or taken possession of by the bank. It was giving directions, and its directions were being obeyed. The assets were being disposed of and collection of accounts were being made and importunate creditors turned away empty-handed with the knowledge and pursuant to the instructions of the vice president of the bank, who was also attorney for the company or one of its attorneys. *New York County National Bank v. Massey*, supra, sanctions no such transaction. The syllabus of the case is as follows:

"The balance of a regular bank account at the time of filing the petition is a debt due to the bankrupt from the bank, and, in the absence of fraud or collusion between the bank and the bankrupt with the view of creating a preferential transfer, the bank need not surrender such balance but may set it off against notes of the bankrupt held by it and prove its claim for the amount remaining due on the notes. *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438 [21 Sup. Ct. 906, 45 L. Ed. 1171], distinguished."

Here is a clear case of collusion between the bank and the bankrupt with the view of creating a preferential transfer, and the transactions above recited and not denied would operate as an actual fraud on the other creditors if allowed to stand and treated as a mere offset. When Lowery left the place of business of the company as he did and left it in the hands he did, and the vice president of the bank, the legal adviser of the company, gave the instructions he did, which were obeyed, and payment to other creditors was refused, it is evident that the purpose was to prefer the bank on the one hand and receive a preference from an insolvent debtor on the other and to place the money deposited in such situation that it could not be used by the Wright-Dana Company in its business; that is, withdrawn by check. This substantial abandonment of the property of the Wright-Dana Hardware Company by the treasurer and this taking possession, in effect, by the bank which, in effect, directed its disposition, together with the directions and conduct as to the disposition of such proceeds of sales and collections, was an appropriation thereof by the bank to the payment of its debt, and the sales and deposits were procured and secured for this very purpose and not for the purpose of having an ordinary deposit made subject to check, one where the

ordinary relation of debtor and creditor between this bank and company would and did exist. These transactions subsequent to January 1, 1912, contemplated the sale and disposition of the stock of goods and collection of outstanding accounts for the benefit of the bank alone and to make payment on the notes held by it, and consequently the moment the sale or collection and deposit were made the estate of the bankrupt was diminished by so much for the benefit of the bank. When the sales were made and the money deposited, the Wright-Dana Hardware Company no longer had any control over the property or its proceeds or the collections made. It was intended that it should not.

In the Massey Case, *supra*, the court said (192 U. S. 146, 147, 24 Sup. Ct. 201, 48 L. Ed. 380):

"This section 1 (25), read with sections 60a and 57g, requires the surrender of preferences *having the effect* of transfers of property 'as payment, pledge, mortgage, gift or security which operate to diminish the estate of the bankrupt and prefer one creditor over another.' The law requires the surrender of such preferences given to the creditor within the time limited in the act before he can prove his claim. These transfers of *property*, amounting to preferences, contemplate the *parting with the bankrupt's property for the benefit of the creditor* and the consequent diminution of the bankrupt's estate. *It is such transactions, operating to defeat the purposes of the act, which under its terms are preferences.* * * * There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

In the case now before this court there was a parting with the bankrupt's property, first a sale and collection of accounts and then a deposit for the benefit of the bank and for the very purpose of having the deposits held by the bank and applied on the notes held by it. The evidence here does show "collusion with a view to create a preferential transfer of the bankrupt's property to the bank," and no other conclusion is possible. But as to the deposits prior to January 1, 1912, and the application of the deposits on the notes held by the bank, we have a different situation and a different state of facts. As to those transactions it is a question whether these constitute preferential payments or mere offsets. Prior to January 1, 1912, the business of the company was being conducted in the usual manner. Sales were made, the money collected and placed in the bank in the usual course. It is true that the bank insisted on having demand or short-time notes. Of course there could be no offset until the notes became due, and it is evident that Mr. Symonds, the president of the bank, desired to have matters in such shape that the amount in bank to the credit of the company could be applied on its indebtedness to the bank at short intervals. But if the deposits were made, in the absence of collusion or fraud, and the relation of debtor and creditor between the bank and the company as to such deposits prior to January 1, 1912, was created and existed, could not the parties offset the one indebtedness against the other in whole or in part, the company directing the bank to charge its account so much and apply it

on one of the notes? In short, when these applications, prior to January 1, 1912, were made, the bank owed the company certain sums by reason of the deposits then or before made, and the company owed the bank certain notes then due. Here was a mutual indebtedness and by mutual understanding the deposit, to an extent, was offset or applied as a payment in whole or in part on the note, one or more of them. There is no evidence, unless by inference, that bankruptcy was then contemplated or that any preference was intended by the company. As stated, the bank must have known that the company was in fact insolvent, but business was being continued in the usual manner down to January 1, 1912. If bankruptcy (that is, the filing of a petition) had occurred on either of the days when the application of deposits on notes was made prior to January 1, 1912, the deposit would have been offset on the notes. *New York County Bank v. Massey*, 192 U. S. 138, 147, 24 Sup. Ct. 199, 201 (48 L. Ed. 380), where the court said:

"As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68a. If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

It seems to me that what the law would do and sanction in case a petition was filed it would permit the parties to do prior to that time, in the absence of any collusion or intent and purpose on the part of the one to give a preference and on the part of the other to receive a preference.

We come to this proposition, viz., if a bank, receiving deposits in regular course from a mercantile firm, knows that such firm is in fact insolvent but continues to receive its deposits and discount its paper, applying deposits from time to time on such notes by direction and consent of the firm, does it do so at its peril of being compelled to refund all such sums so applied within four months of the filing of a petition in bankruptcy, in case one is subsequently filed, if it would prove the balance of its claim against the bankrupt estate, the deposit having been received subject to check and not with a view to use it as a set-off or payment on the note or notes? If this is the law, then banks must cease to do business with men, firms, and corporations engaged in business the moment they are advised of insolvency. In the *Massey Case*, on the 23d day of January, the bankrupt asked the bank to extend two notes coming due January 26th stating they would be unable to pay the notes when due. In the afternoon

they delivered a statement as of January 22d, showing assets \$19,095.67 and liabilities \$65,864.61. January 25th the bankrupts made a deposit of \$1,803.95, bringing their total deposit up to \$6,209.25. Later the bank honored a check drawn on the account. January 26th a note held by the bank fell due. January 27th a petition in bankruptcy was filed, and on the 27th adjudication was had. The bank in its proofs of claim credited the balance of the deposits on its notes or the note which fell due January 26th. It was held that the bank had the right to do this. It is noticed that \$1,803.95 was deposited after the bank actually *knew* of the insolvency. The check paid thereafter was only \$16. It seems to me that this decision of the Supreme Court of the United States (*New York County Bank v. Massey*, 192 U. S. 138, 147, 24 Sup. Ct. 199, 48 L. Ed. 380) is decisive of this case as to the amount of the deposits applied on the notes held by the bank prior to January 1, 1912, or \$1,231.29, and equally decisive as to the applications thereafter, viz., \$48.77, \$200, \$1.27, \$629.04, \$75, and \$1,328.69; the last sum (\$1,328.69) being the balance on deposit after deducting the \$624.04 and \$75 applied January 16, 1912, and January 26, 1912. See, also, *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313.

My conclusions are that the order of the referee should be modified so as to provide that the claim of the bank and that of Kinne, in fact a claim of the bank, shall not be allowed unless the bank pays over to the trustee in bankruptcy said sums, aggregating \$2,282.77, being the amount of the preference paid and retained by the bank or appropriated by it, viz., \$48.77 applied January 4, 1912; \$201.27 applied January 8, 1912; \$629.04 applied January 16, 1912; \$75 applied January 26, 1912; and the balance of the account applied and retained at the time or day before the petition was filed, \$1,328.69. In case such sums are paid over, the bank will be entitled to file a new claim for the amounts applied and disallowed or an amended claim so as to include the amount of such notes without deducting the amounts held to be preferences, and this notwithstanding the year for filing claims has expired.

So ordered.

UNITED STATES v. BREEDING.

(District Court, W. D. Virginia, at Big Stone Gap. September 3, 1913.)

GRAND JURY (§ 3*)—FEDERAL COURTS—NUMBER TO BE SUMMONED.

Judicial Code (Act March 3, 1911, c. 231) § 276, 36 Stat. 1164 (U. S. Comp. St. Supp. 1911, p. 239) specifies the method of drawing jurors in federal courts by commission provided for, and section 282 declares that every grand jury shall consist of not less than 16 nor more than 23 persons, and that if, of the persons summoned, less than 16 attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. *Held* that, since neither section nor any federal statute limits the number to be summoned, such question is to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

determined by the common law; and hence it is proper for the court, in its discretion, to order the summoning of more than 23, in order that on their appearance in court there shall be a sufficient number of qualified persons to constitute a lawful grand jury.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 3-6; Dec. Dig. § 3.*]

Alfred Breeding was indicted for carrying on the business of a retail liquor dealer without having paid the special tax in due time. On motion to quash the indictment. Denied.

Barnes Gillespie, Dist. Atty., of Tazewell, Va., for the United States.

S. H. Sutherland, of Clintwood, Va., for defendant.

McDOWELL, District Judge. The defendant, who was indicted at the August, 1913, term of the court at Big Stone Gap for carrying on the business of a retail dealer in malt liquors without having paid the special tax, in due time moved to quash the indictment because more than 23 veniremen for grand jury service had been summoned to attend the court. This motion was overruled and an exception noted.

The first order for juries for the said term directed the clerk and jury commissioner, inter alia, to draw from the box for the Big Stone Gap division of the district the names of 30 veniremen for grand jury service. The next order directed the issue of writs of venire facias. The returns on the writs were in proper form. When the grand jury was called it was found that 24 qualified veniremen were present. Under a standing rule of court, made and entered May 13, 1911, providing for such contingency, an alphabetical list of the veniremen was made by the clerk, and the first 23 veniremen were chosen as grand jurors. The grand jury thus formed was duly sworn and charged, and the sole point for consideration is the propriety of ordering more than 23 veniremen to be summoned.

Prior to May, 1911, it was the practice in this district to have only 23 veniremen summoned for grand jury service. Owing chiefly to the great number of exemptions from jury service allowed by the Virginia statutes, it happened not infrequently that less than 16 qualified veniremen were found present. The provisions of section 808, Rev. Stat. (U. S. Comp. St. 1901, p. 626)—section 282, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1164 [U. S. Comp. St. Supp. 1911, p. 239])—in connection with Act June 30, 1879, c. 52, § 2, 21 Stat. 43 (U. S. Comp. St. 1901, p. 624)—section 276, Judicial Code—when complied with, made the procedure for supplying a deficiency of grand jurors so dilatory, inconvenient, and expensive that the present practice was adopted. At that time the rule of court above mentioned was adopted, and I prepared two rather voluminous opinions, one pointing out certain serious objections (perhaps of greater weight in this circuit than elsewhere) to any method of supplying a deficiency of grand jurors other than a strict compliance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with the statutes above mentioned, and the other stating the reasons and authority for adopting the practice of ordering more than 23 veniremen to be summoned in the first instance. For present purposes it will be sufficient to set out a part of the latter opinion.

It should first be said that no charge of undue extravagance can be made against the present practice. In the more than two years that this practice has been in force, during which time about 30 terms of court have been held, the present writ of venire for grand jurors is, so far as I can recall, the first one that has brought to court more than 23 qualified veniremen. Usually only from 18 to 20 of those in attendance are found to be qualified.

The first objection to summoning more than 23 veniremen is, of course, the seeming difficulty in fairly selecting those who are to serve. The rule of court above mentioned certainly wholly obviates this objection. This rule being followed, it is a matter of pure chance. There is no room for even any suspicion of unfairness in selecting the grand jury of 23 from the qualified veniremen present.

The only remaining objection that occurs to me must be found in a supposed implication from the statutory requirement (section 808, Rev. Stat.; section 282, Jud. Code) that grand juries shall not exceed 23 members. There is certainly in the statute no express inhibition against *summoning* more than 23 veniremen, and there are some very strong reasons against finding in the statute any implied inhibition.

Section 808, Rev. Stat., was taken from Act March 3, 1865, c. 86, 13 Stat. 500. That act was general in operation and applied to the federal courts in practically all of the states. At that date—as well as prior thereto and since (27 L. R. A. 848 et seq.)—the laws of the different states (as appears from the sources of information at present available) fixed various different numbers of persons to be summoned as grand jurors, and in some of the states the maximum number allowed to be summoned was less than 16. 27 L. R. A., note page 851; 12 Am. St. Rep., note page 904; U. S. v. Wilson, 6 McLean, 604, 28 Fed. Cas. 725; U. S. v. Tuska, 14 Blatchf. 5, 28 Fed. Cas. 234; State v. Ostrander, 18 Iowa, 435, 440, 444; State v. O'Brien, 18 R. I. 105, 25 Atl. 910. While deriving the nature of the state laws indirectly from the sources stated is not as satisfactory as would be an actual examination of the statutes of the various states in force in March, 1865 (which at present is impracticable), still the information thus obtained seems to fully justify the conclusion that in enacting the statute in question Congress did not intend that the number of persons to be summoned as grand jurors should be regulated by the state laws.

Of the possibility that Congress had by its own previous legislation fixed the number of persons to be summoned as grand jurors, it should be said that every statute to which reference is made in the margin of the Revised Statutes has been examined, and that nothing has been found which seems to bear such interpretation. See Act Sept. 24, 1789, c. 20, 1 Stat. pp. 88, 112; Act May 13, 1800, c. 64, 2 Stat. 82; Act May 20, 1826, c. 136, 4 Stat. 188; Act July 20,

1840, c. 47, 5 Stat. 394; Act Aug. 8, 1846, c. 98, 9 Stat. 73. See, also, opinions *infra*.

As the intent of section 808 may have been that the common law should govern it is of interest to ascertain the common-law rule in respect to the number of persons to be summoned as grand jurors, at least since the grand jury as we know it came into existence. In 1 Chitty, Crim. Law, 310, 311, it is said:

"Upon the summons of any sessions of the peace, and in cases of commissions of oyer and terminer and gaol delivery, there issues a precept, either in the name of the king or of two or more justices, directed to the sheriff, upon which he is to return *24 or more* out of the whole county, namely, a sufficient number out of every hundred, from which the grand jury is selected. Upon this precept, although it *generally specifies only 24, the sheriff usually returns 48*. * * * Though the number of jurymen thus returned to the court amount to 48 or more, not more than 23 are to be sworn. * * * At the sessions, it is not an unusual practice, after 15 or 16 names have been called, to consider the inquest complete, and not to insist upon the service of the rest, who may happen to be in attendance."

In 3 Bacon, Abr. (Ed. 1794) p. 232 ("Juries"), it is said:

"Upon the summons of any session of the peace, and in cases of commissions of oyer and terminer and gaol delivery, there goes out a precept, either in the name of the king or of two or more justices, directed to the sheriff, upon which he is to return *24 or more*, out of the whole county, namely, a considerable number out of every hundred, out of which the grand inquest * * * are taken and sworn. * * *"

Bacon and Chitty both cite 2 Hale's P. C. 154, as authority. In 4 Blackstone's Com. 302, it is said that the sheriff is bound to return *24* good and lawful men. But, as he also refers to 2 Hale's P. C. 154 as authority, it seems that Blackstone (who is followed in 10 Ency. Pl. & Pr. 367, and 20 Cyc. 1317) failed to accurately follow the text of his authority. In 2 Hale's P. C. 154, the language is:

"Upon this precept the sheriff is to return *24 or more* out of the whole county, a considerable number out of every hundred, out of which the grand inquest at the session of the peace, oyer and terminer, or gaol delivery are taken. * * *"

In Lesser's Hist. Jury System, p. 148, it is said:

"In the reign of Edward III, the separation of the grand and petit jury was an established factor in English criminal jurisprudence. * * * After the various enactments enumerated and changes referred to, it was only a question of time to dispense with the service of the knights who acted as elisors, and by precept of the court directly to authorize the sheriff of each county to return the names of *24 or more* persons from whom the grand jury is chosen. * * *"

In Thompson & Merriam on Juries, § 483, it is said:

"* * * There issued a precept, * * * directed to the sheriff, upon which he returned *24 or more* out of the whole county, a certain number being from each hundred, from which panel the grand jury was organized."

In Crown Circuit Companion (Ed. 1816) p. 4, it is said:

"Before the justices of assize go their circuits, they issue out their precept, directed to the sheriff, to cause the assizes to be summoned, and the persons who are obliged to attend thereon to appear before them, in consequence of which he issues out his warrant directed to his bailiffs. * * * He is also

to cause 24 or more good and lawful men of the county, some out of every hundred, and which are called the grand inquest, * * * to attend.
* * *

See, also, *Rex v. Marsh*, 6 A. & E. 236, 33 E. C. L. Rep. 143.

From the foregoing, and especially from what is said in *Chitty* (see, also, *People v. McKay*, 18 Johns. [N. Y.] 214, 215), it seems reasonably clear that the precept specified the number of persons to be summoned, and that the number could be more than 24, although that was the number usually specified. It follows that, if the intent of Congress in enacting section 808 was to leave the number of persons that should be summoned as at common law, there can be little or no doubt of the right to order more than 23 to be summoned. And such seems to be the most reasonable construction to put upon the statute.

It is a canon of statutory construction that a statute is not to be construed as making any innovation upon the common law which is not expressed, or which its words do not clearly require. In *Arthur v. Bokenham*, 11 Mod. 148, it is said:

"* * * Statutes are not presumed to make any alteration in the common law further or otherwise than the act does *expressly declare*. * * *"

In *Shaw v. Railroad Co.*, 101 U. S. 557, 565 (25 L. Ed. 892), it is said:

"No statute is to be construed as altering the common law farther than *its words import*. It is not to be construed as making any innovation upon the common law which it does not *fairly express*."

In *Northern Securities Co. v. U. S.*, 193 U. S. 197, 361, 24 Sup. Ct. 436, 466 (48 L. Ed. 679), Mr. Justice Brewer said:

"Whenever a departure from common-law rules and definitions is claimed, the purpose to make such departure should be *clearly shown*."

In *Johnson v. Railroad Co.*, 117 Fed. 462, 466, 54 C. C. A. 508, 512, it is said:

"The common or the general law is not further abrogated by such a statute than the *clear import of its language necessarily requires*."

In *Chauncey v. Dyke*, 119 Fed. 1, 17, 55 C. C. A. 579, 595, Judge Sanborn says:

"The common or the general law is not further abrogated by such a statute than the *clear import of its language necessarily requires*."

In 26 Am. & Eng. Ency. (2 Ed.) p. 662, it is said:

"* * * Statutes are not presumed to make any alteration in the common law further or otherwise than the *clear import of the statutory language necessarily requires*."

See, also, *Sutherland*, Stat. Constr. § 290; *Black*, Interp. Laws, pp. 110, 233; *Whitfield v. Insurance Co.*, 144 Fed. 356, 361, 75 C. C. A. 358.

Assuredly the language of the statute in question neither necessarily nor at all clearly requires that it be construed as repealing the common-law powers of the judges as to the number of veniremen to be summoned for grand jury service.

Again, construing this statute as limiting the number of persons that may be summoned to 23 brings about frequently great public inconvenience. Not only must the grand jurors present be held idle, but the frequently numerous witnesses recognized to appear before the grand jury, the persons bound over or held for action by the grand jury, and sundry court officials are delayed, it may be for several days, if less than 16 qualified veniremen respond. If there be any real doubt as to the intent of Congress in this respect, that construction which leads to such inconvenience should be avoided. In *U. S. v. Fisher*, 2 Cranch, 359, 386 (2 L. Ed. 304), Chief Justice Marshall said:

"It is also true that, where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the Legislature be plain. * * *

See, also, 1 Fed. Stats. Ann. xlix; 26 Am. & Eng. Ency. (2d Ed.) 648, note 3; Black, Interpret. Laws, p. 102; Sutherland, Stat. Constr. § 323.

Mr. Justice Brewer's opinion in *U. S. v. Egan* (C. C.) 30 Fed. 608, 610, 611 (from which Judge Thayer dissented, and which possibly may not ultimately prevail), is a striking application of the doctrine in question. In order to avoid the inconvenience involved in a literal construction of Act June 30, 1879, c. 52, 21 Stat. 43, 4 Fed. Stats. Ann. 749 (U. S. Comp. St. 1901, p. 624), requiring that "all such *jurors*, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box," etc., Mr. Justice Brewer thought it proper to substitute the word "*juries*" for the word "*jurors*" used in the statute.

The conclusion reached is that Congress intended to leave the number of persons that should be summoned for grand jury service, as at common law, to the discretion of the trial judges. The entire silence of section 808, as well as of all previous and later statutes, on this point, is itself an indication of some force in support of such conclusion. But of much greater force is the fact that, in order to find in section 808 an implied intent to limit the number to be summoned to 23, we must unnecessarily so construe the statute as to create public inconvenience, and must, in defiance of an elementary canon of construction, assume an intent to change the common law which is not expressed and is neither necessarily nor clearly implied. The chief argument for an implied intent to restrict the number that may be summoned is found in the fact that the statute restricts the maximum number that may be impaneled. At common law only 23 persons could act as grand jurors, but this fact did not forbid summoning more than 23 persons. By parity of reason the statute, in forbidding that more than 23 persons be impaneled as grand jurors, does not impliedly forbid that more be summoned.

The foregoing conclusion is seemingly justified by the following authorities:

In *U. S. v. Insurgents*, Whart. St. Tr. 102, 26 Fed. Cas. 499, 514 (1795), the objection was to the number of trial jurors summoned. Mr. Justice Patterson said:

"The objections that have been suggested on this occasion are principally founded on the twenty-ninth section of the judicial act of Congress, which refers the federal courts to the state laws for certain regulations respecting juries. But the words of this reference are clearly restricted to the mode of designating the jury by lot, or otherwise, and to the qualifications which are requisite for jurors, according to the laws and practice of the respective states. Since, therefore, the act of Congress does not itself fix the number of jurors, nor expressly adopt any state rule for the purpose, it is a necessary consequence that the subject *must depend on the common law; and by the common law the court may direct any number of jurors to be summoned, on a consideration of all the circumstances under which the venire is issued.*"

In *U. S. v. Dow*, Taney, 34, 25 Fed. Cas. 901 (1840), Mr. Justice Taney said:

"The following points were ruled by the court, before the jury were sworn: * * * The act of Congress of September 24, 1789, c. 20, § 29 [1 Story's Laws, 63; 1 Stats. 88], in referring to the laws of the states in relation to juries, applies only to the mode of selecting them, and not to the number to be summoned. The Circuit Courts are bound to follow the laws of the respective states in which they are held, in the mode of forming the juries, and in determining upon their qualifications; but the *laws of the states do not regulate the courts of the United States in the number to be summoned*; upon this subject, *the courts of the United States are governed by the rules of the common law.*"

In *U. S. v. Tuska*, 14 Blatchf. 5, 28 Fed. Cas. 234, 235 (1876), Judge Benedict said:

"This case comes before the court upon a demurrer to a plea in abatement. All the averments of the plea relate to the constitution of the grand jury that found the indictment. The material averments are that 48 persons were summoned by the marshal to attend as grand jurors. * * * In regard to the order directing that 48 persons be summoned to attend, I desire to say, further, that it is not open to the charge of irregularity. No statute of the United States fixes the number of persons to be summoned, nor has the state law as to number been adopted; and, moreover, there is no uniform law of the state upon the subject, in force throughout the locality comprising the Southern district of New York. In some parts of the district the state law allows the summoning of 50 persons; in other parts, the number is 36. Resort to the common law also fails. Whether, at common law, an irregularity would be committed by the sheriff in selecting and summoning more than 24 jurors to attend as grand jurors, I do not stop to inquire. If such be the rule applicable to an officer charged with the duty, not only of summoning but of selecting good and lawful men to compose a grand jury, the reason of the rule fails under our system of procedure, where the marshal has simply to summon designated persons, and the court, in the absence of any other mode provided by statute, must select the requisite number of fit persons from those in attendance. In the absence of statutory regulation, the court must necessarily determine what will be a sufficient number to enable a grand jury to be constituted; and the existence of this power will be found to be implied in section 808, Rev. St. U. S. It should be added that it has been of frequent occurrence, in this district, to direct that 48 persons be summoned; and, in at least one instance, an order similar to the one in this case was made by the Circuit Judge."

See, also, *U. S. v. Tallman*, 10 Blatchf. 21, 28 Fed. Cas. 9; *Fries Case*, Whart. St. Tr. 458, 9 Fed. Cas. 826, 921, 923.

In *U. S. v. Richardson* (C. C.) 28 Fed. 61, 69 (1886), Mr. Justice Gray, considering an objection to the method employed to obtain a grand jury, after great consideration of the Acts of Congress of September 24, 1789 (1 Stat. 88), May 13, 1800 (2 Stat. 82), June 20, 1840

(5 Stat. 394), sections 800, 802, and 803, Rev. Stat., and the Act of June 30, 1879 (21 Stat. 43), said:

*"The courts of the United States must determine for themselves the number of jurors to be summoned. * * *"* Citing U. S. v. Dow, supra; U. S. v. Reed, 2 Blatchf. 435, 27 Fed. Cas. 727; U. S. v. Tallman, supra; U. S. v. Woodruff, 4 McLean, 105, 28 Fed. Cas. 761; Alston v. Manning, Chase, 460, 1 Fed. Cas. 575.

In Wolfson v. U. S., 101 Fed. 430, 432, 41 C. C. A. 422, 424 (1900):

"The court ordered that the names of 23 persons be drawn to constitute the grand jury. The court also ordered that 10 additional names of persons be drawn to serve as grand jurors. The grand jury was organized by first calling the 23 persons first drawn. Sixteen of them appeared, and were sworn as grand jurors, together with 7 of the 10 ordered to be drawn and summoned."

Motion to quash an indictment found by the grand jury obtained as above stated was overruled on the ground of delay in making the objection. The appellate court does not discuss the question we are concerned with, but the case is of interest as showing the construction put upon section 808, Rev. Stat. by the trial court.

In U. S. v. Mitchell (C. C.) 136 Fed. 896, 905 (1905), Judge Belinger said:

"The summons in this case was for 30 jurors, and it is suggested, rather than argued, that this fact may operate to invalidate the grand jury. Experience has shown that it is necessary, and it has therefore become the practice in this court, to issue the venire for a greater number than the maximum required, inasmuch as not all of those summoned will be found, and among those found some will be entitled to exemption, and others will be disqualified, through sickness or otherwise, for jury service. In the present case, of those summoned, 19, not including Robertson, who was exempt, reported for duty. This number was afterwards increased, by the presence of Peebler and Bufum, to 21. If the venire had been only for the maximum number required, it is doubtful if a quorum could have been had at the time appointed for the organization of the grand jury. The practice which has resulted in the particular complaint is founded in necessity, and I have no doubt of its legality and propriety. It is immaterial, and *does not affect the legality of the grand jury, if more than 24 persons are summoned to appear as jurors.* Stevenson v. State, 69 Ga. 68; Turner v. State, 78 Ga. 177; People v. Harriot, 3 Parker, Cr. R. [N. Y.] 112; State v. Watson, 104 N. C. 735, 10 S. E. 705; Lowrance v. State, 4 Yerg. (Penn.) 147."

After writing the foregoing an effort was made to ascertain the practice of the federal trial courts generally in respect to the number of persons ordered summoned as grand jurors. Excepting the judges in North Carolina (where a state practice is followed—United States v. Breese [D. C.] 172 Fed. 767), and in Indiana, Kentucky, and the Western district of Arkansas (governed by special statutes—4 Fed. Stat. Ann. 752, 754), a request was sent to all of the District Judges in the United States for information as to the practice of the judges in the respect mentioned. From the answers received it appears:

In the Eastern, Western and Southern districts of Texas and in the Western district of Tennessee, as in North Carolina, the practice is to summon a sufficient number of jurymen, without distinguishing between grand and petit jurors. In the Western district of Missouri the practice is to summon 21 grand jurors. In the Northern and

Southern districts of Alabama, in Delaware, Kansas, Eastern district of Illinois, Maryland, Massachusetts, Western district of Michigan, Minnesota, Southern District of Ohio, Eastern and Western districts of Oklahoma, Eastern district of Pennsylvania, per Judge Holland, Western district of Pennsylvania, Rhode Island, South Carolina, Utah, Eastern district of Virginia, Southern district of West Virginia, Western district of Wisconsin, and in Wyoming the practice is to summon only 23 grand jurors. Of the judges of these 21 districts, one expresses the opinion that section 808 forbids summoning a greater number than 23, two express a doubt on the subject, and nine express the opinion that the statute does not limit the number that may be summoned. The remainder express no opinion.

In the following districts the number of persons summoned as grand jurors is as shown below:

M. D. Ala. (Judge Jones).....	more than 23
E. D. Ark., 23 and 6 alternates.....	29
N. D. Cal.....	usually 40 to 45
S. D. Cal.....	over 23
Colo.....	about 30
Conn.....	27
N. D. Fla.....	27
S. D. Fla.....	usually 23, occasionally over 23
N. D. Ga.....	36
S. D. Ga.....	at least 30
Idaho.....	usually 23, sometimes over 23
N. D. Ill. { Judge Carpenter.....	30 to 35
{ Judge Landis.....	45 to 50
S. D. Ill.....	24
N. D. Iowa.....	23 to 30
S. D. Iowa.....	30 to 40
E. D. La.....	40
N. D. Miss.....	35 to 40
E. D. Mo.....	40
Mont.....	45 to 50
Neb. 23 and 7 alternates.....	30
Nev.....	never less than 30
N. J.....	24
N. D.....	30 to 33
E. D. N. Y.....	36
N. D. N. Y.....	25 or 26
S. D. N. Y.....	50 to 75
W. D. N. Y.....	36
N. D. Ohio.....	as high as 30
Or.....	30 to 35
E. D. Pa.....	24
M. D. Pa.....	23 to 24
S. D., 23 and 5 alternates.....	28
E. D. Tenn.....	25
Vt.....	23 to 25
E. D. Wash.....	25
W. D. Wash.....	occasionally over 23
N. D. W. Va.....	24
E. D. Wis.....	30

A practice which is followed in so many other districts, which often obviates great public inconvenience, which is fortified by sound rules of statutory construction and a very considerable weight of authority, should not be lightly abandoned.

In re BARDE et al.

(District Court, D. Oregon. September 8, 1913.)

No. 2,288.

1. BANKRUPTCY (§ 384*)—COMPOSITION—CONFIRMATION—BEST INTERESTS OF CREDITORS—EVIDENCE.

Where a proposed composition with creditors has the approval of a majority of such creditors, such fact in itself is prima facie evidence that it is for the best interests of all.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. § 384.*]

2. BANKRUPTCY (§ 384*)—COMPOSITION—CONFIRMATION—OBJECTIONS—BURDEN OF PROOF.

Bankr. Act July 1, 1898, c. 541, § 12d, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), provides that a proposed composition shall be confirmed if the judge is satisfied that the bankrupt has not been guilty of any acts, or failed to perform any of the duties which will bar his discharge. *Held*, that the burden is on the objecting creditor to establish by a clear preponderance of the evidence that some valid reason exists for denying the bankrupt's discharge, in order to prevent a confirmation of a composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. § 384.*]

3. BANKRUPTCY (§ 384*) — COMPOSITION — CONFIRMATION — OBJECTIONS — GROUNDS.

Bankr. Act July 1, 1898, c. 541, § 12d, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), provides that a composition shall be confirmed by the judge if satisfied that the bankrupt has not been guilty of any acts or failed to perform any of the duties which will bar his discharge, and section 14b, subd. 2, declares that a bankrupt shall be entitled to a discharge unless he has with intent to conceal his financial condition destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained. *Held*, that such latter provision is available as an inhibition to confirmation to a composition with creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. § 384.*]

4. BANKRUPTCY (§ 384*)—COMPOSITION—OBJECTIONS—FAILURE TO KEEP BOOKS—EVIDENCE.

Evidence *held* to require a finding that bankrupts had failed to keep books of account, with intent to conceal their financial condition, and hence that they were not entitled to confirmation of a proposed composition as against the protest of certain creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. § 384.*]

In Bankruptcy. In the matter of bankruptcy proceedings of M. Barde and J. Levitt, individually and as partners, doing business as Barde & Levitt. Application for confirmation of a proposed composition denied.

Bauer & Greene and A. H. McCurtain, all of Portland, Or., for objecting creditors.

Giltner & Sewall and Alex. Sweek, all of Portland, Or., for bankrupts.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WOLVERTON, District Judge. This is a proceeding on a proposed composition with the creditors of the copartnership of Barde & Levitt. The assets of the bankrupts, both as partners and as individuals, as appears by the appraisers' report, amount to \$112,908.50. The proved claims, as appears from the report of the referee in bankruptcy, aggregate \$132,872.12, being 147 in number. Besides these, there are claims, five in number, which have been allowed, amounting to \$488.65. Other claims have been scheduled, 17 in number, amounting to \$3,885.60, but have not been proven.

Subsequent to adjudication and examination of the bankrupts, they offered a composition of 45 per cent. of their liabilities, and later deposited with R. L. Sabin, the duly elected trustee, the sum of \$62,029.57 with which to meet such offer.

Certain creditors, seven in number, whose claims aggregate \$8,362.72, have interposed objections, assigning numerous grounds why confirmation of the composition should not be had. Among these objections is one that the bankrupts, with intent to conceal their financial condition, failed to keep proper books of account so that their business condition might be ascertained.

In the view I take of the controversy, after a careful and thorough reading and study of the record, it will be unnecessary to discuss other objections except incidentally.

One of the objections goes to the insufficiency of the amount of money deposited as a consideration to be paid by the bankrupts to their creditors under the proposed composition. It might be that upon a close estimate the amount deposited would be short of the requirements of the statute, but the difference cannot be large as compared with the magnitude of the transaction, and the point may well be waived that the merits of the controversy may be considered.

A brief statement of the facts attending the formation of the partnership of Barde & Levitt will be instructive and aid materially in the solution of the question which is brought into the record by the objections, and which I deem vital to the cause in the present aspect.

For from 15 to 20 years prior to entering into partnership with Levitt, Barde had been engaged in the junk business, and had evidently prospered in that line, as he had accumulated a considerable property; the partnership with Levitt having been entered into early in August, 1912. Barde's sons were engaged in business with him part of this time. The eldest son, J. N. Barde, entered into business with him about ten years ago, at which time young Barde was of the age of 16 years. Barde says he then took his son in as half partner, and the firm was called M. Barde & Son. Later—that is, in 1908—he took in his second son, L. B., also as a partner; the firm name being changed to M. Barde & Sons. L. B. Barde was at the time 16 years of age. When asked what proportion this son was to have in the firm, Barde replied:

"I was supposed to give him a third, each of them. Q. The other boy had previously had a half? A. Well, it wasn't exactly a half. I didn't promise him exactly a half. I told him to go on and buy it out and be a partner, and then the second boy grewed up and we took him in and supposed to be partners all together. Q. You one-third, and J. N. Barde one-third? A. Yes."

Each of these boys is alleged to have put in \$2,000 when he entered the firm; they having accumulated the money or being entitled thereto by reason of having worked for their father in the business during their younger days. Barde asserts that still later, namely, about five or six months previous to the time of taking his testimony, another son, Harold, still younger than the others, was taken in and became a partner; this son being about 17 at the time. Harold, however, received stock in a corporation previously formed under the name of M. Barde & Sons, but was really never a partner. He is said to have put about \$2,000 into the business also; this being an estimate of what was due him for services rendered the firm in his younger days. The capital stock of the corporation was fixed at \$100,000, divided into 1,000 shares of \$100 each. The property of the partnership was turned into the corporation, and the stock issued in payment therefor. The shares of stock were subscribed for, and divided among the three partners as follows: M. Barde, 600 shares; J. N. Barde, 250 shares; and L. B. Barde, 150 shares. The incorporation was had and the stock assigned about August 13, 1912. Later, namely, in December, 1912, the shares of stock, by mutual understanding between the parties concerned, were reissued and re-assigned as follows: To M. Barde, 200 shares; J. N. Barde, 350 shares; L. B. Barde, 200 shares; Harold Barde, 150 shares; and to J. N. and L. B. Barde, 100 shares in trust. The 100 shares in trust, it is explained, were to secure the payment of money that Barde owed the corporation.

Barde claims by his testimony that the first issue and assignment of the stock was merely temporary, and that the shares were to be so held until the parties to the arrangement "were straightened out," and further says:

"Now, that is the way it was. It was made up before I left till I would come back, then we will straighten that matter out between the children.
* * * That was just temporary until we would meet again and we would divide it among the three boys."

The words "before I left" had reference to his going East with Levitt to purchase merchandise for the business of Barde & Levitt.

Jacob Levitt had a store in East Portland, in charge of his brother, S. J. Levitt, which he had been conducting about two years, and a store in Oregon City. This latter he had owned for a much longer time. He says his stock in Oregon City at the time he entered into partnership with Barde was worth \$24,000 or \$25,000, and his stock in East Portland inventoried about \$5,000; that he valued his entire stock, held in both places, at \$30,000. At the time his liabilities were \$18,000 or \$19,000 for merchandise, and at banks in amounts sufficient to carry them up to \$36,000 and over. So that, adding to his assets \$2,000 for accounts receivable, it left him with liabilities exceeding his assets in a sum above \$4,000. Barde was on some of Levitt's paper, and was aware approximately of Levitt's true financial condition. Levitt's stock was contributed to the business, and immediately he and Barde borrowed considerable sums of money at the banks with which to carry on the venture. They moved the East

Portland stock to Salem, but in the meantime they established what they term a chain of stores—one at Salem, one at Corvallis, and later one at Hood River, and partially made arrangements for one at Eugene. Having made provision for opening these stores, both Barde and Levitt went East to purchase stock, and purchased heavily on the usual credit. In the time between that date and the failure, February 14, 1913, there was added to the old stock, according to the testimony of Alexander Young, the expert accountant employed to expert the accounts of the firm, \$99,981.50, making a grand total of stock received, including the original stock of \$30,000 and the purchase of a store at Salem for \$2,900, of \$132,881.50. The appraisal of stock on hand at time of failure is \$66,582.31. The stock representing the difference between these two amounts is not satisfactorily accounted for, and, even aided by the verbal statements of Levitt, there is yet a large sum wholly unaccounted for. Barde knew but little about the business, and S. J. Levitt, who is styled the manager and was given general oversight concerning it, does not enlighten us greatly.

This brings us to the inquiry as to the manner in which the books of the concern were kept. Miss Levitt, a sister of Levitt, the partner, was employed at Oregon City as stenographer to Levitt, and bookkeeper. She kept a merchandise ledger, showing the invoices of merchandise purchased and payments made upon merchandise. This was practically the only regular book of account kept for the entire business conducted at all the stores. As to the bookkeeping, Levitt testifies as follows:

"Q. Who kept that ledger? A. It was my sister. I started that ledger myself, and then my sister would take the bill and put it into that ledger. For instance, we got in a bill of goods, why she would put in the ledger, and if I sent away a check she would credit the account with so much. That is all the bookkeeping I did. Q. She posted from the bill or invoice directly into the ledger? A. Into the ledger. Q. Didn't it contain any cash account, that ledger? A. No. Q. Nor an expense account? A. No. Q. Nor rent account? A. No, it was all done by checks. Q. Or a salary account? A. No. Q. None of that was entered in this ledger? A. No. Q. Was it entered in any other book? A. Well, I used to have a little book there to keep a memorandum of my salaried men, what they were drawing and what they were getting paid."

Further on he was interrogated:

"Q. So I understand, then, you did not keep a regular set of books at any of these stores? A. No. Q. Nor a general set of books at any of the stores or at Oregon City? A. No; only this ledger I kept at Oregon City."

And again:

"Q. How did you keep the financial accounts in these branch stores, how was it kept? Just explain the mode. A. Well, it was just kept this way: It was a little daily sales—we had registers in every place, National Cash Registers, and sales were taken off of that register, you know. Q. And entered into daily sales books? A. And entered that into the daily sales book. Or they didn't have them sales book, they had them sales slips; not regular sales books; and during the day they would have a place there where to put them, and in the evening they would go more on the register than they would on those sales slips. Q. They checked up the sales slips with the cash register total? A. Well, now, I don't know as to that, Mr. Greene. Q. Did you ever

do it any? A. In my own store? Q. Yes; or the other stores either? A. Well, I don't know. Q. You don't recollect? A. I don't recollect whether I ever done it. I didn't do it. Q. What did you do with the cash received during the day? A. Well, they used to deposit it in the bank every day. Q. The local bank? A. The local bank."

And later:

"Q. All the facts you have testified to here were merely gathered by the expert from the checks and the books and a little clue here and there, is that the situation? A. Yes, sir; that is as near as I can get at it. Q. You didn't keep the cashbook? A. I kept no books than what is here. Q. That's all the books you kept? A. Yes, sir. Q. You kept no cashbook? A. No, sir. Q. You kept no bills payable account? A. No, sir. Q. Any interest account? A. No, sir. Q. Any expense account? A. No, sir. Q. Any operating account? A. No, sir; nothing of that sort at all. Q. You never kept anything of that sort at all? A. I kept track of the checks I paid out, and had a daybook of the accounts credited, charge accounts, and my ledger; when I got in a bill of goods I put it in the ledger, and when the bill was paid I took it and put it in the file."

Alexander Young testifies as follows:

"Q. Tell the court, Mr. Young, whether or not the books, records, and documents kept by the bankrupts, Barde & Levitt, and examined by you, were and are such as to afford a basis for a determination of the financial standing of Barde & Levitt at the time they went into bankruptcy, or at any time covered by the books you examined? A. No such condition to allow doing that. Q. Are you able to say whether or not they kept such books or accounts as would enable any bookkeeper or accountant of ordinary intelligence and ability to determine their financial condition at any time during the period the books covered? A. If these are the books here, it is absolutely impossible. Q. You now have reference to the exhibits that have been introduced in this case, including the ledger and various books and documents and check stubs and canceled checks, and so forth? A. I do."

Mr. Kenneth Evans, an expert accountant employed by the bankrupts to make a statement of the condition of the assets and liabilities of the firm, testifies, as bearing upon the manner in which the books were kept, as follows:

"Q. Now go right along with your statement. A. There was no cashbook, consequently I could not make a statement of cash from any record. Taking the facts, they borrowed \$42,200 from the banks, and they had no cash on hand at the time the partnership was formed, and they had received from the sales, cash sales, \$34,000; they have handled actual cash during the six months of business \$76,200. Q. What became of that money? A. Upon inquiry from Mr. Levitt and from some memos which he had, I learned that they had paid in remodeling the various stores: At Salem, \$1,625; Corvallis, \$645; Hood River, \$250—in remodeling and fixing those stores up ready for their business, and occupancy. A total of \$2,520. From Mr. Levitt's statement of what he paid his manager at each store, rent, lights, phone, advertising—not advertising, but rent, phone, light, heat and help—wages, I arrived at the total expense, operating expense at Salem, \$5,844; Corvallis, \$2,935; Oregon City, \$7,503.88; Hood River, \$250; a total operating expense of all stores, \$16,522.88. Q. During what period? A. From August 12, 1912, to February 14, 1913. They tell me they had made a trip East at a cost of \$3,000, and various other traveling expenses between the stores, \$1,550, or a total traveling expense account of \$4,550. They claimed to have paid out in addition in the neighborhood of \$2,500—the interest they were paying at the banks for their loans, from what they told me. As near as I could figure it was \$2,433.12. They paid from their receipts and loans, for merchandise, according to the merchandise ledger, \$22,000, and Mr. Levitt

claims he had paid on old accounts, merchandise accounts, which were made previous to the partnership— Q. And assumed by the partnership? A. (Continuing) \$15,500, or a total amount paid out for merchandise of \$37,500. They claim to have paid for freight and express \$3,500. They paid back to the banks on their loans, according to my previous statement, \$4,650, and they withdrew and paid Mr. A. Levitt, \$900; M. Blum, \$575; Morris Goldblock, \$346; R. Blum & Sons, \$203—or a total of \$2,024 withdrawn from the business for personal accounts. This would account for the entire amount of cash that they apparently had received and borrowed. Q. What is the total of their disbursements? A. \$76,200. Q. This shows the amount of all moneys they received during the time they were in partnership? A. As near as I could arrive at it from the books and what inquiries I could make. * * * Q. Go on with your statement. A. From the information, and from the figures that I had previously secured, the statement of Barde & Levitt's balances at the close of the business would appear as follows: Assets, accounts receivable, \$2,000; assets, account receivable from M. Klapper, Aberdeen, \$7,000; merchandise stock as per inventory, \$74,717—or a total of \$83,717. Their liabilities for merchandise, \$76,717; loans of banks, \$53,800—or a total liability of \$129,917, showing a deficit of \$46,200. Now, I will state that one reason I was called in this matter was to put in some kind of writing or some shape, figures or a statement that these gentlemen could understand. It is apparent there is no books kept other than this one ledger. From that ledger I gave you the statements of the actual purchases and amounts paid back on those purchases. In endeavoring to account for this deficit of \$46,200, I find that Mr. Levitt began with \$30,000 worth of stock and \$2,000 worth of accounts."

On cross-examination he testified:

"Q. You said, I believe, on analyzing book 'Creditors' Exhibit 2,' you found it was wrongfully kept? A. Yes, sir. Q. You said in inquiring from Levitt you found he owed \$15,000 for merchandise? A. That statement is wrong. Q. The only information you had on that subject is what Levitt said to you? A. In regard to what credits he was owing; yes, sir. Q. Did he show you any records or vouchers to prove his statements? A. I didn't go into the old books. I didn't know where they were. Q. You say the payment to George W. Bates & Co. and Oregon City Bank were not showed by the books? A. No, sir. Q. The only way you know about that is by what Levitt said to you? A. Yes, sir. Q. And you also stated said Levitt informed you that since then—that is, I suppose, meaning since the partnership was formed, and in the six months period they operated—were sums of money aggregating \$42,200. Did you ascertain that figure from anything else than Levitt's statement? A. No, sir. Q. And you also stated that the total money borrowed from banks was \$58,450 between August 12, 1912, and February 14, 1913? A. No, Mr. Greene, I said the total amount they had borrowed altogether was \$53,800. Q. Did you learn that from any other source than the books? A. No, sir; I learned that from Mr. Levitt. Q. The books did not disclose those facts? A. No, sir. Q. You also say that Levitt informed you he had stock and fixtures at the time of the partnership of \$30,000. Did he exhibit to you any records, or documents, to verify that figure? A. No, further than Mr. Barde stated also that was the correct amount. They both admitted the stock at that figure. Q. The two of them estimated the amount on hand at that time? A. Yes, sir. Q. There is no entry made in any book to sustain that fact? A. I didn't examine the old books. Q. Was it made in book 2 of Barde & Levitt? A. No, sir. * * * Q. You also in your statement include an estimate of the amount of sales or business transacted at the three stores, Oregon City, Corvallis, and Salem. Is there any definite record of that in any of the books or records or documents of the firm? A. There is a definite record of the deposits which indicate sales, but there is no record on the books showing the sales from day to day, except in the case of Oregon City. I found that. I found a memorandum or daybook in which it shows the cash receipts for the day, and in taking that off on an

adding machine I found it came to a little less than \$10,000. Q. Why your estimate for Oregon City is \$16,660. A. Oh, just a minute—that was at Salem I found that. Q. But there is no record of it in any other store? A. No, sir. * * * Q. You further said there was no cashbook kept by this firm. You found no cashbook? A. No, sir. Q. You reached the sales by their statements or methods you have stated? A. No, sir; absolutely without any statement at all, or any verification from Mr. Levitt. I arrived alone first, at the average business done by the bank book deposits from day to day. Excepting any one large amount which would apparently be receipts from other than the regular store. Q. Now, your estimate of the cost of fitting up the stores, what did you base that on? A. Merely took Mr. Levitt's statement. Q. Was there anything in the books or records to verify his statements? A. No, sir. Q. On what did you base your figures as to the traveling expenses for the eastern trip and other traveling expenses? A. Mr. Levitt's statement. Q. Was there anything in the books to verify that? A. No, sir. Q. And your estimate as to the money paid out for advertising, upon what did you base that? A. Mr. Levitt's statement. Q. Was there any verification in any of their books or records? A. No, sir. A reasonable apportionment of the three stores they operated and engaged in business. * * * Q. Do you want the court to understand then, Mr. Evans, that you could, from the records of this firm now in evidence and which you say you have examined, accurately determine their financial condition on the 14th of February, 1913, without any inquiry from anybody outside of the books and records themselves, or any explanation of any kind? Could you have done so? A. Probably not. Q. Did that firm keep such books of account as would enable a bookkeeper or accountant of ordinary ability to determine their exact financial condition at any one time during the six months' period that you went over their affairs? A. Not from the books."

It appears that, in order to establish a trade, the firm began selling at reduced prices, and later, finding themselves needing money with which to meet demands falling due, they sold at greatly reduced figures. One sale was had to one Klapper, amounting to \$14,000, at 50 per cent. of the invoice price of the goods. While it is suggested that this sale was made for the purpose of meeting maturing obligations, it appears that it was on time running from three to six months, and could render them no aid in that direction. Whether the firm for any considerable time maintained normal prices, by which the usual mercantile profits were derived, is problematical. They claim they lost money in the business, and low prices and forced sales are excuses, among others given, for such loss.

[1] One of the objections urged why the composition should not be confirmed is that it is not for the best interests of the creditors. The proposed composition here has the approval of a large majority of the creditors, and this is in itself prima facie evidence that it is for the best interest of all. Were this the only objection, I should be inclined to direct a confirmation.

[2] The Bankrupt Act requires, among other things, that the composition shall be confirmed if the judge is satisfied that the bankrupt has not been guilty of any acts or failed to perform any of the duties which would bar his discharge. Section 12d. By the manner in which the proposition is stated, the act would seem to require the bankrupt to establish the fact that he is not amenable to it in this respect; but the burden of proof is cast upon the objecting creditor, and he must establish the fact by a clear preponderance of the evidence.

The bankrupt is entitled to a discharge unless he has, among other

things, "with fraudulent intent to conceal his true financial condition, * * * destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained." Section 14b, subd. 2.

[3] Reading the two clauses together, this latter is available as an inhibition to a composition with creditors.

[4] From the testimony, it is very clear that the bankrupts have failed to keep books of account or records from which their financial condition could be ascertained. The testimony of the two accountants proves this, and they were experts in the business of stating accounts. But the crucial inquiry is: Did they so fail to keep such books and records with intent to conceal their financial condition? What their intent was in this respect is left for inference and presumption, and must be deduced from what they did and their manner of installing and conducting their business. At the beginning we find them embarking in a business that was even then hopelessly insolvent. Barde had never had any experience in that line of business, for he says himself, "I just started to learn the game." After borrowing some money at the banks, for their credit was good (probably more through Barde's connection with the firm than on account of Levitt), and paying some of Levitt's liabilities, they both went East, and purchased heavily, leaving S. J. Levitt in charge, as manager of the business, to install the chain of stores and put them in working order. About the time of entering into this partnership, if not shortly subsequent, Barde had his private business incorporated, and a division of the capital stock was had between himself and his two sons; he retaining the controlling interest. Later, in December, when it must have become apparent that the burden of liabilities of the firm was becoming oppressive, the capital stock of M. Barde & Sons was reissued and reassigned so as to include another son in the arrangement, leaving Barde without control of the stock, and, incidentally, 100 shares of the stock which Barde was entitled to were issued in trust to secure his indebtedness to the corporation. I do not say at this time that this latter transaction, including the reissue and reassignment of this stock among the partners receiving the same, was fraudulent as it respects the creditors of Barde & Levitt, for it is not necessary to pass upon that question now; but I allude to the incident as bearing upon the intent of Barde in not keeping a proper line of books in the partnership business. Further than this, goods were sold, for a good part of the time the business was conducted at least, at a loss to the concern, and the receipts from sales can only be approximated, and this from deposits made with the banks and from Levitt's statements of what was probably drawn out of the business to meet expenses and the private needs of the partners.

The business was conducted from the early part of August, 1912, until February 14, 1913, and within that time the merchandise shrank, taking the estimate of the bankrupts' own accountant, from \$128,117, including freight estimated only, to \$72,307, leaving a margin of \$55,817, and of this amount \$6,810 is wholly unaccounted for. But, according to Mr. Young's report, the shortage in cash unaccounted for is much greater, running up to \$28,415.67.

These matters are all pertinent for consideration on the question of

the intent with which Barde & Levitt failed to keep proper books of account of their business.

In the case of *In re Alvord* (D. C.) 135 Fed. 236, it was held by Platt, District Judge, that from failure to keep any books whatever it must be presumed that the bankrupts intended to conceal their financial condition. *McKibbon, Driscoll & Dorsey et al. v. Haskell*, 198 Fed. 639, 117 C. C. A. 343, a Court of Appeals case, is to the same effect. The court says in this case:

"The act of Congress proclaims the presumption and expectation of the law that honest merchants will keep account books which will disclose their true financial condition. In the absence of prevailing evidence to the contrary, every man is presumed to intend the natural and inevitable consequences of his acts."

In the case of *In re Brod* (D. C.) 166 Fed. 1011, the bankrupt was denied a discharge because of a shrinkage of \$10,000 in his assets in a period of 13 months; he being unable to show from his books what became of the property.

Taking into consideration the entire history of this unfortunate venture, and the magnitude of the business to be transacted and which was in reality carried on, including a chain of mercantile stores at several points, the inference and presumption are so strong as to amount to absolute persuasion that Barde & Levitt, by their failure to keep suitable books of account, intended the natural and inevitable consequence of such failure, which was to conceal the true condition of their business and financial standing from their creditors.

The composition with the creditors will therefore not be confirmed.

In re BANKS.

(District Court, N. D. New York. September 15, 1913.)

1. BANKRUPTCY (§ 172*)—OWNERSHIP OF ASSETS—FILING PETITION.

Prior to the filing of a petition in voluntary bankruptcy, the bankrupt is the owner of all his property and may sell and incur it except in fraud of creditors or in violation of some provision of law, and after filing the petition and prior to adjudication he holds the title in trust for creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. § 172.*]

2. BANKRUPTCY (§§ 164, 314*)—DEBTS BARRED BY LIMITATION—RENEWAL—PAYMENT ON ACCOUNT BEFORE FILING PETITION.

Where a bankrupt, knowing his insolvency and that he is about to file a petition in bankruptcy, before filing the same went to two of his creditors whose claims were barred by limitations and who had no knowledge of his insolvency or of his intention to become a bankrupt and paid to each a dollar with the statement that he did so to renew the debt, such act was not an attempt to create a preference but was effective to renew the debt so as to entitle the creditors to prove their claims against the bankrupt's estate, and this though the bankrupt in his schedules referred to the debts as evidenced by notes, when in fact he owed such cred-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

itors only one claim each which were on open accounts for goods sold and delivered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 469–473, 478, 483–487, 489, 490; Dec. Dig. §§ 164, 314.*]

3. BANKRUPTCY (§ 314*)—CLAIMS PROVABLE—DEBTS BARRED—NEW PROMISE—DESCRIPTION OF DEBT—LISTING CLAIMS IN BANKRUPT'S SCHEDULES.

Where a bankrupt owed two claims for goods, wares, and merchandise, both of which were barred by limitations, the fact that he listed the claims in his schedules in bankruptcy, describing them as evidenced by notes, when in fact no notes had been given, did not constitute a new promise sufficient to renew the claims under the rule that a new promise to pay in order to take the debt out of the statute must satisfactorily appear to refer to the very debt in question.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

4. BANKRUPTCY (§ 314*)—PAYMENT BY BANKRUPT—DEBT—RENEWAL—FRAUD.

A payment made by a bankrupt immediately before bankruptcy and the filing of his petition, to renew an outlawed debt, and to enable the creditor to prove his claim and share in the distribution, the creditor having no reasonable cause to believe it would operate as a preference, was neither a fraud on creditors nor the Bankruptcy Law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

5. BANKRUPTCY (§ 340*)—CLAIMS—PROOF—EVIDENCE—ISSUES.

Where a trustee's petition for re-examination of claims did not allege that they were for too large a sum but rested entirely on the statute of limitations, and no application to amend was made, the exclusion of evidence to show an alleged uncredited payment on one of the claims was not error.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Ira O. Banks. Proceedings to review referee's order allowing the respective claims of Philip Quencer and John Quencer. Affirmed.

Curtis L. Hildredth, of Watertown, N. Y., for trustee.

Edgar V. Bloodough, of Watertown, N. Y., for claimants.

RAY, District Judge. The referee has allowed the claim of John Quencer at the sum of \$792.03 and the claim of Philip Quencer at the sum of \$701.26. The allowance of these claims is challenged on the ground that they were barred by the six years' statute of limitations at the time the petition in bankruptcy was filed, and that the bar of the statute had not been removed by part payment or by an acknowledgment of the debt in writing, as provided by section 395 of the Code of Civil Procedure of the state of New York, which provides that:

"An acknowledgment or promise contained in a writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest."

On the 7th day of September, 1912, the bankrupt, Ira O. Banks, signed and verified his petition and schedules in voluntary bankruptcy, which were filed September 12, 1912, and adjudication made. In the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

schedules of debts owing the bankrupt listed, "Philip Quencer, Wattertown, N. Y., note, \$250," and "John Quencer, Perch River, N. Y., note, \$250," and no mention was made therein of any other debt owing them or either of them or of the consideration for the note, if there was one. After the trustee was appointed and qualified, and September 25, 1912, Philip Quencer filed his verified claim for:

71 tons of hay at \$9.50.....	\$674 50
September, 1904, by cash.....	200 00
	<hr/>
	\$474 50
Interest for 8 years.....	227 76
	<hr/>
	\$702 26
1912. Received.....	1 00
	<hr/>
Balance due.....	\$701 26

October 14, 1912, John Quencer filed his claim with the referee for:

66 tons of hay at \$11.....	\$726 00
Interest to April 1, 1905.....	23 23
	<hr/>
	\$749 23
April 1, 1905, cash.....	200 00
	<hr/>
	\$549 23
Interest to September 1, 1912.....	244 40
	<hr/>
	\$793 68
September, 1912, cash.....	1 00
	<hr/>
	\$792 63

—with interest from September 1, 1912.

In the verified claims filed there is no mention of or reference to a note or notes. The claims state:

"That the consideration of said debt is as follows: 'Goods, wares and merchandise sold and delivered to the said bankrupt at his special instance and request.' * * * Nor has any note or other evidence of said debt been received except as herein stated."

As stated no note is mentioned in the claim. The total of all claims of other creditors proved is \$721.69.

As to the claim of Philip Quencer it is asserted that on the 10th or 11th of September, 1912, some five days after the petition was verified and one or two days before it was filed, Banks paid to Quencer the sum of \$1 and stated to him that he wanted to pay him the dollar to renew the debt. As to the claim of John Quencer, it is asserted that on the 10th or 11th day of September, 1912, Banks paid to him the sum of \$1 and stated that he paid it to him for the purpose of renewing the debt. What debt was not mentioned.

[1] It is, of course, true that until a bankrupt files his petition in bankruptcy, he is the owner of all his property and may sell or encumber it, except in fraud of creditors or in violation of some provision of law, as he sees fit. Even after the petition is filed and down to the time of the adjudication, the title remains in the bankrupt, but during that time he holds in a sort of trust capacity for creditors.

[2] A debtor as a general rule may at any time acknowledge a debt against which the statute of limitations has run and renew same by a promise in writing which identifies the debt or by a partial payment of the specific debt. A recognition of the debt by a part payment thereof operates as a new promise to pay the remainder. If, as against the trustee and the creditors, this renewal of the debt cannot be effected by an acknowledgment of the debt made in the schedules and filed with the petition, still if the acknowledgment in writing is made before the petition is filed or a part payment of the specific debt is made before the filing of the petition, in the absence of fraud on the law or collusion, I see no reason why the transaction is not valid, unless made under such circumstances as to amount to a preference. If within four months of filing a petition the debtor makes a payment on an outlawed debt intending at the time to go into bankruptcy knowing his insolvency, and the person receiving the payment knows the insolvency and has reasonable cause to believe that a preference is intended, it would not be such a payment as would renew the debt. The transaction would be in fraud of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The transaction could be repudiated by the trustee and the payment recovered.

By section 60a of the Bankruptcy Act, as amended (Act June 25, 1910, c. 412, § 11, 36 Stat. 842 [U. S. Comp. St. Supp. 1911, p. 1506]), it is provided that:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * * or made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

And section 60b provides that:

"If a bankrupt shall * * * have made a transfer of any of his property, and if, at the time of the transfer, * * * the bankrupt be insolvent and * * * the transfer then operates as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Section 57g of the act provides that:

"The claims of creditors who have received preferences, voidable under section 60, subdivision b, * * * shall *not be allowed* unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."

If, then, the payment to renew a debt be made on the eve of bankruptcy (that is, the filing of a petition) and be made under such circumstances and with such knowledge as to constitute the giving and receipt of a preference, the claim cannot be allowed unless the preference is surrendered. The amount of the payment is immaterial. If the payment is recovered (that is, was in fraud of the law), then how can it operate to renew the debt? It leaves the whole matter as if no payment had been made

It is plain that Banks knew his insolvency and intended to prefer both John and Philip Quencer. What knowledge did they have? So far as appears, these claimants had not taken any proceedings to collect or reduce their claims to judgment, except one of them says he had spoken of the debt, we may infer, when he met Banks. All deny that the claimants had any knowledge of the contemplated bankruptcy proceedings prior to the filing of the petition. All fail to remember anything that was said at the time the \$1 payments were made, except the statement of Banks that he wanted to pay the \$1 to renew the debt.

[3] The alleged renewal of the debts by listing claims in the schedules, "creditors whose claims are unsecured, * * * Philip Quencer, Watertown, N. Y., note, \$250; John Quencer, Perch River, N. Y., note, \$250"—cannot be held to renew these claims on accounts two years outlawed when it appears that no note whatever was given. It appears in such case that the debtor had notes in mind, not an account for goods, wares, and merchandise sold and delivered. If he intended to renew a note, he certainly did not intend to renew an account for hay for which no note had been given.

"The general rule is that a new promise, whether made before or after the bar is complete, will avoid the operation of the statute of limitations." 25 Cyc. 1328; *Winchell v. Hicks*, 18 N. Y. 558; *Esselstyn v. Weeks*, 12 N. Y. 635; *Wright v. Parminter*, 23 Misc. Rep. 629, 52 N. Y. Supp. 99.

See the many cases cited in note, 25 Cyc. 1328.

"The general rule is that an acknowledgment or promise to pay, in order to take the debt out of the statute, must satisfactorily and certainly appear to refer to the very debt in question." *Stafford v. Bryan*, 3 Wend. (N. Y.) 532; *Clark v. Dutcher*, 9 Cow. (N. Y.) 674; 25 Cyc. 1330, and cases there cited.

In *Re Currier* (D. C.) 27 Am. Bankr. Rep. 597, 601, 602, 192 Fed. 695, the bankrupt filed his voluntary petition in bankruptcy not knowing that he had sufficient property to pay all his debts when in fact he did have. He scheduled the valid existing claims against him and included and scheduled an outlawed claim. This was duly approved and allowed. Later the bankrupt discovered that he had property more than sufficient to pay all his debts, and he (the bankrupt) then moved to expunge the scheduled outlawed claim and that it be disallowed. No creditor objected or had objected to the proof and allowance of that claim, nor did the trustee in their behalf. This court discussed the whole situation, but all that it decided was that under such circumstances the bankrupt himself, and wholly in his own interest and in order to secure for himself the balance of his own estate after paying the claims which were *not* outlawed prior to making his schedules, could not allege that a claim which he scheduled as valid and subsisting was outlawed and barred by the statute; and that under the circumstances the creditor whose claim was barred *when the petition was filed* could share in distribution only after the others were paid in full.

Here creditors are objecting through the trustee who represents them. Here the question of the effect of a partial payment on an outlawed claim on the eve of filing a voluntary petition in bankruptcy as

between creditors, those whose claims *were* and those whose claims *were not* barred by the statute of limitations at that time, is in question. In *Re Currier* the question was between a solvent but alleged bankrupt in his own interest and his creditors.

There are very substantial reasons why an insolvent person on the eve of going into voluntary bankruptcy should not be permitted, as against his creditors whose claims are not barred by the statute of limitations, to renew by a small partial payment thereon those claims which are barred by the statute. Creditors whose claims are barred by the statute usually do not seek to enforce them by suit and judgment as they feel assured the debtor will plead the statute. If, then, a person who has been out of business seven or eight or more years, and who has no judgments against him and no claims against him which have accrued due within six years but does owe debts to a large amount barred by the statute, starts in business and obtains credit and purchases and has in possession a large amount of property recently purchased on credit, but finds himself unable to meet his obligations, he may make a small payment on each of his outlawed debts and then go into bankruptcy and both *ancient and modern* creditors, so to speak, will share in the distribution of the proceeds of such recently acquired property. This would operate as a fraud on his creditors whose claims were not barred by the statute. Still if there was no collusion and no reasonable cause on the part of the creditors receiving the payments to believe that a preference was intended, and the defense of the statute is personal to the creditor until after a petition is filed, how can the court hold that such renewal by part payment is forbidden by any law? Section 67e of the bankruptcy act provides that:

"All * * * transfers * * * of his property or any part thereof made, or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition *with the intent and purpose on his part* to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except," etc.

And the property so transferred remains a part of the bankrupt's estate. It would seem, not from direct evidence but from some statement or question asked, that some person had obtained a judgment against Banks, and we may infer that this was the reason of his going into bankruptcy. This is surmise, however. Assume this to be the case, we further infer that Banks made up his mind that all his creditors should share in his estate, those whose claims were barred by the statute and those whose claims were not so barred, and hence he made the payments referred to after the execution of, but before filing, his petition. Assume this to have been his purpose, was the transfer of the \$1 on the occasion in question one "*with the intent and purpose on his part* (Banks) to hinder, delay, or defraud his creditors or any of them?" I am not prepared so to hold. So far as this court is informed, it has not been held that a payment made on account or on a note for the express purpose of renewing an outlawed claim of itself is or operates as a fraud on creditors within the meaning of the statute.

Suppose we take the position that the payment of the \$1 on each of these claims, after the petition was verified but before it was filed, was the creation of new debts or obligations, and I am not able to find any law which will prevent their proof and allowance. The status of the claim must be determined as it existed at the time the petition was filed. Suppose the parties had figured up the accounts and Banks had given promissory notes intermediate the verification of the petition in bankruptcy and its filing, would or would not the claim be provable? I am of the opinion that Banks, as against his other creditors, in the absence of fraud and collusion, had the right to renew these claims at any time before he filed his petition. It does not appear that the Quencers, or either of them, knew Banks was insolvent. It seems to me that the law has not prohibited the renewal of outlawed claims under such circumstances.

It is contended that there is nothing to show that the bankrupt intended to pay anything on an account or debt due for hay sold and delivered, but that the evidence discloses an intent to make a payment on a promissory note. A few days before the payments were made, the bankrupt made up his schedules of indebtedness which were attached to and formed a part of his petition in bankruptcy. Here he stated that he owed to John Quencer a note of \$250 and to Philip Quencer a note of \$250; that is, *debts evidenced* by such notes. The consideration of these notes is not mentioned in the schedules. It is evident that Banks at that time had in mind claims against himself in favor of the Quencers evidenced by notes, \$250 to each. The date of the notes was not given. So far as appears, this was his state of mind and these the debts he had in mind when he went to the Quencers on the occasions mentioned. There was no conversation as to any indebtedness except Banks handed to each \$1 and said he wanted to pay or paid the dollar to renew *the debt*. In fact, so far as the proof goes, no note had been given to one of the Quencers, but a note of \$400 had been given to the other which he had handed back, under what conditions and for what reason does not appear. In fact, as the referee finds, Banks owed a balance to each of the Quencers for hay sold and delivered and nothing else; the claim, however, being barred by the statute. The contention is, nothing having been said regarding the nature or character of the debt, that Banks had notes in mind and intended to make a payment on notes and not on an account or claims for hay sold and delivered. But if there was only one claim or debt, and that for hay, is it material that Banks supposed he had given a note for the debt when in fact he had not? It is only material that a specific indebtedness was recognized and a payment made to apply on it as a partial payment of a greater indebtedness. If it was stated that the dollar was paid to renew the debt, a larger debt than \$1, and there was but one debt, here is a plain recognition of a larger sum due than the amount paid and an implied promise to pay the remainder. If the debt was for hay, is it material that it was not evidenced by a promissory note as Banks supposed? On this subject see *Crow v. Gleason*, 141 N. Y. 489, 493, 494, 36 N. E. 497. This case is cited and approved *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 90 N. E. 834, 27 L. R. A. (N. S.) 843. See, also, *Hughes v. Eddy Valve Co.*,

147 App. Div. 356, 131 N. Y. Supp. 744, and *Murphy v. Walsh*, 113 App. Div. 428, 99 N. Y. 346. I think the claimants brought themselves within the principles enunciated in the cases cited.

[4] I cannot hold that a payment made immediately before bankruptcy, or filing a petition in bankruptcy, to renew an outlawed debt and to enable the creditor to come in and share in the distribution, the one receiving it having no reasonable cause to believe it will operate as a preference, is a fraud on creditors or the law.

[5] The petition of the trustee for a re-examination of these claims and praying that they be expunged from the list of proved claims did not allege that they were for too large a sum. The reason for disallowance alleged was the bar of the statute. In one case, that of *Philip Quencer*, the bankrupt was asked if he had not paid \$25 at one time on the claim. This evidence was offered, evidently, to reduce the claim in case the court held it not barred by the statute. The referee held that, under the petition as it stood, the trustee could not go into the question of the amount of the claim. The trustee should then have asked to amend, and a refusal to permit the amendment and allow proof of the exact amount of the claim would have been error. But the trustee did not seem to regard the question of much importance, and I do not think it was error to reject the evidence. The same question had been raised regarding the other *Quencer* claim, and the questions were answered.

On the whole, I am of the opinion that the order of the referee allowing the claims should be affirmed. So ordered.

THE TEXAS.

THE JAMES McCaULEY.

(District Court, D. Delaware. July 30, 1913.)

No. 730.

COLLISION (§ 102*)—STEAMSHIP AND TOW MEETING IN FOG—VIOLATION OF SPEED AND NARROW CHANNEL RULES.

A collision occurred in the Delaware river between a steamship down-bound and a schooner passing up in tow of a tug by hawser. There was a fog and both steamship and tug were sounding proper fog signals. The steamship was in about the middle of the channel while the tug and tow were on the western side of the river. *Held*, on the evidence, that the steamship was in fault for not reducing speed when she heard or should have heard the fog signal of a towing vessel ahead which she could not see, as required by article 16 of the Inland Rules, 30 Stat. 96 (U. S. Comp. St. 1901, p. 2880); that the tug was also in fault in that, although there was a fog which increased the danger of collisions, she was with a tow on a long hawser on the wrong side of the channel without necessity, in violation of article 25 of such rules, which applies to towing tugs as well as other steam vessels.

[Ed. Note.—For other cases, see *Collision*, Dec. Dig. § 102.*]

In Admiralty. Suit for collision by Walter M. Ervin, Master of the Schooner *Dorothy B. Barrett*, against the steamship *Texas* and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

tug James McCaulley, brought in under admiralty rule 59. Decree against both steamship and tug, each for half damages.

Ward, Gray & Neary, of Wilmington, Del., for libelant.

H. Alan Dawson, of Philadelphia, Pa., and Leonard E. Wales, of Wilmington, Del., for the steamship Texas.

John F. Lewis and Francis C. Adler, both of Philadelphia, Pa., for tug McCaulley.

BRADFORD, District Judge. This suit was instituted by Walter M. Ervin, master of the schooner Dorothy B. Barrett, by the filing of a libel in rem against the Norwegian steamship Texas for the recovery of damages sustained by the former from a collision with the latter in the Delaware river December 20, 1906. All injury that was inflicted was sustained by the Barrett. Subsequently, on the petition of the Texas, the tug James McCaulley was brought in as a party respondent under rule 59 in admiralty. The collision occurred shortly after two o'clock in the afternoon not far from Marcus Hook and while the Barrett was in tow of the McCaulley. The weather, though unsettled, was not stormy; but at and for some time prior to the collision fog more or less dense prevailed on the river necessitating the use of fog signals. The Texas was proceeding down the river in charge of a duly licensed pilot of long experience on the Delaware river and bay. The Barrett in tow of the McCaulley was proceeding up the river on her way to Philadelphia without cargo and light. She was not attached to the tug save by a towing line as to the length of which there is considerable diversity of evidence. The proverbial conflict of mariners' testimony in collision cases is strikingly displayed here as to the density of the fog, the giving of proper signals, the distance between the steamship and the tug and her tow when first seen or heard, the positions of the vessels with respect to the channel of the river, the courses or directions they were respectively pursuing prior to the collision, and many other points deemed by the proctors of the several parties of more or less importance to a proper determination of the cause.

No contention has been made that the collision was the result of accident unaccompanied by culpable fault. In view of the evidence such a claim would be wholly inadmissible. Further, the evidence does not disclose actionable or substantial negligence on the part of the Barrett. In fact the Texas admits as much; for her proctors in their brief say:

"We doubt very much whether in law the schooner can be condemned for these faults [some supposed minor faults] and in our judgment the tug is wholly responsible for the collision."

The inquiry, therefore, is whether the collision was due to fault on the part of both the steamship and the tug, and if not, of which of the two. A careful examination of the evidence in connection with the briefs of the proctors has led me to the conclusion that the Texas was in fault. It appears from the evidence, direct and circumstantial,

when taken as a whole, that the Texas as she was approaching the Barrett shortly before the collision and until it became imminent was proceeding down the river not far from the center of the channel and approximately parallel to the Pennsylvania or, as it has been termed, the western shore, and that she duly conformed to the requirements of subdivision (a) of article 15 of the pilot regulations that in case of fog "a steam-vessel under way shall sound, at intervals of not more than one minute, a prolonged blast." Nor do I place any reliance upon the reckless testimony adduced on the part of the Barrett and the tug that the Texas ported her helm, swung to starboard, and headed toward the Pennsylvania shore almost at right angles, maintaining a speed of from six to ten knots through the water and thus causing the collision. That Teal, an old and experienced pilot, thoroughly familiar with the channels and waters of the Delaware river and bay, should have directed, while in his right mind and without any perceptible reason, such a suicidal course on the part of the Texas is not to be accepted for an instant. The circuit court of appeals for the third circuit in *The Menominee*, 197 Fed. 736, 117 C. C. A. 130, used language very suggestive on this point, as follows:

"That an old and experienced pilot like Schellinger who was thoroughly acquainted with the navigable channels of the Delaware should without the slightest cause and while in his senses (and there is no evidence that he was not in full possession of his faculties) should have executed or intended such a maneuver is incredible in the absence of evidence of such quality and strength as to be conclusive on the point."

But article 16 of the pilot rules provides that:

"Every vessel shall, in a fog * * * go at a moderate speed, having careful regard to the existing circumstances and conditions."

I am satisfied from the evidence that for some time before the Texas came in proximity to the Barrett and the tug the latter vessel duly complied with article 15 of the pilot rules requiring that "a steam-vessel when towing, shall, instead of the signals prescribed in subdivision (a) of this article, at intervals of not more than one minute, sound three blasts in succession, namely, one prolonged blast followed by two short blasts"; and that the fog whistle of the tug was loud and strong and either was heard by those on the Texas or should have been heard by them, had they been paying the attention the circumstances demanded, considerably before either the tug or the Barrett became visible. This was plain notice to the Texas that she was approaching a steam vessel having a tow and imperatively required the exercise of the utmost vigilance and caution on her part. Notwithstanding the testimony of those on the Texas that she was making little or no headway through the water at and for some time prior to the collision the weight of the evidence, including not only the direct testimony of witnesses but the force with which the Barrett was struck by the Texas as shown by the amount of repairs rendered necessary, establishes the fact that the Texas was moving at an improper and dangerous rate of speed which had a direct causal connection with

the collision. I see no reason why the second paragraph of article 16 of the pilot rules was not applicable to the Texas. It provides:

"A steam-vessel, bearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

It is argued on the part of the Texas that the tug had the former vessel on her starboard side and consequently was obliged to keep out of her way. But on this point it should be observed not only that the tug had the Barrett in tow, but the fog was of such a character as to render the rule inapplicable by obscuring the course if not the bearings of the vessels with respect to each other. If the Texas had promptly adopted the proper precautions as soon as the fog signal of the tug was or should have been heard by the Texas the latter vessel would not have been at fault. But this she failed to do and accordingly must bear the consequences.

The evidence also satisfies me that the tug was at fault. In her answer it is set forth that "at the time of meeting the said steamship Texas the tug McCaulley and her tow were at the extreme western edge of the navigable part of the river." Article 25 of the pilot rules provides:

"In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

And article 27 provides:

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Article 25 clearly applies to the portion of the channel in which the collision occurred. The tug was proceeding with her tow on the wrong side of the channel in direct violation of that article. It would have been "safe and practicable" within the meaning of the rule for the tug to keep on the starboard side of the channel in going up the river. Nor were there any "special circumstances" rendering a departure from the rule "necessary in order to avoid immediate danger." The fact that the tug was towing the Barrett did not confer a privilege on the former vessel to pursue a course on the port side of the channel in violation of the sailing regulations. It would have been no more unsafe for the tug with her tow to pass up the river on the starboard side of the channel than it would have been for the Texas to pass down the river on that side. Yet it would have been a fault of the Texas to so pass down the river, whereas it would have been altogether proper for the tug and her tow to pass up the river on that side. The circumstance that the tug was a towing vessel gave her no right to force the Texas from the proper side of the channel in descending the river or to adopt an illegal course for the purpose of seeing the land. If a sight of the land was necessary to the safety of navigation under the circumstances it was quite as important that

the Texas should have that sight as the tug. The tug with its tow being on the wrong side, it was especially incumbent on her to observe great vigilance and care to avoid collision. The *Taurus* (D. C.) 156 Fed. 838. The tug was not lashed to the side of the Barrett, but connected with her by a towing line of 50 or 60 fathoms in length, if not longer. The danger and impropriety of using such a line in a fog and on the wrong side of the channel must be apparent, and have been judicially recognized on one or more occasions. The tug had no right to place herself and her tow on the wrong side of the channel in a fog, and to do so without being attached to the tow by lashing or otherwise in such a manner as to control the movements of the latter from swinging with the tide or otherwise was inexcusable. Had she been so attached to the Barrett she could upon the approach of danger from the oncoming steamer in all human probability have prevented the collision by forthwith reversing and proceeding full speed astern. There is much conflicting testimony as to signals and courses, but it is unnecessary to pursue the subject further. The total damages and costs must be borne equally by the Texas and the McCaulley. Let an interlocutory decree in accordance with this opinion be prepared and submitted.

REVETT v. CLISE et al.

(District Court, W. D. Washington, N. D. September, 1913.)

No. 10.

1. COURTS (§ 314*)—FEDERAL COURTS—PARTIES—CITIZENSHIP—CORPORATIONS.

The citizenship of a corporation, for the purpose of jurisdiction of federal courts, is in the state of its creation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 314.*]

2. COURTS (§ 272*) — FEDERAL COURTS — JURISDICTION — CITIZENSHIP — RESIDENCE.

Complainant, a citizen of Colorado, sued C. and another, citizens of Washington, in the Western district of Washington and also joined N. and W., citizens and residents of New York, the G. Navigation Company, a New Jersey corporation authorized to do business in Washington, and doing business within the district, and the G. Navigation Company, Limited, a Washington corporation, charging that the individual defendants had entered into a conspiracy to organize the corporations named and secure the subscription of capital stock by irresponsible third persons; that the individual defendants were the sole owners of all the stock of both corporations, but carried it on the books of the corporations in other names; that the stock of the corporations was unpaid; that the New Jersey corporation purchased certain steamships and chartered them to the Washington corporation, in order to relieve the New Jersey corporation from all liability for their operation; that the New Jersey corporation never engaged in the transportation business, but both corporations maintained the same office and were represented by the same person; that complainant secured a judgment for breach of a transportation contract against the Washington corporation, but that this corporation had no assets, and about the time of the rendition of the judgment transferred

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all of its assets to the New Jersey corporation; and that, in order for complainant to enjoy the benefit of his judgment, it was necessary that the New Jersey corporation be required to pay the same—and prayed that the individual defendants be compelled to pay into court a sufficient sum on their subscriptions in the name of third persons for the stock of the Washington corporation to satisfy the judgment. *Held*, that N. and W., citizens and residents of New York, and the New Jersey corporation, could not be required to answer a demand for judgment in personam against them without their consent in the federal court sitting in Washington, even though they might be doing business within the district and have a general agent pursuant to the laws of Washington, under Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (U. S. Comp. St. Supp. 1911, p. 150), providing that no civil suit shall be brought in any District Court against any person in any other district than that whereof he is an inhabitant, but, where jurisdiction is founded on diversity of citizenship, suit shall be brought only in the district of the residence of either plaintiff or defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 811; Dec. Dig. § 272.*]

3. COURTS (§ 269*)—FEDERAL COURTS—JURISDICTION—CLAIM TO PROPERTY.

Such cause of action was not to establish a claim to real property in the district, or to enforce a lien or remove a cloud on the title to real or personal property, and therefore was not maintainable in Washington under Act Cong. March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), providing that when, in any suit commenced in any Circuit Court of the United States to enforce any lien or equitable claim on or claim to, or to remove any incumbrance or claim or cloud on, the title to real or personal property within the district where the suit is brought, one or more of the defendants thereto shall not be inhabitants of or found within the district, or shall not voluntarily appear thereto, it shall be lawful for the court to direct the defendants to appear, etc.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*]

In Equity. Bill by Ben Stanley Revett against J. W. Clise and others. On objection by defendants William Nottingham, H. S. Wilkinson, and the Globe Navigation Company to the jurisdiction, on the ground that neither complainant nor defendants are residents or citizens of the district or state of Washington. Objection sustained.

Richard Saxe Jones and James A. Snoddy, both of Seattle, Wash., for complainant.

H. R. Clise and C. K. Poe, both of Seattle, Wash., for defendants.

NETERER, District Judge. The complainant, a citizen of the state of Colorado, brings this action against J. W. Clise and H. R. Clise, citizens of the state of Washington and of this district, William Nottingham and H. S. Wilkinson, citizens and residents of New York, the Globe Navigation Company, a corporation of the state of New Jersey, authorized to do business under the laws of the state of Washington, and doing business within this district, and the Globe Navigation Company, Limited, a corporation of Washington, and charges the defendants Clise, Nottingham, and Wilkinson with entering into a conspiracy for the purpose of organizing the corporations named and securing the subscription of capital stock of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

corporations by irresponsible third parties, and alleges that they are the sole owners of all of the capital stock of each of the said corporations, but carry it on the books of the company in other names; that the capital stock of the corporations is unpaid; that the New Jersey corporation purchased three steamships for the sum of \$300,000, and executed a charter to the Washington corporation, so that it might appear to operate the vessels and to relieve the parent corporation from all liability in the operation thereof; that the New Jersey corporation also proceeded to build five sailing vessels for the purpose of carrying lumber and other merchandise, and for a long period of years prior to 1913 said sailing vessels were operated by the Globe Navigation Company, Limited, the Washington corporation, under various charters from the Globe Navigation Company of New Jersey; that in pursuance of such conspiracy the Globe Navigation Company of New Jersey never itself entered upon or engaged in the business of carrying freight or passengers for hire, but that the business of the said corporations was operated by the Globe Navigation Company, Limited, of Washington; that, as a part of the conspiracy, J. W. Clise was given the control and management of the business of both corporations, maintaining offices in Seattle, Wash.; that the plaintiff in the year 1905 entered into an agreement in writing with the Globe Navigation Company, Limited, for the transportation of certain freight to the port of Nome in the territory of Alaska; that a breach of said contract was made; that the complainant brought an action in the Washington courts against the said corporation, obtained judgment for a sum in excess of \$8,000; that execution was issued, and return by the sheriff of nulla bona was made; that supplemental proceedings under the laws of Washington were prosecuted, and it was ascertained that the Globe Navigation Company, Limited, against which the said judgment was obtained, had no assets of any kind; that at about the time of the rendition and entry of said judgment the Washington corporation, for the purpose of defrauding complainant, transferred all of its assets to the New Jersey corporation; that demand was made upon William Nottingham, H. R. Clise, J. W. Clise, and H. S. Wilkinson, and the Globe Navigation Company of New Jersey, for the payment of such judgment, but same was refused; that in order for the complainant to enjoy the benefit of his judgment it is necessary that the Globe Navigation Company of New Jersey be required to pay the same, and that William Nottingham, J. S. Wilkinson, H. R. Clise, and J. W. Clise be compelled to pay into court a sufficient sum upon their subscription made in the name of third parties for the stock of the Globe Navigation Company, Limited, to satisfy this judgment; and judgment is prayed to that effect.

The defendants Clise have filed separate answers. The defendants Nottingham and Wilkinson and Globe Navigation Company, appearing separately and specially for such purpose, object to the jurisdiction of the court on the ground that neither the complainant nor the defendants are residents or citizens of this district or of the state of Washington.

The provisions of the Judicial Code of the United States, which are necessary for the court to consider, are as follows:

"Sec. 51. * * * No civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 50 provides:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

[1] The citizenship of a corporation, for the purpose of jurisdiction of the federal courts, is in the state of its creation. *St. Louis & S. F. Ry. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *Southern Ry. v. Allison*, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078; *Louisville Ry. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; *Baldwin v. Pacific Power & Light Co.* (D. C.) 199 Fed. 291.

[2] *Nottingham and Wilkinson*, citizens and residents of New York, and the *Globe Navigation Company*, being a New Jersey corporation, could not be required to answer a demand for judgment in personam without their consent in this court; this not being the district of the citizenship and residence of *Wilkinson* and *Nottingham*, nor the district of the creation of the *Globe Navigation Company*, even though it may be doing business in this district and have a general agent pursuant to the laws of Washington. *Judicial Code*, § 51; *Shaw v. Quincy*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; *Western Loan Co. v. Butte & Boston Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 31 Sup. Ct. 81, 54 L. Ed. 1069; *Puget Sound Sheet Metal Works v. Great Northern Ry.* (D. C.) 195 Fed. 350.

[3] It is contended that by the provisions of the act of 1875, supplemented by the act of 1888, it was the intention to give jurisdiction to any question between parties residing in different states; where several defendants were joined, and some of them served in the district of their residence, and the interests of all were joint or the business "really local," all could be sued in the locality where such business was conducted; and emphasis is placed upon section 8 of the act of 1875. Section 8 of the act of 1875 provides, in substance, that when, in any suit commenced in any Circuit Court of the United States to enforce any *lien* or equitable claim upon or claim to, or to remove any incumbrance or *claim* or *cloud* upon the title to, real

or personal property within the district where such suit is brought, one or more of the defendants thereto shall not be inhabitants of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing the defendants to appear, and provides for process and hearing, and adjudication of such suit in the same manner as if the said absent defendants had been served with process within the said district, "but said adjudication shall, as regard to said absent defendants, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein within such district."

Manifestly, it appears to me from the allegations of the complaint and the prayer for relief that the contention is not well taken. Paragraph 21 of the complaint reads as follows:

"That in order that complainant may have, receive, and enjoy the benefit of his judgment hereinbefore set forth, it is necessary that the Globe Navigation Company (of New Jersey) be required to pay, and that William Nottingham, H. S. Wilkinson, J. W. Clise, and H. R. Clise, the real owners of the capital stock and the real incorporators of Globe Navigation Company, organized under the laws of New Jersey, be compelled to pay into this court a sufficient sum upon their subscription so made by and in the name of E. F. Johnston and otherwise for the stock of the Globe Navigation Company, Limited, to satisfy such judgment, together with interest thereon and the costs and disbursements of this action."

And the prayer reads:

"Wherefore complainant prays that testimony be taken as to the facts in regard to the cause above set forth and be returned to this court, and after due hearing, a final decree be entered in favor of the complainant as against the defendants herein, and each and all of them, decreeing their true and full interest in this matter, and for the full amount of complainant's judgment, with interest and costs."

I am of opinion that in no sense can the cause of action be said to belong to the exceptional cases referred to in section 8. It is not an action to establish a "claim to" real property in the district, or enforce a lien or remove a cloud upon the title to real or personal property. *Ladew v. Tennessee Copper Co.*, *supra*. There is no property the subject of this suit. The action is bottomed on conspiracy, and the proceeding is in personam. Clearly complainant cannot proceed under section 8 of the act of 1875, and section 50 of the Judicial Code specifically fixes the legal status of the parties and the procedure which must be taken by this court.

The objections are sustained. An order may be accordingly entered.

In re SCHMIDT.

(District Court, W. D. Pennsylvania. August 1, 1913.)

No. 8,088.

ALIENS (§ 68*)—NATURALIZATION—CONSTRUCTION OF STATUTE.

The certificate from the Department of Commerce and Labor, which an applicant for naturalization is required to file with his petition by Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), showing the date, place, and manner of his arrival, is not necessarily the same certificate which it is provided by section 1 (U. S. Comp. St. Supp. 1911, p. 124) shall be issued to an immigrant on his registry by the Commissioner of Immigration, nor need it be made up from the record of his registry, since he may be admitted to citizenship on proof of the requisite facts, although he did not come into the United States through a regular port of entry.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

In the matter of the petition of Paul Hermann Schmidt for naturalization. Petition granted.

W. M. Ragsdale, of Pittsburgh, Pa., for the United States.

ORR, District Judge. On January 11, 1913, the petitioner filed his petition for naturalization, and attached to his petition a certificate in the form following:

"Form 526. Certificate of Arrival—For Naturalization Purposes.

"(For use of aliens arriving in United States after June 29th, 1906. To be issued immediately prior to petitioning for naturalization.)

"Department of Commerce and Labor,
"Immigration Service.

"Port of Pittsburgh, Pa., 12-31-12.

"The immigration records at this port show the following as to the alien named below:

"Name of alien: Paul Hermann Schmidt.

"Date of arrival: November 15, 1906.

"Name of vessel: Kaiser Wilhelm II. Line, N. G. L.

"[Over]

W. W. Sibray,

"[Title] U. S. Immigrant Inspector."

Indorsement:

"The above certificate does not purport to verify the landing or admission of the alien described therein, but investigation indicates that according to the records of the consul general of Germany, New York, one Paul Schmidt deserted the steamship Kaiser Wilhelm II on November 15, 1906. He therefore entered without inspection under the immigration laws, and no registry was made at the time of his arrival. It is granted solely for the purpose of allowing the alien to file a petition, so that the court in which petition is filed may judicially determine whether the certificate of arrival required by section 4 must be made up from the registration prescribed in section 1 of the Naturalization Act. This point should be brought to the attention of the court in every case in which it is used."

At the hearing of the petition it appeared that the applicant was born at Gersdorf, Germany, on May 12, 1888; that he came to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this country November 15, 1906; that he was 18 years of age at the time he left his native country; that by reason of his age it was impossible for him to secure a passport; that he secured employment in a kitchen of the steamship Kaiser Wilhelm II; that he deserted that steamer in the harbor at New York; and that he was not inspected by the immigration authorities.

The government contends that the certificate attached to the petition of the applicant was not a sufficient compliance with the requirements of section 4 of the act of June 29, 1906, commonly known as the Naturalization Act. As there are several cases in which a similar certificate has been presented, this court deems it proper to express its reasons why the contention of the government cannot prevail. The only question is whether or not such a certificate is in compliance with the law.

Section 1 of the Naturalization Act provides in part as follows:

"That it shall be the duty of the said bureau to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof."

There is in that language no duty imposed upon the alien, but rather upon the commissioners of immigration. There is no provision in the act requiring the alien to take the certificate at the hand of the commissioners and to preserve the same.

In section 4 of the same act, after provisions as to residence and as to the form and contents of the petition for citizenship and its verification by witnesses, there is this provision:

"At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrived in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made part of said petition."

There is no provision in the act that the certificate required to be attached to the petition is the same certificate of registry that the commissioners of immigration should cause to be given to the alien. The certificate to be filed with the petition for naturalization provides only that it shall set forth the "date, place, and manner of his arrival." The certificate of registry would include, in addition, occupation, personal description in detail, place of birth, last place of residence, and the intended place of residence in the United States.

The government contends that it was the intention of Congress, in requiring a certificate of arrival into the United States, and in establishing a means of providing said certificate, to prevent abuses in the administration of the old law by requiring at least a five years' registration before a petition for naturalization should be filed. It

is contended that the certificate of arrival in the United States is the evidence to the court of the period of residence required before citizenship may be conferred upon the alien.

We cannot agree with that contention. It is interesting to note that the certificate of arrival required by the act of June 29, 1906, is not wholly new. On April 14, 1802, Congress passed a naturalization law (Act April 14, 1802, c. 28, 2 Stat. 153) providing, among other things, for the registration of aliens who contemplate naturalization, a certificate of which registration could be used as "evidence of the time of his arrival within the United States." The material provisions of that act are as follows:

"Sec. 2. * * * All free white persons, being aliens, who may arrive in the United States after the passing of this act, shall, in order to become citizens of the United States, make registry, and obtain certificates, in the following manner, to wit: Every person desirous of being naturalized shall * * * make report of himself * * * to the clerk of the District Court where such alien or aliens shall arrive, * * * and such report shall ascertain the name, birthplace, age, nation and allegiance of each alien, * * * and it shall be the duty of such clerk * * * to record the same in his office, and to grant to the person making such report * * * a certificate under his hand and seal, * * * and such certificate shall be exhibited to the court by every alien who may arrive in the United States, after the passing of this act, on his application to be naturalized, as evidence of the time of his arrival within the United States."

It is curious to note that that act of 1802 came under the notice of the great Chief Justice Marshall in *Spratt v. Spratt*, 4 Pct. 393-405 (7 L. Ed. 897). He says:

"As James Spratt arrived within the United States after the passage of the act of 1802, he is embraced by the second section of that act, and was under the necessity of reporting himself to the clerk, as that section requires. Must this report be made five years before he can be admitted as a citizen? The law does not in terms require it. The third condition of the first section provides 'that the court admitting such alien shall be satisfied that he has resided within the United States five years at least, but does not prescribe the testimony which shall be satisfactory. This section was in force when James Spratt was admitted to become a citizen, and was applicable to his case. But the second section requires, in addition, that he shall report himself in the manner prescribed by that section, and requires that such report shall be exhibited, 'on his application to be naturalized, as evidence of the time of his arrival within the United States.' The law does not say that this report shall be the sole evidence, nor does it require that the alien shall report himself within any limited time after his arrival. Five years may intervene between his arrival and report, and yet the report will be valid. The report is undoubtedly conclusive evidence of the arrival, and must be so received by the court; but if the law intended to make it the only admissible evidence, and to exclude the proof which had been held sufficient, that intention ought to have been expressed. Yet the inference is very strong, from the language of the act, that the time of arrival, must be proved by this report, and that a court, about to admit an alien to the rights of citizenship, ought to require its production."

While the language just quoted from the opinion in that case was collateral to the issue there decided, it is illuminating as revealing the attitude of the constructive jurist toward the naturalization laws.

It is not for the courts to embody in an act of Congress something which is not clearly to be found therein. The applicant in the case at bar, like James Spratt, was under the necessity of procur-

ing a certificate. He was under the necessity of reporting himself to the department, while James Spratt was under the necessity of reporting himself to the clerk. He can no more be required to permit five years to elapse between his report to the department than James Spratt was required to make his report five years before he was admitted to citizenship. The real reason is that the act does not require it. That the department might desire to create a uniformity in matters wherein the act of Congress is deficient is easily understood, but it is beyond their power in this instance.

It does not seem to us that the naturalization laws and the immigration laws are so interdependent that, because an alien has entered this country in violation of the immigration laws, he should not be admitted to citizenship by virtue of the naturalization laws after the proper judicial action contemplated by the latter has been had. The immigration laws by their provisions recognize that immigrants come to the United States other than through a port of entry or in the regular channel provided by said laws and the general rules of the department. This is plain from the provision that within a period of three years they may be deported. That a man may have come into this country in violation of the immigration laws is a fact perhaps to be considered by the court in reaching the conclusions required before the alien may be admitted to citizenship; but it is not a ground for his exclusion from citizenship, else it would have been so provided in the acts of Congress.

Citizenship is granted by a court of record after a hearing, and the court must be satisfied as to the residence of the alien, as to his good moral character, as to his attachment to the principles of the Constitution and to his being well disposed to the good order and happiness of the United States.

Our attention has been called to several cases where this same matter has been considered. One is the Matter of Dell Hayes Laverne Page, by Judge Tuttle, of the District Court of the United States for the Eastern District of Michigan, under date of April 14th last, in which he admitted to citizenship a man who was not registered at the time of his entrance to the country and who presented a nunc pro tunc certificate.

Judge Day, of the District Court for the Northern District of Ohio, in the matter of the application for naturalization of Edward Hollo, seems to have reached a different conclusion. Without considering his opinion in detail, with which we are at variance, we have noted that he uses the following language:

"The certificate offered by the applicant is simply a record of a statement made by him. It is not verified, and it is at most a formal record of what he said to the immigration authorities."

The learned judge seems to have overlooked the fact that the certificate need not be based upon the statement of the applicant alone, but upon the records of the department, or, if they are deficient, then upon such other evidence as may satisfy the department of the truth of the facts stated in the certificate.

We are satisfied that the applicant in the present case, and the other applicants in this court, who have filed similar certificates, have rightfully procured their certificates from the department according to law, and that because they have complied with the law in all respects, and have satisfied the court as to their qualifications, they should be admitted to citizenship.

I am authorized to state that Judge YOUNG concurs in this opinion.

UNITED STATES, for Use of JENNINGS et al., v. COOKE et al. (MINNEY et al., Interveners).

(District Court, E. D. Washington, N. D. August 6, 1913.)

No. 1,581.

1. CONTRACTS (§ 284*)—CONSTRUCTION CONTRACTS—PERFORMANCE—DECISION OF ENGINEER.

It is competent for the parties to a building or construction contract to make it a term of their contract that the decision of an engineer or other officer of all or specified matters of dispute shall be final and conclusive as between them, and in the absence of fraud or mistake so gross as to necessarily imply bad faith the decision of the umpire so selected will not be subjected to the revisory power of the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1292-1302, 1308-1310, 1312-1316, 1326-1338, 1340-1342, 1344-1346, 1350, 1351; Dec. Dig. § 284.*]

2. CONTRACTS (§ 198*)—CONSTRUCTION—EXCAVATION WORK—"ROCK IN PLACE."

Cement gravel *held* not to constitute "rock in place," within the meaning of provisions of a contract classifying material to be excavated.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-877, 879-883; Dec. Dig. § 198.*]

For other definitions, see Words and Phrases, vol. 7, p. 6265.]

3. CONTRACTS (§ 47*)—VALIDITY—CONSIDERATION.

A circular letter, sent by the general contractors for government construction work to subcontractors, stating that they had raised the prices on certain classes of the work, *held*, under the evidence, not to have constituted a contract binding on the contractors for lack of consideration; the proposal being furthermore subject to certain stated conditions, which it did not appear that the subcontractors had fulfilled.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 220, 221, 256-258; Dec. Dig. § 47.*]

At Law. Action by the United States, for the use and benefit of P. A. Jennings and all other creditors of the defendants, against George Cooke, G. F. Cooke, and W. H. Cooke, copartners as George Cooke & Sons, and the National Surety Company, defendants, in which Homer Minney and W. J. Maxwell, copartners as Minney & Maxwell, James Lineham, W. L. Carpenter, O. F. Leonard, Samuel Bowles, P. O. Berglund, and W. E. Rahier intervened. Judgment for plaintiffs and interveners.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Post, Avery & Higgins, of Spokane, Wash., for plaintiffs and interveners Minney & Maxwell.

H. J. Snively and Ralph B. Williamson, both of North Yakima, Wash., for interveners Lineham, Carpenter, Leonard, Bowles, Berglund, and Rahier.

Robertson & Miller, of Spokane, Wash., for defendants Cooke & Sons.

E. C. Macdonald, of Spokane, Wash., for defendant National Surety Co.

RUDKIN, District Judge. On the 11th day of April, 1910, the defendants George Cooke & Sons entered into a contract with the United States for the construction of 36 miles of laterals in connection with what is commonly known as the "Tieton project" under the Reclamation Service in Yakima county in this state, according to certain advertisements, proposals, plans, and specifications which were made a part of the contract. At the same time Cooke & Sons executed a bond to the United States in the penal sum of \$30,000, with the defendant National Surety Company as surety, conditioned for the faithful performance of this contract and prompt payment to all persons supplying labor and material for the prosecution of the work provided for, as required by the acts of Congress in such cases made and provided. On the 21st day of September, 1911, P. A. Jennings, a subcontractor under Cooke & Sons, commenced an action in this court on the bond in the name of the United States to recover from the contractors and the surety company a balance of \$5,181 alleged to be due under the subcontract with Cooke & Sons. Thereafter Minney & Maxwell, James Lineham, W. L. Carpenter, and O. F. Leonard, subcontractors under Cooke & Sons, and Samuel Bowles, P. O. Berglund, and W. E. Rahier, subcontractors under Minney & Maxwell, filed their complaints in intervention, likewise claiming a balance due from the principal contractors and the surety company under the terms of their several contracts.

Issues have been made up, and by stipulation of parties the case was tried by the court without a jury. The original contract and each of the subcontracts classify the material to be removed or excavated in the construction of the laterals as follows:

"Class 1. All material that is loose and can be handled with scrapers, and all material that can be plowed by a six horse team, each animal weighing not less than 1,400 pounds, attached to a suitable plow, all well handled by at least three men; also all loose rocks in pieces not exceeding two cubic feet in volume occurring in loose material or in material that can be thus plowed.

"Class 2. All material not included in classes 1 and 3.

"Class 3. All rock in place that cannot be removed without the use of powder, and all detached masses of rock exceeding ten cubic feet in volume."

The several contracts also contain the following stipulations:

"It is mutually agreed between said parties that to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, that the said chief engineer or assistant engineers shall be and hereby is made an umpire to decide all matters arising or growing out of this contract between them."

"It is further mutually agreed and expressly understood that the decision of said chief engineer on any point or matter touching this agreement shall be final and conclusive between the parties hereto, and each and every of said parties hereby waives any and all right of action, suit or suits, or other remedy, in law or otherwise, under this contract, or arising out of the same."

"And the said first party, in consideration of the fulfillment and performance of all the stipulations contained in this contract by said second party, to be by said second party fulfilled and performed, and whenever said work shall have been, in the opinion of said chief or assistant engineers, completely finished in every respect, and performed agreeably to the various stipulations and specifications of this agreement, and said chief or assistant engineers shall have furnished to said first party a certificate of the fact under his hand, together with his estimate of the quantities of the various kinds of work done by said second party under this agreement, which estimate shall be final and conclusive between the parties hereto, will pay to said second party, within thirty days after said certificate and estimate shall have been furnished by said chief engineer, the sum which may be due under this contract, agreeably to said estimates, at the following rates and prices."

The rates differ in the different contracts, but all are based on the same classification. In addition to the construction contract, the contractors further agreed to furnish supplies to the subcontractors at cost, with 10 per cent. added. The contracts for supplies were oral in all cases, and the witnesses naturally differ as to the language used. The terms of the supply contracts, if such they may be called, are perhaps correctly stated in a telegram and letter sent by the contractors to the subcontractor Lineham before the contracts were let. The telegram reads:

"Pay roll and furnishing supplies optional. If we handle, charge 10 per cent."

This was explained in a letter of the same date as follows:

"We stated in our telegram that the handling of the pay roll and furnishing supplies were optional with you. This was in part an error, as we invariably make a stipulation with subcontractors that we shall furnish supplies, for which we charge 10 per cent. above actual cost, including freight. In case, however, you should wish to buy your supplies elsewhere, you would be perfectly free to do this, provided we receive the said 10 per cent. As to the pay roll, this is entirely optional with you. If you wish us to handle it, we will charge the 10 per cent. as stated."

On the 13th day of October, 1910, the contractors sent to the subcontractor Lineham the following letter:

"We have this day raised the prices on various classes of material covered by your contract with us, dated May 2, 1910, as follows:

"Excavation—Class No. 2, .48 (forty-eight cents).
" — " No. 3, 1.00 (one dollar).

"Subject to the following provision: That you make a corresponding increase in the prices paid by you to your subcontractors, and that you pay the cost of liability insurance, which amounts to one-half of 1 per cent. of your gross pay roll; also that you complete your work in the time allowed by the government engineer."

Similar letters were sent to all other subcontractors under Cooke & Sons, but the date of the contracts and the amount of the increase were not the same in all cases.

Under the foregoing facts the following claims are made by the respective parties:

First. The subcontractors under Cooke & Sons, other than Jennings and Minney & Maxwell, seek to avoid the force and effect of the certificate of the chief engineer of the Reclamation Service, or his assistants, because of their classification in part of what is commonly known as cement gravel under class 2 and their failure to classify it as "rock in place that cannot be removed without the use of powder, and all detached masses of rock exceeding ten cubic feet in volume," under class 3.

Second. The plaintiff Jennings and all interveners, claim that they were entitled to purchase powder and other explosives from Cooke & Sons under the terms and conditions of the contracts for supplies; whereas, the defendants Cooke & Sons and the surety company claim that powder and other supplies were furnished under a special contract and at a price considerably in excess of that fixed by the supply contracts.

Third. The plaintiff Jennings and all interveners claim that the increase of prices fixed by the letters of October 13th applied and extended to all excavations made under their respective contracts, while the defendants Cooke & Sons claim that the increase only applied to work performed and excavations made subsequent to the date of the letter. The defendant Cooke & Sons and the surety company further claim that the promise to pay the increased rates was without consideration and void.

[1] 1. It is entirely competent for parties to a contract of this kind to make it a term of their contract that the decision of an engineer or other officer of all or specified matters of dispute that may arise during the execution of the contract shall be final and conclusive as between them, and in the absence of fraud or mistake so gross as to necessarily imply bad faith the decision of the umpire so selected will not be subjected to the revisory power of the courts. *United States v. Gleason*, 175 U. S. 588, 602, 20 Sup. Ct. 228, 44 L. Ed. 284. And before the contractor can recover any sum in excess of the sum allowed in the final certificate of the engineer, he must show that the latter, in making his final estimate, was guilty of collusion or fraud, or exhibited such an arbitrary and wanton disregard of the rights of the contractor under the contract as to be equivalent to fraud, or that he committed errors or mistakes to the prejudice of the contractor so palpable and so gross as to leave no doubt in the mind of the court that a grave injustice has been done. *Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co. (C. C.)* 140 Fed. 465, 468.

The reasons for this rule are obvious. As said by the court in *Choctaw & M. R. Co. v. Newton*, 140 Fed. 225, 233, 71 C. C. A. 655, 663, in speaking of a similar contract:

"Such stipulations are evoked out of the experience of railroad companies in such construction work. From its very nature, extending over a long line of road, with diversified topography of country, encountering many varieties of geological formation, and difficulties impossible to anticipate, the variant views and notions of contractors and subcontractors respecting the infinite details of the work, the classification and measurement of material, the prevention of incessant wrangles over the work, with its annoyances and litigation,

justified the railroad company in requiring as a condition precedent to letting the construction of this work, the acceptance of the foregoing provisions of the contract. The contractor is presumed to protect himself against possible loss resulting from any adverse judgment of the engineer by the amount of his bid; and when litigation arises over the decisions and award of such an umpire the courts cannot, without making a new contract for the parties, disregard such positive provisions, or set aside the action of the umpire, except for the most grave and cogent reasons."

[2] Viewing the testimony in the light of this established rule, I am satisfied that the decision or classification made by the engineers of the Reclamation Service must stand. It is not charged that they were guilty of any actual fraud, nor can I find such gross errors or mistakes as would of necessity imply fraud or bad faith on their part. On the contrary, I am inclined to agree with those experts who testified that the classification made was liberal and just to the contractors. While "rock" is a very comprehensive term in geology, in a construction contract such as this the term "rock in place" must have a far more restricted meaning, and it occurs to me that neither hardpan nor cement gravel are properly classified under that head. The expense of excavating the material or the necessity for blasting was not adopted as the criterion for classification. In *Wilkin v. El-lensburgh Water Co.*, 1 Wash. 236, 24 Pac. 460, it was held that cement gravel came within the classification of "earth and gravel" in a contract of a similar kind, and, if so, it could under no possible circumstances be classified as rock in place. In the language of the court in the case cited:

"We cannot, therefore, say that excavating 'cement gravel' was not contemplated by the parties to the contract, or that plaintiffs are entitled to recover compensation for removing it, beyond the price specified. On the contrary, we are of the opinion that the contract price must be the measure of plaintiffs' compensation. Plaintiffs may have made a bad bargain; but, if so, it is their misfortune, and they can be afforded no relief in this action."

2. I am also of opinion that powder and other explosives were not expressly excepted from the contract for supplies, and I see no satisfactory reason why they should be excepted by implication or by reason of custom. But there is another reason why the claim of the defendants cannot be accepted. If these articles were not included in the contract for supplies, the price was not controlled by contract at all, for the act of the contractors in sending slips for each purchase stating a price, against which the purchasers constantly and repeatedly protested, would not and did not establish a contract, express or implied. As a result, therefore, the defendants are at most entitled to offset against the demands of the subcontractors the reasonable value of the powder and other explosives furnished at the time and place of delivery, and no evidence was offered upon that basis. True, some evidence was offered tending to show a general custom among contractors to make an arbitrary charge for powder and explosives, regardless of the actual or reasonable value, or of the time or place of delivery; but such testimony did not establish or tend to establish the market value. The value of the powder and other explosives must therefore be fixed in accordance with the terms of the supply con-

tracts, because there is no other basis upon which the court can act. The testimony satisfies me that under these contracts the contractors were entitled to a net profit of 10 per cent. over and above cost. The fact that they were to receive the 10 per cent. on supplies purchased by subcontractors from third parties affords cogent proof in support of this construction. The defendants will therefore be allowed as an offset against the demands of the plaintiff and interveners the first cost of powder and other explosives, the cost of transportation and handling, to which will be added the 10 per cent. profit reserved to the contractors.

[3] 3. The circular letter of October 13th, mailed or delivered to the various subcontractors, is ambiguous on its face. The expression, "We have this day raised the prices on various classes of material covered by your contract with us," might be construed to apply either to the entire contract or to the uncompleted portions only. The court is therefore at liberty to look to the prior negotiations of the parties and all the surrounding circumstances in order to give effect to their intent. When this is done, I am convinced that the contractors had in mind the entire contract and all excavations included therein; and if the contract is valid, and founded upon a sufficient consideration, it must be enforced as written. The previous negotiations referred to raise a grave doubt in my mind as to the validity of the contract on grounds of public policy. It clearly appears from the testimony that the main object and purpose of the increase was to induce the engineers of the Reclamation Service to give to the contractors, and as a result to the subcontractors, a more favorable classification of material than they had theretofore been receiving. It was the duty of the engineers to classify the material justly and properly—a duty they owed to both the government and the parties—and any contract or agreement entered into for the purpose of influencing them in the discharge of that duty would seem to be against sound public policy and utterly void.

But, aside from this, what was the consideration for the promise to pay the increased prices? First. That the parties to whom the promise was made should make a corresponding increase in prices to their subcontractors. So far as the record discloses, some of them had no subcontractors, and it does not appear that any of them have paid their subcontractors at the increased rate, or that they have obligated themselves so to do. Some of them testified in a general way that they had furnished statements or made settlements; but the testimony in this regard is extremely general and indefinite, and cannot be said to establish a legal obligation on their part. The second requirement was that the subcontractors should pay the liability insurance, which it seems the contractors had taken out in their behalf and probably paid for. At least, none of the subcontractors have paid the liability insurance, or incurred any legal obligation therefor, so far as the record discloses. The third requirement was that the contract should be completed within the time allowed by the government engineers—something the parties were already obligated by contract to do. Perhaps the weight of authority is to the effect that a promise

to do that which a party is already obligated to do by law or by contract is without consideration and void. Many cases hold, however, that if one of the parties to a contract refuses to perform, and the other party promises to pay an increased price in consideration of performance, the latter promise is founded upon a valid consideration. *Domenico v. Alaska Packers' Ass'n* (D. C.) 112 Fed. 554, and cases cited.

But this case does not fall even within this exception. There is no testimony tending to show that any of the subcontractors refused to perform their contract, so as to support a new promise to pay at an increased rate. On the entire record, I am therefore of opinion that the accounts as stated by the contractors must stand, except as to the items for powder and other explosives. If the parties are unable to agree upon the prices for these items under the rule laid down by the court, the matter will receive further attention at some future day.

Let findings and judgment be prepared accordingly.

MURRAY v. PACIFIC COAST S. S. CO.

(District Court, W. D. Washington, S. D. September 16, 1913.)

No. 1,232.

1. SHIPPING (§ 86*)—INJURY TO STEVEDORE—ACTION—NATURE AND FORM.

An action by a longshoreman to recover damages against a steamship corporation owning the ship in which he was working at the time of his injury, charging that the injury was caused by defendant's negligence, and alleging that at the time of the injury defendant was in default in the payment of the accident funds used for compensation of injured workmen, required by Washington Workmen's Compensation Act (Laws 1911, c. 74), and that the same was therefore not applicable, was a suit to enforce a common-law remedy in personam and not a proceeding against any res, independent of a personal defendant, and was therefore not exclusively within the jurisdiction of admiralty.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353-360; Dec. Dig. § 86.*]

2. CONSTITUTIONAL LAW (§ 46*)—CONSTITUTIONAL QUESTION—DETERMINATION.

Where, in a suit by a longshoreman for injuries alleged to have resulted from defendant's negligence, plaintiff charged that defendant was in default in the payment of accident funds used for the compensation of injured workmen, and that demand had been made for the payment of the amount due, for which reason Washington Workmen's Compensation Act (Laws 1911, c. 74) was inapplicable, defendant's contention that the suit was unconstitutional would not be determined, since whether unconstitutional or inapplicable it was no bar to plaintiff's right to enforce his common-law remedy.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

At Law. Action by John Murray against the Pacific Coast Steamship Company. On demurrer to defendant's answer. Sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Bone & Wright and Grant A. Dentler, all of Tacoma, Wash., for plaintiff.

Farrell, Kane & Stratton, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. This cause is for decision upon plaintiff's demurrer to the defendant's answer, alleging the unconstitutionality, as between plaintiff and defendant, of the Workmen's Compensation Act of the state of Washington (Laws of 1911, p. 345), under which it is claimed plaintiff sues.

The action is one in personam to recover damages for an injury to plaintiff, received, while in the employ of the defendant as a longshoreman, at work stowing away wheat then being loaded in the hold of one of defendant's vessels lying at the wharf in Tacoma. The injury is charged to have been caused by defendant's negligence.

In plaintiff's amended complaint it is alleged that the defendant is a California corporation, maintaining an office for the transaction of its business in the county of Pierce, state of Washington, and engaged in transporting freight by water from and to the port of Tacoma. Paragraph X of the complaint alleges:

"That, at the time said injury was inflicted upon the plaintiff as aforesaid, the defendant was in default in the payment to the accident funds used for the compensation of injured workmen of its percentage of its total pay roll, according to the schedule made and provided by law, and demand for such payment had been made upon the defendant by the State Industrial Insurance Department of the state of Washington long prior to the time said injury was inflicted upon said plaintiff as aforesaid."

The Washington Compensation Law provides an industrial insurance for workmen injured in certain employments classed in the act as "extra hazardous." The fund from which said workmen are to be paid is raised by a tax upon the employers, based on a varying table of percentages on their pay rolls for the year. Stevedoring and longshoring are classed as "extra hazardous," and the tax on these employers is fixed at ".030." The act provides:

"* * * All phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.

"Sec. 8. If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or the husband, wife, child or dependent of such workman in case death result from the accident), as he would have been prior to the passage of this act.

"In case the recovery actually collected in such suit shall equal or exceed the compensation to which the plaintiff herein would be entitled under this act, the plaintiff shall not be paid anything out of the accident fund; if the said amount shall be less than such compensation under this act, the accident

fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the state for the benefit of the accident fund. In any suit brought upon such cause of action the defense of fellow servant and assumption of risk shall be inadmissible, and the doctrine of comparative negligence shall obtain. Any such cause of action assigned to the state may be prosecuted or compromised by the department in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department." Pages 345, 346, 362, and 363.

The answer alleges that this act is unconstitutional, as between the parties to this suit, because it contravenes sections 1 and 2, art. 3, section 8, art. 1, of the Constitution of the United States, the fifth, seventh, and section 1 of the fourteenth amendments to the Constitution, and section 21, art. 1, of the Constitution of the state of Washington.

Plaintiff relies upon the following authorities: *Munn v. Illinois*, 94 U. S. 113-134, 24 L. Ed. 77; *State v. Heldenbrand*, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743; *Danforth v. Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495; *Pittsburgh, Cincinnati, Chicago & St. L. Ry. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *J. L. Stoll v. Pacific Coast S. S. Co. (D. C.)* 205 Fed. 169; *American Steamboat Co. v. Philip B. Chace, Adm'r*, 83 U. S. (16 Wall.) 522, 21 L. Ed. 369; *Schoonmaker et al. v. Gilmore et al.*, 102 U. S. 118, 26 L. Ed. 95; *Garcia y Leon v. Galceran et al.*, 78 U. S. 185, 20 L. Ed. 75; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Moses Taylor v. Hammons*, 71 U. S. (4 Wall.) 411, 18 L. Ed. 397; *Steamboat Ad. Hine v. Mathew R. Trevor*, 71 U. S. (4 Wall.) 555, 18 L. Ed. 451; *Knapp, Stout & Co. v. John McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921.

Defendant relies upon the following cases: *Steamboat Ad. Hine v. Trevor*, 4 Wall. 555, 18 L. Ed. 451; *Gerrity v. The Kate Cann (D. C.)* 2 Fed. 241; *Leathers v. Blessing*, 105 U. S. 626, 26 L. Ed. 1192; *The Strabo (D. C.)* 90 Fed. 110; *Grimsley v. Hankins (D. C.)* 46 Fed. 400; *Levy v. McCartee*, 6 Pet. 108, 8 L. Ed. 337; *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 583, 43 L. Ed. 873; *Cowhick v. Shingle*, 5 Wyo. 87, 37 Pac. 692, 25 L. R. A. 608, 63 Am. St. Rep. 17; *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 500, 37 L. Ed. 345; *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717; *The Roanoke*, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770; *The Lyndhurst (D. C.)* 48 Fed. 839; *New Zealand Ins. Co. v. Earnmoor S. S. Co.*, 79 Fed. 368, 24 C. C. A. 644; *Laidlaw v. O. R. & N. Co.*, 81 Fed. 876, 26 C. C. A. 665; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 181, 36 C. C. A. 135; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Ex parte Wood (C. C.)* 155 Fed. 190.

This cause was begun in the state court and removed to this court. Paragraph X of the complaint (above quoted) brings the action within the exception named in the Compensation Act.

Section 2 of article 3 of the Constitution of the United States provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." The Federal Judiciary Act provides:

"The district courts shall have jurisdiction as follows: * * * Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine." Section 563, R. S.; volume 4, Fed. Stat. Ann. p. 220 (U. S. Comp. St. 1901, p. 457).

In the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1091 (U. S. Comp. St. Supp. 1911, p. 136), this paragraph is amended to read:

"Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize." Section 24, par. 3, p. 8.

The Judiciary Act further provided:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: * * * Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." Section 711, R. S.; Fed. Stat. Ann. vol. 4, p. 494 (U. S. Comp. St. 1901, p. 577).

This provision has been carried into the Judicial Code, without change, as section 256 (pages 87 and 88).

Defendant contends that, under the Constitution and provisions of the Judiciary Act (section 563, R. S., above quoted), the subject-matter of the present suit being such as to permit a suit in admiralty, either in personam or in rem, the jurisdiction of the admiralty court is exclusive, and that, the Compensation Act giving the remedy asked in this suit, the same is unconstitutional as affecting a case in the admiralty jurisdiction.

It would appear, although its decision in the present suit is unnecessary, that the change in the language of the Judiciary Act, as used in the Judicial Code, omitting the words:

"And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given in the circuit courts"

—which words were contained in the Judiciary Act, was made on account of the Circuit Court having been abolished by the Judicial Code and not with the purpose of permitting or granting jurisdiction to the state or common-law courts over those matters theretofore within the exclusive jurisdiction of the admiralty court, especially in view of section 711 having been carried unchanged into the latter Code.

The question is rather whether the suit is one seeking to enforce a common-law remedy "where the common law is competent to give it,"

saved and excepted from the exclusive admiralty jurisdiction by both the Judiciary Act and the Judicial Code.

[1] This suit is one seeking to enforce a common-law remedy, asking a personal judgment for damages for personal injuries, caused by negligence. It is not a proceeding against any res, independent of a personal defendant, as in those suits held to be exclusively in the admiralty jurisdiction. *Knapp v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921; *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296; *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Garcia y Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74; *The Hine v. Trevor*, 4 Wall. 555, 18 L. Ed. 451; *Stewart v. Potomac Ferry Co. (C. C.)* 12 Fed. 299; *The N. W. Thomas*, 1 Biss. (U. S.) 210, 18 Fed. Cas. No. 10,386; *Moir v. The Dubuque*, 3 Chic. Leg. N. 145, 17 Fed. Cas. No. 9,696.

It is further claimed that the Washington State Compensation Act violates the fourteenth amendment to the Constitution and provides for the taking of defendant's property without due process of law; that this is accomplished by taking from defendant a tax, the consideration for which is the exemption of the defendant from suit on account of injuries to its servants while in the discharge of their employment.

It is argued that the plaintiff might sue in the common-law courts or in admiralty, and that as the state Legislature could not curtail the admiralty jurisdiction by abolishing a cause of action of which the admiralty court has jurisdiction, if the defendant paid the tax to the state, the plaintiff could still have gone into the admiralty court to recover for his injuries, and that its payment of the tax would not have shielded the defendant from liability.

[2] The question argued is an interesting one, but its decision is not required herein. The tax has not been paid. Defendant's property has not been taken on account of such tax. Nor is this suit one to recover such a tax. If the state law, on account of the tax provision, violates the amendment to the Constitution and is therefore of no effect, plaintiff's right of action for the failure of his master to furnish him a safe place to work would remain, under the common law, unrepealed by reason of the invalidity of the Compensation Act. If the Compensation Act is effective, and the defendant has not paid its tax, as alleged, by the Compensation Law, the failure to pay the tax saves to the plaintiff the right of action for defendant's negligence under the common law. In either event, the suit may be maintained.

Upon the demurrer, the question of whether, if this suit were in admiralty, the defenses of fellow servant and assumption of risk would be abolished and the rule of comparative negligence supplant that of contributory negligence, as provided in the state law, it is not now necessary to decide, though it may be noted that they are all common-law defenses, and that that of contributory negligence is not a defense in admiralty; the rule there being something nearer comparative negligence, as provided by the Compensation Act. The

Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586. In admiralty, equitable principles govern rather than the common law. *California-Atlantic S. S. Co. v. Central Door & Lbr. Co.* (C. C. A.) 206 Fed. 5. It is also clear, for the same reason, that the question of whether the penalty imposed by the Compensation Law, rendering the defendant liable for the payment of the tax upon a suit by the state, while still leaving it subject to a suit by the injured servant, is so extravagant and unreasonable as to deny it the equal protection of the law, in violation of the fourteenth amendment to the Constitution, is not now properly before the court.

It is not necessary to determine herein whether the elimination of the defenses of assumption of risk, fellow servant, and contributory negligence is to be considered a penalty imposed for nonpayment of the tax, or whether the purpose was to abolish those defenses generally in the cases of injured employes engaged in the extrahazardous followings enumerated in the Compensation Act.

Demurrer sustained.

In re GREEN.

(District Court, E. D. Pennsylvania. September 10, 1913.)

No. 4,643.

BANKRUPTCY (§ 212*)—PROPERTY FRAUDULENTLY TRANSFERRED—JURISDICTION—POWERS CLAIMED—PLENARY SUIT.

Where, in reply to a petition by a bankrupt's trustee to recover certain assets alleged to have been transferred by the bankrupt with intent to defraud his creditors, it was shown that the assets were out of the bankrupt's possession when the petition was filed, and the transferee testified under oath that he had purchased the property in good faith while the bankrupt was doing business in the ordinary manner, and had paid the bankrupt therefor with money that the transferee had hoarded, he was entitled to have the question determined in a plenary suit, notwithstanding his testimony was incredible.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236; Dec. Dig. § 212.*]

In Bankruptcy. In the matter of Jacob Green, bankrupt. Proceeding by trustee to recover certain goods alleged to have been transferred by the bankrupt to one J. H. Dahm, with intent to defraud the bankrupt's creditors. Dismissed.

Alfred Aarons and Wessel & Aarons, all of Philadelphia, Pa., for John H. Dahm.

Maurice W. Sloan, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. The order of the referee which is certified for review was entered July 21, 1913, and was as follows:

"And now, to wit, the 21st day of July, 1913, it appearing that J. H. Dahm has in his possession a lot of goods, the property of the bankrupt, Jacob Green, it is hereby ordered that the said Dahm hand over to the trustee in bankruptcy all of the goods in his possession properly identified to have been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

obtained by him from Jacob Green, and that the costs of this proceeding be imposed upon the said J. H. Dahm."

The order was based upon a petition of the trustee averring that the bankrupt, with the assistance of Dahm, had transferred the assets in question to a store at No. 1206 Columbia avenue, in the city of Philadelphia, with intent to cheat and defraud his creditors, upon which the referee entered a rule upon the bankrupt and Dahm to show cause why the bankrupt and Dahm should not deliver the property to the trustee.

On behalf of Dahm a petition was filed moving to dismiss the trustee's petition for want of jurisdiction, averring *inter alia* that during the months of September, October, and November, 1912 (prior to the filing of the petition in bankruptcy), he (Dahm) purchased certain shoes, rubbers, shoe findings, and window stands from the bankrupt, and that the purchases were made by him in the ordinary course of trade, in good faith, for valuable consideration, without fraud, and while the bankrupt was a merchant in apparently prosperous circumstances, and that he has made payment for said purchases; that since acquiring the chattels located at No. 1206 Columbia avenue by purchase he has had sole, exclusive, open, notorious, and adverse possession thereof, and that they have never been in the possession of the trustee, nor at any time since said purchases have they been in the possession of the bankrupt, Jacob Green; that the chattels are his sole and separate property, and that neither the bankrupt nor any other person has any interest therein whatsoever, but that he has title absolute and adverse against the trustee and against the whole world. Jacob Green, the bankrupt, filed an answer denying the removal and secretion of his goods as set out in the petition, and denying possession of the assets, and averring that it is beyond his power to comply with the order.

Sufficient appears from the testimony taken before the referee to indicate that the goods alleged to have been removed and secreted were out of the possession of the bankrupt at the time of the filing of the petition, and it therefore became material to determine whether Dahm's claim of adverse title was merely colorable, or whether his claim was such as to put the trustee to a plenary action to determine the title to the goods. The learned referee, after careful consideration of the testimony of Dahm and other witnesses, made the order, as stated in his report—

"on the ground that I declined to consider seriously the testimony of Dahm, the claimant, that he had accumulated \$4,000 in bank bills, which he kept in a book, of which he did not know the name, and carried the same in his pocket to Philadelphia. I discriminated this case from the case of *In re Blum* [C. C. A.] 29 Am. Bankr. Rep. 332 [202 Fed. 883], on the ground the claimant in *Re Blum* alleged credible facts, whereas the facts related in the claim of Dahm are incredible on their face and not worthy of serious consideration, as shown in my report."

Dahm's testimony, which stands uncontradicted, is to the effect that he was desirous of embarking in the shoe business in Philadelphia; that he came to this city and leased the premises 1206 Columbia avenue in the summer of 1912, and that he arranged with Green to purchase

a stock of shoes for him; that he paid about \$500 to fit up his store, and paid Green, up to October 3, 1913, \$3,440 for the stock of shoes. He stated that before coming to Philadelphia he was working in Pottsville, earning a salary of \$12 per week and making some money in other work, and that in about five years he had saved nearly \$4,000, which he kept in a book—the third volume of a set of Dickens' Works, the volume being kept in a shoe box not under lock and key—in an attic room on the third floor of the house in which he lived in Pottsville; that he brought this money in cash to Philadelphia, and used it in fitting up the store and in paying the \$3,440 to Green; that he later, before Green's bankruptcy, gave Green a note for \$3,000 to cover the balance. He was not able to state the number of shoes purchased from Green, nor the number of cases in which they were delivered, and his entire testimony was such as to justify an opinion that the story was incredible. The facts set out in the motion to dismiss were, however, under oath, and the examination by the referee was under oath.

While the circumstances stated by Dahm may have appeared so improbable as to have convinced the referee that they were untrue, yet Dahm swore to them as facts, and, for the purposes of determining whether Dahm's claim is adverse, I think it is beyond the power of the referee or this court to decline to consider these alleged facts, which are not contradicted, notwithstanding the impression of untruthfulness. Upon the face of the averments in the motion to dismiss and the statements made under oath before the referee, Dahm has set up an adverse claim of title to the property which comes within the rule in *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. Rep. 163, and *Louisville Trust Co. v. Comingor*, 184 U. S. 19, 22 Sup. Ct. 293, 46 L. Ed. 413, 7 Am. Bankr. Rep. 421, and the question involved can, therefore, only be raised by a plenary suit. It was stated in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224:

"But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt. The bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real, even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review."

In the case of *In re Blum* the court said:

"The term 'colorable' seems to have crept into the bankruptcy decisions without authority of statute, unless it be construed to mean merely that if a respondent sets up as facts, and not as conclusions of law, matters which, if true, would constitute a statement of an adverse claim, then the claim would be adverse, and not colorable, and not within the jurisdiction of the referee. It can hardly have been the purpose of Congress to deprive a litigant of the benefit of a plenary hearing in cases involving the determination of *contested questions of fact*."

As I construe the decisions, the determination of questions of fact is for a jury or a chancellor in a plenary suit, if the uncontradicted

facts asserted are sufficient, if true, to make out a real adverse claim, no matter how ill-supported it may appear to be. In *re Teschmacher & Mrazay* (D. C.) 127 Fed. 728, 11 Am. Bankr. Rep. 547.

Incredible though the facts to sustain the claim of adverse title may appear, I think the claimant is entitled to have them taken as true for the purpose of determining the question of jurisdiction, and it is therefore ordered that the order of the referee be set aside, and the trustee's petition dismissed.

Ex parte MAC FOCK.

(District Court, W. D. Washington, N. D. August, 1913.)

No. 2,500.

1. ALIENS (§ 32*)—PROCEEDINGS FOR DEPORTATION OF CHINESE—EVIDENCE—FORMER JUDGMENT.

A certificate by a United States commissioner that a Chinese person of a certain name was tried before him and adjudged to have the right to remain in the United States is not competent evidence of a judgment which can be used in bar of a subsequent proceeding.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—PROCEEDINGS FOR DEPORTATION OF CHINESE—ABUSE OF DISCRETION.

Petitioner, a Chinese person, sought to enter the United States and presented as the only evidence of his right what purported to be a certificate made by a commissioner 17 years before that petitioner had been tried before him and adjudged to be a citizen and entitled to remain in the United States, which was not in a form to be competent evidence. *Held*, that the immigration authorities did not abuse their discretion in making further examination nor, on finding that the certificate was fraudulent, in ordering petitioner deported, although he had resided in this country for the greater part of the 17 years.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

In the matter of the application of Mac Fock for writ of habeas corpus. On motion to dismiss. Motion granted.

Victor M. Place, of Seattle, Wash., and L. Frank Brown, of Seattle, Wash., for petitioner.

C. F. Riddell, U. S. Atty., and E. B. Brockway, Asst. U. S. Atty., both of Tacoma, Wash., for respondent.

NETERER, District Judge. The petitioner alleges in substance that he arrived at the port of Seattle on his return from China on the 21st day of March, 1913, and was denied admission by the Commissioner of Immigration; that an appeal was prosecuted from the decision of the Commissioner of Immigration to the Secretary of Labor; and that such decision was affirmed. He further alleges that he had resided in the United States for over 17 years; that he has in his possession a certificate issued by Felix W. McGettrick, United States Commissioner, bearing date June 12, 1896, issued to him upon his dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charge after arrest for being unlawfully in the United States. Attached to the petition is a copy of the alleged certificate, which reads as follows:

"United States of America, District of Vermont.

"Before me, Felix W. McGettrick, a commissioner of the Circuit Court of the United States, within and for said district, complaint was presented by John H. Senter, United States Attorney, within and for said district, charging in substance that on or about the 12th day of June, 1896, at Richford in said district, Mac Fock in violation of section ——— of the Revised Statutes of the United States, did unlawfully come and was in the United States, and on the 12th day of June, 1896, defendant was brought before me, the said commissioner, at my office, in St. Albans, in said district, and upon full hearing on said charge the said district attorney being present, it was adjudged by me that said Mac Fock had the lawful right to be and remain in the United States, by reason of being a citizen thereof, and he was accordingly discharged.

"Given under my hand and seal at St. Albans, in the district of Vermont, this 12th day of June, 1896. Felix W. McGettrick,

"United States Commissioner for District of Vermont. [Seal.]"

A photograph is attached to the certificate.

On the 9th of June a writ was issued directing the proper officers to produce in court Mac Fock, to do and receive concerning the said Mac Fock what should then be directed. A return was made to the writ as directed, in which the possession of the certificate is admitted. The return further states that Mac Fock is held under order of deportation; that he applied for admission to the United States as a returning native-born American of Chinese descent, and that, upon the examination by the Commissioner of Immigration upon oral and documentary evidence, it was found that Mac Fock was born in China; that an appeal was prosecuted to the Secretary of Labor, who affirmed such decision. A reply is filed to this answer, in which it is stated, in substance, that Mac Fock had lived in the United States in various parts for more than 17 years; that before his departure for China he presented the certificate to the Commissioner of Immigration, and that it was pronounced genuine; and that the petitioner thereupon departed for China, relying upon the investigation made by the immigration officers of his right to re-enter. All of the evidence taken before the Commissioner of Immigration and the record on appeal is a part of the record in this case. A motion is made by the government that the proceedings herein be dismissed upon the pleadings and admitted facts as disclosed by the record, and that the petitioner be held for deportation.

It is contended on the part of the petitioner: First, that the certificate issued to him by Felix W. McGettrick, United States Commissioner, is a final adjudication of the petitioner's right to admittance; second, that the Immigration Department, having investigated the certificate and pronounced it genuine, led the petitioner to believe that he could re-enter and is now precluded and estopped to deny his admittance.

[1] It has been repeatedly held that where a Chinese person for alleged unlawful residence in the United States has been apprehended and given a fair trial and discharged, and a judgment of discharge

entered upon the merits, it constitutes an adjudication of the right of the Chinaman to remain in the United States. *Leung Jun v United States*, 171 Fed. 413, 96 C. C. A. 369.

The first question to be disposed of is: Is the certificate which was presented a judgment in contemplation of the exclusion act? I think a reading of the document is sufficient to conclusively show that it is not. On its face it shows that it is not a judgment. It does not purport to be a certified copy of any judgment or record of judgment. It is not a document which could be considered as evidence by any court or tribunal. It is merely a statement that a certain act had been done. It does not purport to, nor does it in fact fill the requirements of any rule of evidence, state law, or act of Congress with relation to authentication of records of the United States.

"A written statement by a United States commissioner that a Chinese person of a certain name was brought before him and was adjudged to have the right to remain in the United States by reason of being a citizen is not evidence of a judgment." *Ah How v. United States*, 193 U. S. 65, 24 Sup. Ct. 357, 48 L. Ed. 619; *United States v. Lew Poy Dew* (D. C.) 119 Fed. 786.

[2] Estoppel cannot operate as against the government, nor do the facts show abuse of discretion. Upon the conceded facts with relation to this certificate, it being all the proof that was presented, the Department of Immigration cannot be criticised for further examination with relation to the nativity of the petitioner. The examination as disclosed by the record seems to have been fair and impartial and no undue advantage taken of the petitioner. The examination disclosed that the petitioner was born in China; that he arrived in Vancouver and entered the United States at Richford, Vt.; that the certificate was there given to him; that it was fraudulently issued or obtained through perjury. The petitioner, if not an actual participant, was the beneficiary and knew of the wrongful practices.

Being in the United States unlawfully and the beneficiary of the certificate unlawfully issued, and having lived in the United States for 17 years, and knowing of the fraud or perjury practiced upon the issuance of the certificate, and the fraudulent practices continued by him upon the Immigration Commissioner when he obtained an expression of regularity of such certificate, the petitioner upon the record before the court cannot complain. No lapse of time would ripen such a wrong into a right nor afford a basis upon which to predicate abuse of discretion. The Department of Immigration did not abuse its discretion. *De Bruler v. Gallo*, 184 Fed. 566, 106 C. C. A. 546; *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; *Ex parte Lung Wing Wun* (D. C.) 161 Fed. 211; *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917.

The motion is granted, the writ discharged, and the petitioner remanded to the custody of the Commissioner of Immigration.

FREEMAN et al. v. NEW JERSEY PORTLAND CEMENT CO.

(District Court, N. D. New York. September 16, 1913.)

1. MINES AND MINERALS (§ 70*)—LEASE OF MINE—REMOVAL OF PROPERTY—ASSIGNMENT OF LEASE—RIGHTS OF ASSIGNEE.

Where a lease of mining property binding the successors and assigns of the respective parties authorized removal of property placed on the leased premises by the lessee only in case there were no arrearages of royalty or taxes, on the termination of the lease, a covenant between the lessee and its assignee, to which the landlord was not a party, that the assignee should not be bound by such covenant, did not affect the landlord's right to insist that the personal property placed on the land by the tenant and the assignee should remain until it was determined whether there was royalty or taxes in arrears.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192-197; Dec. Dig. § 70.*]

2. MINES AND MINERALS (§ 70*)—LEASE OF MINE—REMOVAL OF PROPERTY—ROYALTY—INJUNCTION.

Where defendant, a foreign corporation, and having no property in New York, except certain property on land held under an assigned lease providing for removal of such property only in case there were no arrearages of royalties or taxes at the end of the term, the landlord was not required to resort to attachment to retain the property within the jurisdiction pending a determination of the question whether there were arrearages of royalties and taxes unpaid, but was entitled to relief by injunction.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192-197; Dec. Dig. § 70.*]

Action by Eliza J. Freeman and another against the New Jersey Portland Cement Company. On motion to vacate or modify an order, granted by a Justice of the Supreme Court of New York prior to removal of the cause, restraining defendant from removing certain of its property from a mine in St. Lawrence county owned by plaintiffs, in alleged violation of the lease. Denied.

Joseph F. Brown, of Canton, N. Y., for the motion.

Sturtevant & Abbott, of Gouverneur, N. Y., opposed.

RAY, District Judge. In April, 1912, the plaintiffs, Eliza J. Freeman and Frank N. Freeman, who are the owners of a mine on premises owned by them in the county of St. Lawrence, N. Y., leased said mine, with certain privileges, to the North American Selling Company of the City of New York, and June 3, 1912, the said company assigned said lease and its rights thereunder to the defendant, a corporation of the state of New Jersey, which has no property in the state of New York, except that hereafter mentioned, and said defendant corporation entered on said premises and in said mine, and placed therein certain property and machinery for the purpose of operating said mine, which for a time it did. The plaintiffs claim that there is due them under the terms of such lease from the defendant the sum of \$4,000, and this action is brought, not only to recover such sum, but to enjoin

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Ren'r Indexes

the removal of the property referred to, in violation of the express terms and covenants of the lease so assigned to the defendant not to remove same in certain events, and under which it operated, and which defendant threatens to do. The said lease contains this clause:

"Further understood that second party, whenever this lease is terminated and for whatever reason, is to leave all supports and timbers, ladders, stairs, steps, and tracks used for or furnishing means of access, ingress, or egress in and from said mine, to be absolutely the property of the party of the first part. Party of the second part also gives party of the first part the privilege of purchasing any and all buildings, tools, railroad ties, railroad iron, and any and everything used in connection with said mine at the termination of this lease, upon party of first part giving party of second part 90 days' notice of their intention so to purchase, and in case party of the first part does not elect to so purchase, second party is to have a reasonable time to remove the same upon the termination of this lease, providing there is no arrearages of royalty or payment of taxes; otherwise same are not to be removed without the consent of the party of the first part."

Also the following:

"And it is further agreed that this agreement shall bind the heirs, personal representatives, successors, and assigns of the respective parties."

[1] It seems to me very clear that the parties to the lease intended that the personal property placed in the mine by the lessee should remain there as a security for the payment of the rents or royalties due the plaintiffs under the terms of the lease. The defendant here claims that, when it took an assignment of the lease from the North American Selling Company, it was stipulated that it should not be bound by these covenants; but, as I view the matter, this would not affect the rights of the plaintiffs, unless they became parties to such an arrangement, which would operate as a modification of the lease. The papers before me do not establish such modification so far as the plaintiffs are concerned. Whether or not the defendant company is indebted to the plaintiffs, and, if so, in what sum, is to be determined on the trial of the action. This court should not assume to determine that question on a motion, where, as here, the affidavits are in conflict.

[2] The covenant in the lease not to remove the property is in the nature of a negative covenant. The defendant bound by the terms of the lease was not to remove this property in case there was default in the payment of royalties or taxes by the defendant, except with the consent of the plaintiffs. It seems to me clear that plaintiffs have the right to insist on the observance of this condition, and enjoin the removal of such property, until it is determined on the trial of the action that no arrearages of taxes and royalties exist. Otherwise, the covenant is of no benefit to the plaintiffs.

I think the plaintiffs have the right to insist that this property shall remain where it is until it is determined on a trial that they have no claim for royalties or unpaid taxes, and are not compelled to resort to an attachment in order to retain the property within the jurisdiction of this court. Here is a remedy provided by the parties themselves, and I do not think this court has any right to disregard it. Clearly it was not contrary to any law to insert such a

provision in the lease. This court has held that it has power to restrain by injunction a covenant not to infringe a patent granted to and owned by the plaintiff; a license to use the patented article having been granted the defendant, accompanied by a covenant on its part not to infringe. In such case the plaintiff could sue at law for damages for the infringement and recover. *General Electric Company v. Westinghouse Electric Company* (C. C.) 151 Fed. 664; *Reece Folding Machine Company v. Earl & Wilson* (D. C.) 205 Fed. 539.

With such a provision in the lease given and accepted by the defendant, and under which it operated, and which provision was evidently inserted for the protection and security of the plaintiffs, can it be that the court is without power to compel by injunction the retention of this property within the jurisdiction of the court, the defendant having no other property here, and when they obtain a judgment, if they do, make it unnecessary for plaintiffs to pursue the defendant into the state of New Jersey? I am not prepared so to hold. This is not a case to restrain the violation of a contract, when the violation thereof would result in damages for which suit may be brought and judgment recovered and enforced in due course and in accordance with well settled practice, but one where a provision is deliberately inserted in the lease for the protection of the lessors and security to them, and the violation of which provision will deprive them of that security. In such case equity may and ought to interfere and prevent the removal of the property, in effect pledged as security from the jurisdiction of the court. If equity in such a case is powerless, then it is a sham. There might be a remedy at law by going into the state of New Jersey and there bringing suit; but it would not be an adequate remedy, and to deny relief by injunction would be to disregard the covenants of the parties. The equitable remedy by injunction is much more full and complete and adequate.

This action may be speedily tried and the rights of the parties determined.

Motion denied.

DREXEL STATE BANK v. CITY OF LA MOURE.

(District Court, D. North Dakota, S. D. August 28, 1913.)

1. MUNICIPAL CORPORATIONS; (§ 901*)—IMPROVEMENT WARRANTS—INTEREST.

Rev. Codes N. D. 1905, § 2786, provides that special assessments levied for sewers, street paving, and water mains shall constitute a fund for the payment of the cost of the improvement; that, in anticipation of the levy and collection of such assessments, the city may issue warrants on such funds, payable at specified times, which warrants shall bear interest at not to exceed 7 per cent. per annum, and may have coupons attached representing each year's interest. Section 6564 provides that the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest; and section 5510 provides that interest for any legal indebtedness shall be 7 per cent. unless a different rate is contracted for, and that all contracts shall bear the same rate of interest after they become due as before, unless it clearly appears therefrom that such was not the intention. *Held*, that warrants on special assessment funds and interest coupons attached thereto draw interest from maturity and, if no rate is named in the instruments themselves, at the rate of 7 per cent.; there being no statute making sections 5510 and 6564 inapplicable to such warrants.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1886; Dec. Dig. § 901.*]

2. MUNICIPAL CORPORATIONS (§ 901*)—IMPROVEMENT WARRANTS—INTEREST.

Under Rev. Codes N. D. 1905, § 2786, authorizing the issuance of warrants on special assessment funds in anticipation of the levy and collection thereof, and providing that it shall be the duty of the city treasurer to pay such warrants and coupons as they mature and are presented for payment, out of the funds on which they are drawn, where, at the time of the maturity of the warrants and coupons, there were in the hands of the treasurer of the city moneys belonging to the funds on which they were drawn, which had been paid by property owners prior to assessment, which fact was not known to the holder of the warrants and coupons, and the city's officers led such holders to believe that no funds were available for their payment, and there were some negotiations looking to the issuance of warrants to take up those in question, the failure of the holder to present the warrants and coupons for payment did not prevent the subsequent accrual of interest thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1886; Dec. Dig. § 901.*]

Action by the Drexel State Bank against the City of La Moure.
Judgment for plaintiff.

Watson & Young, of Fargo, N. D., for plaintiff.

W. J. Hughes, of La Moure, N. D., for defendant.

YOUMANS, District Judge. This is a suit by the plaintiff on warrants and interest coupons attached thereto, drawn on special assessment sewer and water main funds. Written stipulation waiving a jury has been filed, and the cause has been submitted to the court upon an agreed statement of facts. The only points in controversy are: (1) Whether the warrants and interest coupons draw interest after maturity; and (2) if so, whether in this case, in order to draw interest, they should have been presented for payment at maturity.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] The warrants and interest coupons in question were issued under authority of section 2786 of the Revised Codes of North Dakota of 1905. That section reads as follows:

"All special assessments levied under the provisions of this article shall constitute a fund for the payment of the cost of the improvement for the payment of which they are levied, and shall be diverted to no other purpose, and those for payment of sewer improvements shall be designated respectively 'Sewer District No. ——— Fund,' and such fund shall be numbered according to the number of the sewer district in which it is raised. Those collected for paving improvements shall be designated as 'Paving District No. ——— Fund,' and such fund shall be numbered according to the paving district in which it is raised; and those levied for the payment of water mains shall be known as 'Water Main District No. ——— Fund,' and such fund shall be numbered according to the number of the water main district in which it is raised, and in anticipation of the levy and collection of such special assessments the city may, at any time after the making of a contract for any such improvements, issue warrants on such funds, payable at specified times, and in such amounts as, in the judgment of the city council, the taxes and assessments will provide for, which warrants shall bear interest at the rate of not to exceed seven per cent. per annum, payable annually, and may have coupons attached representing each year's interest. Such warrants shall state upon their face for what purpose they are issued, and the fund from which they are payable, and shall be signed by the mayor, and countersigned by the city auditor under the seal of the city, and be in denominations of not more than one thousand dollars each. Such warrants may be used in making payments on contracts for making such improvements or may be sold for cash, at not less than the par value thereof, and the proceeds thereof credited to such fund, and used for paying for such improvements. It shall be the duty of the city treasurer to pay such warrants and interest coupons as they mature and are presented for payment, out of the district funds on which they are drawn, and to cancel the same when paid."

The warrants referred to in the section above quoted are a special class of warrants essentially different from the municipal warrants referred to in sections 2708 and 2709, Revised Codes of 1905. In the former interest is provided for at the time of the execution of the warrants by attaching coupons thereto. In the latter there is no fixed date for payment, and presentation and nonpayment are necessary in order that interest may attach and run.

Section 6564 provides that:

"The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest thereon."

Section 5510 provides that:

"Interest for any legal indebtedness shall be at the rate of seven per cent. per annum, unless a different rate is contracted for in writing and all contracts shall bear the same rate of interest after they become due as before, unless it clearly appears therefrom that such was not the intention of the parties."

There is no statute of North Dakota making the two foregoing sections inapplicable to warrants issued against special assessment funds. The rule is that interest coupons draw interest from maturity. *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586; *Amy v. Dubuque*, 98 U. S. 473, 25 L. Ed. 228; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886. There-

fore, in the absence of a statute in North Dakota changing the general rule, warrants and interest coupons payable out of special assessment funds draw interest from maturity, and, if no rate is named in the instruments themselves, the rate will be 7 per cent. per annum.

[2] At the time of the maturity of the warrants and coupons in question, there were in the hands of the treasurer of defendant some moneys belonging to these two funds. These amounts had been paid by property owners prior to assessment, and the fact that such payments had been voluntarily made before assessment was not known to plaintiff or its agents. It cannot therefore be charged with notice that funds were available for the payment of the warrants and coupons held by it. The agreed statement of facts shows that plaintiff and its agents were led to believe by defendant's officers that no funds were available for the payment of its warrants and coupons, and for that reason they were not presented to the treasurer. The agreed statement of facts further shows that there were negotiations between plaintiff and defendant's officers looking to the issuance of refunding warrants to take up some, at least, of the warrants involved in this suit. Having that belief, induced by the representations made by defendant's own officers, it cannot be said that it was incumbent upon plaintiff to present its warrants and coupons for payment. Moreover, it appears from the agreed statement of facts that no money was held by the treasurer of defendant for the redemption of the warrants and coupons held by plaintiff. Defendant's funds available for the payment of these warrants and coupons were paid out promptly, after they were received, upon other obligations.

Judgment will therefore be entered for interest accrued after the maturity of the warrants and coupons.

In re WM. S. BUTLER & CO., Inc.

(Circuit Court of Appeals, First Circuit. September 10, 1913.)

Nos. 1,020, 1,021.

1. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—APPLICATION FOR RECEIVER—“INSOLVENT.”

The definition of the term “insolvent” given in Bankr. Act July 1, 1898, c. 541, § 1, cl. 15, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3419), providing that a person shall be deemed insolvent within the provisions of the act whenever the aggregate of his property shall not at a fair valuation be sufficient in amount to pay his debts, is the one to be applied in determining the meaning of the term in section 3a, cl. 4, as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1493), providing that an application for a receiver or trustee of his property, by the alleged bankrupt, being insolvent, or when because of insolvency a receiver or trustee has been put in charge of the property under the laws of the state, shall constitute an act of bankruptcy, and hence the appointment of receivers for an alleged bankrupt on the ground that it was unable to meet its obligations as they matured in the ordinary course of business did not constitute an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

2. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—PROOF—PROCEEDINGS FOR APPOINTMENT OF RECEIVERS.

Where the appointment of receivers for a corporation was claimed as an act of bankruptcy, and the only evidence of the grounds on which they were appointed was the bill, answer, and decree, which bill applied for the appointment on the ground that the corporation was unable to meet its obligations as they matured in the ordinary course of business and did not allege that the corporation's property at a fair valuation was insufficient to pay its debts, and the prayer was granted only to the extent of appointing receivers to assume control of the business and conduct the company's affairs until otherwise ordered by the court, there was no finding of insolvency sufficient to constitute an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

3. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVERS.

Where the appointment of receivers is alleged as an act of bankruptcy, it is not material whether the receivers are temporary or permanent; the important question being whether the decree appointing them is based on the insolvency of the debtor as defined by the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

4. EQUITY (§ 330*)—WAIVER OF OBJECTIONS—SUFFICIENCY OF BILL.

Where, in a bill for the appointment of receivers for a corporation, complainant alleged that it was a citizen and resident of Maine, and that defendant was a citizen and resident of Massachusetts and was indebted to complainant in a sum not less than \$25,000, a large part of which was overdue, and though often demanded remained wholly unpaid, defendant, having admitted both allegations by its answer, waived the right to object to any insufficiency in the second allegation for failure to al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lege that the claim had been reduced to judgment and execution issued and returned unsatisfied.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 660-668, 671; Dec. Dig. § 330.*]

5. JUDGMENT (§ 713*)—DECREE—ACTUAL COMPLAINANT—EQUITABLE RELIEF.

Where a decree appointing receivers for a corporation determined that the complainant in the bill was the real complainant and a creditor of the corporation entitled to equitable relief, such decree when introduced in a subsequent proceeding, in the absence of proof of fraud in its procurement, was conclusive evidence that the application was made by the complainant in the bill and not by the defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

6. CORPORATIONS (§ 397*)—OFFICERS AND AGENTS—AUTHORITY.

Though a corporation can act only through its officers and agents, their action to bind the corporation must be within the scope of their authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1585, 1586, 1588, 1589, 1596-1601; Dec. Dig. § 397.*]

7. CORPORATIONS (§ 404*)—GENERAL AGENT—PROPERTY OF CORPORATION—DISPOSAL.

A general agent, charged with the management of a corporation, is not authorized to dispose of its entire property in a single transaction, in the absence of special authority so to do.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1626-1628, 1633-1639; Dec. Dig. § 404.*]

8. CORPORATIONS (§ 298*)—DIRECTORS—AUTHORITY—DISPOSITION OF PROPERTY—ACTION—MEETING OF BOARD.

If the directors of a corporation may authorize a general agent to dispose of all of the corporation's property in a single transaction, such authority can be conferred only at a duly warned meeting of the board or one at which all are present.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.*]

9. CORPORATIONS (§ 191*)—STOCKHOLDERS—AUTHORITY.

Stockholders of a corporation can confer authority on the corporation's general agent to dispose of all the corporation's property in a single transaction only by vote of the majority at a corporate meeting duly warned or by unanimous agreement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 732; Dec. Dig. § 191.*]

10. BANKRUPTCY (§ 91*)—CORPORATIONS—RECEIVERS.

Evidence that certain agents of an alleged bankrupt corporation and its counsel undertook to bring about an application for the appointment of receivers by procuring a creditor to file a bill for such relief in its name was insufficient to show that the corporation committed an act of bankruptcy by itself procuring the appointment of such receivers, in the absence of proof that the corporation's directors, while acting as a board, either authorized such action on the part of the corporation's agents and counsel or that the corporation's stockholders with full knowledge ratified such action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.*]

Putnam, Circuit Judge, dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeals from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

In the matter of bankruptcy proceedings against William S. Butler & Co., Incorporated. From a decree adjudging the corporation a bankrupt, the corporation, its receivers, and certain intervening creditors appeal. Reversed and remanded.

Boyd B. Jones, of Boston, Mass. (Charles F. Choate, Jr., Frederick H. Nash, and William M. Morgan, all of Boston, Mass., on the brief), for appellants.

Lee M. Friedman and Burton E. Eames, both of Boston, Mass. (Tyler, Corneau & Eames, Friedman & Atherton, Jacobs & Jacobs, Warren, Garfield, Whiteside & Lamson, Harvey H. Pratt, and Julius Nelson, all of Boston, Mass., of counsel), for appellees.

Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

BINGHAM, Circuit Judge. This is a petition in bankruptcy filed November 9, 1912, in the United States District Court for the District of Massachusetts, by three creditors praying that William S. Butler & Co., Incorporated, be adjudged a bankrupt. The grounds stated in the petition upon which it is claimed that the defendant should be adjudged a bankrupt are the following:

"(1) That said William S. Butler & Co., Incorporated, is insolvent, and that within four months next preceding the date of this petition * * * committed an act of bankruptcy in that it did * * * on the 7th day of November, 1912, because of insolvency, have put in charge of its property two receivers, * * * under the laws of the United States, by virtue of proceedings in equity in the United States District Court for the District of Massachusetts; and
"(2) Committed an act of bankruptcy in that it did * * * on the 7th day of November, 1912, * * * being insolvent, apply to the United States District Court for the District of Massachusetts, sitting in equity, for the appointment of a receiver, by virtue of which proceedings two receivers * * * were appointed."

On the date alleged in the petition, a bill in equity was filed in the District Court for the District of Massachusetts, in which Isaac McLean Sons Company appeared as plaintiff and William S. Butler & Co., Incorporated, as defendant. It was in form a creditors' bill, and after setting out the debt due the plaintiff it alleged in substance:

(1) That the defendant is otherwise indebted to an amount approximating \$700,000, a large amount of which is now due.

(2) That the defendant is unable to meet its liabilities as they mature in the ordinary course of business, and that it would be unjust and inequitable for the plaintiff or other creditors to attempt to gain a preference in the time or manner of settlement of their claims.

(3) That the defendant is engaged in the retail dry goods business in Boston; has invested more than \$250,000 in stocks of new merchandise which are immediately available for sale at a profit if the business can be carried on without interruption; and that the store occupied by it has recently been refitted with expensive fixtures, which are of great value to a going concern.

(4) That it holds a lease of the premises it occupies, which is of great value, and would be of great value to any purchaser of its business as a going concern, but that if attachments should be placed upon its property, and the defendant should be adjudicated a bankrupt, the value of its lease would be wholly lost.

(5) That the defendant and its predecessors during many years of continuous business have built up a good will of great value which would be almost wholly lost if the business should be closed up.

(6) That, unless a receiver is appointed and empowered to borrow money upon receiver's certificates, the store will have to be closed and its assets sacrificed because of its lack of quick assets and its inability to raise money needed for carrying on its business.

(7) That for these reasons the plaintiff is without adequate remedy for the collection of its indebtedness without the intervention of a court of equity and the appointment of a receiver to continue the business of the defendant and protect the value of its assets until sufficient sums can be realized, either from the continuance of the business or the sale of its assets, to discharge the defendant's indebtedness or to distribute its assets ratably among its creditors.

The bill contained two prayers:

"(1) That receivers be forthwith appointed to take possession of and administer the assets of the defendant with power to manage and operate the property, to continue its business, employ agents and employes, and with the approval of the court to borrow money and issue receiver's certificates therefor; and

"(2) That the debt of the plaintiff and the debts of all other creditors who join in the proceedings be established, and that the assets of the defendant be equitably applied as the court may direct in satisfaction thereof."

On the date of the filing of the bill the defendant answered, admitting that the matters and things stated in the bill were true, and thereupon the following decree was entered:

"On this 7th day of November, 1912, comes the plaintiff in this cause, by its attorney, and upon consideration of the bill of complaint and the answer thereto, and on motion of counsel for the plaintiff, the respondent, by its attorney, consenting thereto, it is ordered, adjudged, and decreed that Charles F. Weed, of Brookline, and Millory H. Gibson, of Boston, both in Massachusetts, be and hereby are appointed receivers of all the assets and property of the respondent, wheresoever situated, and the moneys, contracts, debts, choses in action, books of accounts, deeds, and documents belonging to the respondent or relating to or arising from its property or business; and they are directed to file with the clerk of this court within two days from this date their several bonds, with sureties to be approved by the clerk, in the sum of \$50,000 each. Said receivers are hereby authorized and directed to take into their possession forthwith all the assets and property of the respondent wheresoever situated, carrying on the business of the respondent until further order of the court, and for that purpose to purchase such materials and supplies, employ and pay such counsel, servants, and agents, contract for such labor, and, subject to the direction and approval of this court, take such other steps, and enter into such obligations and agreements, as shall be reasonably necessary; to insure any property of the respondent which they may think proper; to collect and receive all sums due or payable to the respondents, or arising from the conduct of its business by the receivers; to pay any accrued rent for the preservation of leases; and under the direction of the court to institute and prosecute all such actions, suits, and proceedings as they may think proper and for the protection and preservation of the respondent's assets or for recovering possession thereof; to defend any and all actions, suits, and proceedings against the respondent or against the receivers in respect of their acts or management as such; and out of the moneys to be received by them, as aforesaid, to pay all taxes and assessments lawfully laid or assessed upon or in respect to the property or business of the respondent, and all expenses and obligations properly incurred by them in carrying on said business, or otherwise in connection with the premises. The said receivers shall deposit all moneys coming into their hands as aforesaid in some suitable bank or trust company in the city of Boston."

The decree also contained an order restraining the respondent, its officers and agents, from interfering with or participating in the management of the business except through and under the receivers.

In the District Court it was found that the proceeding in equity was brought about by Butler & Co., and that, although the bill was in form a creditor's bill, it was in fact an application by the debtor for the appointment of receivers. It was also found that the debtor was insolvent in fact (that is, in the bankruptcy sense of the term) at the time of the filing of the bill and at the time of the filing of the petition in bankruptcy. The company was adjudged a bankrupt on both the grounds set out in the petition, and the receivers and intervening creditors appealed.

[1] The provisions of the statute under which the alleged acts of bankruptcy are sought to be upheld read as follows:

"Or, being insolvent, applied for a receiver or trustee of his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, or of a territory, or of the United States." Section 3a, cl. 4, of the Act of July 1, 1898, c. 541, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3419), as amended by the Act of February 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1493).

In section 1, cl. 15, of the act, it is provided that:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient in amount to pay his debts."

This section undoubtedly sets forth the meaning Congress intended should be given to the words "insolvent" and "insolvency" as used in section 3a, cl. 4, and seems to be the one either directly or impliedly attributed to them by the courts in considering these provisions of the law. In *re Golden Malt Cream Co.*, 164 Fed. 326, 90 C. C. A. 258; *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666; In *re Boston & Oaxaca Mining Co. (D. C.)* 181 Fed. 422; In *re Perry Aldrich Co. (D. C.)* 165 Fed. 249; *Beatty v. Andersen Coal Mining Co.*, 150 Fed. 293, 80 C. C. A. 181; *Hooks v. Aldridge*, 145 Fed. 865, 76 C. C. A. 409; *Blue Mt. Iron & Steel Co. v. Portner*, 131 Fed. 57, 61, 65 C. C. A. 295; In *re Edward Ellsworth Co. (D. C.)* 173 Fed. 699. No case has been called to our attention in which a different conclusion has been reached. If any inference as to the question is to be drawn from the decision in *Re Kennedy Tailoring Co. (D. C.)* 175 Fed. 871, relied on by the appellees, it would seem to be that the insolvency there contemplated was insolvency in the bankruptcy sense, and in the *Beatty Case* it was specifically alleged in the bill of complaint that the debtor was insolvent in fact, as its assets were less than its liabilities. The decision in *Re Golden Malt Cream Company*, 164 Fed. 326, 90 C. C. A. 258, is directly in point, and to the effect that insolvency, as used in clause 4, means insolvency as defined in the bankruptcy act.

With regard to the first act of bankruptcy alleged in the petition (that on the 7th of November, 1912, receivers were put in charge of the debtor's property because of insolvency), the only evidence in its support presented at the trial was the bill, answer, and decree in the equity proceeding; and the question is presented whether the decree

and record in that proceeding disclose that the receivers were put in charge of the debtor's property because of insolvency (that is, because its assets, at a fair valuation, were not sufficient in amount to pay its debts), for unless it can be clearly determined from the decree, or record as a whole, that this was the sole or one of the substantial grounds on which the decree appointing the receivers was based, the adjudication in bankruptcy to the extent that its validity depends upon this alleged act of bankruptcy cannot be sustained.

In *Russell v. Place*, 94 U. S. 606, 608 (24 L. Ed. 214), the court, in considering the effect of a judgment when pleaded as a bar or offered as evidence in a subsequent suit between the same parties or their privies and for a different cause of action, said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit (for a different cause of action) between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record (as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered), the whole subject-matter of the action will be at large and open to a new contention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

And again, on page 610 of 94 U. S. (24 L. Ed. 214), the same court says:

"If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

See, also, on this question, *Beatty v. Andersen Coal Mining Co.*, 150 Fed. 293, 80 C. C. A. 181; *In re Kennedy Tailoring Co.* (D. C.) 175 Fed. 871, 873; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *In re Watts*, 190 U. S. 1, 35, 23 Sup. Ct. 718, 47 L. Ed. 933; *Metcalf v. Gilmore*, 63 N. H. 174, 189.

[2] Does it appear from the bill, answer, and decree that it was alleged and determined that the assets of the debtor, at a fair valuation, were insufficient to pay its debts, and that that was the sole ground, or one of the substantial grounds, upon which the decree appointing the receivers was made? It is to be borne in mind in considering this question that the burden of proof is upon the petitioners to show these facts. It is also to be borne in mind that the record in the equity proceeding was the only evidence that was introduced in this case upon which these facts were to be determined, and that, if extraneous evidence could have been resorted to in case the record left it doubtful what was litigated or admitted and upon what the decree was based, no such evidence was introduced.

The decree does not state the ground or grounds upon which the receivers were appointed, and its terms are not coextensive with the allegations and prayers of the bill. It states that it was entered "upon

consideration of the bill of complaint and the answer thereto, and on motion of counsel for the plaintiff, the respondent, by its attorney, consenting thereto." We must therefore look to the bill and answer. The bill alleges as a specific ground for the appointment of receivers the inability of the defendant to meet its obligations as they mature in the ordinary course of business. This is an allegation of insolvency according to one of the common-law definitions of the term, but not as defined in section 1, cl. 15; and, being specially alleged in the bill and admitted in the answer, it may be assumed, inasmuch as it was a sufficient ground on which to appoint receivers, that it was at least one of the grounds, if not the sole ground, upon which the appointment was made. On the other hand, nowhere in the bill is it alleged that the defendant's property, at a fair valuation, is insufficient to pay its debts, and, although its liabilities are stated, the valuation of its assets other than that they are of great value is nowhere given. In the absence of such allegations, it cannot be said that the defendant by its answer admitted them to be true, or that in the absence of such an admission the court based its decree upon that ground.

Then, again, the prayers of the bill were granted only to the extent that they contemplated and sought the appointment of receivers to assume control of the business and conduct the company's affairs until otherwise ordered by the court. The prayer wherein it was asked that the plaintiff's indebtedness and that of other creditors be determined, and that the assets of the company, if they were insufficient to pay its indebtedness in full, should be equitably distributed, was not covered by the decree. This being so, the decree is alone consistent with the idea that it was made with a view to the preservation of the value of the defendant's assets as a going concern and of enabling the debtor, through an extension of credit and a continuation of its business, to realize a sum sufficient to pay its debts in full and to avoid insolvency if possible. In fact, all the allegations of the bill, so far as they were recognized by the decree, are consistent with the main allegation that the defendant was unable to meet its obligations in the ordinary course of business, and it seems to us that it would be putting upon them a strained construction to hold that the debtor, by admitting in its answer that its property was of great value, thereby admitted that it was insolvent in fact (that is, in the bankruptcy sense), and that the court made use of it as one of the grounds on which to base its decree appointing receivers.

[3] It has also been urged that the receivers appointed in this case were temporary, and that such an appointment was not an act of bankruptcy within the meaning of the clause under consideration. It does not seem to us that it is of any moment whether the receivers be termed temporary or permanent; that the real question is whether the decree appointing them was based on the insolvency of the debtor as defined in the bankruptcy act. If it was, the act of bankruptcy contemplated by the statute took place, and if it was not there was no act of bankruptcy within its meaning. In *re Kennedy Tailoring Co.* (D. C.) 175 Fed. 871; *Blue Mt. Iron & Steel Co. v. Portner*, 131 Fed. 57, 65 C. C. A. 295. The decisions in *Zugalla v. Mercantile Agency*,

142 Fed. 927, 74 C. C. A. 97, and Hudson River Electric Power Co. (D. C.) 173 Fed. 934, upon which the appellants rely, would seem to be based rather upon the fact that no adjudication of insolvency had been made in the equity proceeding in which receivers had been appointed than upon the nature of the receivership.

[4] As to the second alleged act of bankruptcy, the question is whether the defendant, being insolvent, applied for a receiver for its property.

In the bill in equity the plaintiff alleges: (1) That it is a citizen and resident of the state of Maine and brings the bill in behalf of itself and other creditors of the defendant, a citizen and resident of Massachusetts; and (2) that the defendant is indebted to the plaintiff in a sum not less than \$25,000, a large part of which is overdue, and, though often demanded, remains wholly unpaid.

Both of the above allegations were essential to establish a case cognizable under the judiciary act of the United States by the federal court. The second allegation was also material to the establishment of the plaintiff's right to equitable relief.

The defendant in its answer admitted both allegations and by so doing waived its right to object to any insufficiency in the second allegation and material to the equitable relief desired in that it was not there alleged that the claim had been reduced to a judgment, and that execution had issued and been returned unsatisfied. *Matter of Reisenberg*, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 376, 14 Sup. Ct. 127, 37 L. Ed. 1113.

[5] Now, what was determined by the decree in the equity suit with reference to the application for receivers? It is evident that under the first allegation of the bill the court must have decided that the proceeding was one brought by the plaintiff, a citizen and resident of Maine, against the defendant, a citizen and resident of Massachusetts; and, under the second allegation, that the amount in controversy between the parties answered the jurisdictional requirement; and that this allegation, taken in connection with the subsequent allegations of the bill, entitled the plaintiff to equitable relief. It having, therefore, been determined in the equity proceeding that the party set out in the bill as plaintiff was the real plaintiff and a creditor of the defendant entitled to equitable relief, the decree, when introduced in the bankruptcy proceeding, in the absence of proof of fraud in its procurement, was and should have been regarded as conclusive evidence that the application for receivers was made by the McLean Sons Company and not by the Butler Company.

Moreover, it does not seem reasonable that Congress, in the enactment of clause 4, could have contemplated that a decree in an equity proceeding, determining who the applicant for receivers was, should be subject to attack when offered as evidence in a bankruptcy proceeding, unless it be for fraud or collusion. In this case it is expressly found that there was no fraud or collusion, and it was therefore not open to the bankruptcy court to disregard the decree and undertake to determine the question anew. *Matter of Reisenberg*,

208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403; *In re Edward Ellsworth* (D. C.) 173 Fed. 699; *Exploration Mercantile Co. v. Pacific H. & S. Co.*, 177 Fed. 825, 101 C. C. A. 39; *In re Duplex Radiator Co.* (D. C.) 142 Fed. 906; *In re C. Moench & Sons Co.*, 130 Fed. 685, 66 C. C. A. 37.

[6-9] But, if it were open to the bankruptcy court to disregard the decree and to determine this question anew, we are of the opinion the finding of the court below (that the application for receivers was made by Butler & Co.) was not authorized by the evidence. A corporation can act only through its officers and agents, but their action to bind the corporation must be within the scope of their authority. A general agent charged with the management of a corporation is not authorized to dispose of its entire property in a single transaction, in the absence of special authority so to do. If the directors of a corporation may authorize such a disposition of the property of the corporation, they can do so only at a duly warned meeting of the board, or one at which all are present. And the stockholders can confer such authority only by the vote of a majority in a corporate meeting duly warned or by unanimous agreement.

[10] The application for receivers in the equity proceeding involved action looking to a parting with the entire management and control of the business of Butler & Co. and if made by the company, while insolvent, was an act of bankruptcy. The evidence upon which the finding that Butler & Co. made the application was based was that certain agents and counsel for the corporation undertook to bring about the application by procuring a creditor, the McLean Sons Company, to make it in its name.

If procuring a creditor to make an application for receivers can be found to be the application of the corporation and an act of bankruptcy, it can only be so when there is proof that the agents had authority to take such a course of action. In this case the evidence discloses that there was no vote of the board of directors, or of the stockholders, authorizing the action, and no agreement of all the stockholders.

It is urged by the appellees that the directors and stockholders acquiesced in the action taken by these agents and ratified their conduct. But the directors of the corporation, having no authority to act singly, could not, except as a board, ratify action which they could not have authorized, except as a board. And the stockholders could not be found to have acquiesced in and ratified the action of the agents in question without proof that they knew what action was taken and that it was in behalf of the corporation. There was no evidence that all the stockholders knew what action these agents had taken. The equity proceeding, so far as the records would disclose, was the application of a creditor and would give no information as to what these agents had done. And the knowledge possessed by the agents of action taken by themselves in excess of their authority would not be imputable to the corporation or the stockholders.

As it appears that the action of these agents was unauthorized, and there was no evidence that it was subsequently ratified, the corporation could not be found to have made the application for receivers.

The situation in this case resolves itself into this: That Butler & Co., being insolvent in the bankruptcy sense, was put into the hands of receivers. This, however, is not an act of bankruptcy as defined in clause 4, as amended in 1903, and it is apparent that Congress did not intend to make it one. The amendment when introduced read:

"Being insolvent, applied for or was put in the hands of a receiver."

In the Senate its language was changed to read as finally enacted. Had it become a law as originally introduced, the facts in this case would disclose an act of bankruptcy, but, by enacting the clause as amended by the Senate, Congress manifested an intention to leave the situation presented by this case unprovided for, and it is not for the court to enlarge the meaning of the statute by construction and attempt to provide for the omitted situation by holding that the phrase, "because of insolvency," means insolvency other than as defined in section 1, cl. 15.

The power exercised by the court in extending the time for filing answers, and in allowing the receivers to appear, was discretionary. In *re Everybody's Store, Inc.*

In each case the decree will be as follows:

The decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down the 10th day of September, 1913; and the appellants recover cost of appeal.

PUTNAM, Circuit Judge (dissenting). The burden of the litigation in this case is over the definitions given to the words "insolvent" and "insolvency" incorporated in the Bankruptcy Statutes by the amendment of 1903, so far as they relate to these appeals. A careful perusal of text-books and of the decisions of the courts bearing on the definitions to be given these words as applied here fails to show any authority for giving the peculiar definition to the words in question as applied here, except the *Golden Malt Co.*, 164 Fed. 326, 90 C. C. A. 258. This case was much like many of the early decisions with reference to the bankruptcy statutes, where the conclusions were apparently reached without much consideration. The text was so hastily drawn that, on page 328, it declared the provision in question here was a part of the statute of July 1, 1898, when it came in by the Acts of 1903, 32 Stat. 797, as an entirely new topic; a fact which must be regarded in interpreting statutes, which must always be interpreted from an historical point of view in order to be correctly understood. It is true that the amendatory act of 1903 was strictly amendatory in such way as to embody the amendment into the original act of 1898; but, whatever the circumstances under which an amendment comes in, or the form which it takes, the courts are always at liberty to make a broad investigation and to

apply broad considerations with regard to construing an amendment, even more than with reference to construing any part of the body of the original statute, which latter, of course, is always qualified by the context. Here especially, while the statute of 1898 applied throughout to courts in bankruptcy, and therefore may justly be held to have made propositions from the uniform standpoint of those courts throughout, yet this amendment related to proceedings in courts of equity and common law; and in describing those proceedings it may be assumed to use the language of those courts and to construe that language as those courts would have construed it. It is not credible to hold that, in referring to proceedings of the courts of equity and common law, the words "insolvent" or "insolvency," under these circumstances, were to have any different construction than that usually given them in those courts.

By giving the words "insolvent" or "insolvency," as found in the amendment of 1903, the peculiar definition given them by the body of the act of 1898, we would practically defeat the purpose of the amendment, and the amendment would be inapplicable. No proceeding in either courts of equity or common law has ever yet, in appointing receivers or otherwise, used the words "insolvent" or "insolvency" in the special sense declared by the Bankruptcy Act of 1898. Giving these words the force which the opinion of the court gives them would be in substance declaring that no adjudication in bankruptcy based on the appointment of a receiver by a court of equity or common law was in fact and in substance justifiable, because there never has been any case where such an adjudication was secured in which the court which appointed the receiver has ever given to those words the peculiar definition given them by the Bankruptcy Act of 1898, or was ever asked to do so. In the *Golden Malt Co. Case*, to which we have referred, the adjudication in bankruptcy was finally refused. Not only has there never been any adjudication in bankruptcy based on the appointment of a receiver under circumstances like those stated in the opinion of the court, but there is no reasonable probability that there ever will be, as not only has no court of common law or equity ever accepted the definition of "insolvency" embodied in the bankruptcy statutes, but there is no reasonable probability that such courts ever will do so.

None of the cases cited in the opinion of the court seems to sustain its propositions. In order to avoid unnecessary prolixity, we refer to them only by the volumes and pages of the decisions. 106 Fed. 839, 45 C. C. A. 666, was decided before the amendment of 1903; 181 Fed. 422, was in the District Court, and turned on a question of fraud and collusion; 165 Fed. 249, has the same features as the case last referred to; 150 Fed. 293, 80 C. C. A. 181, the *Beatty Case*, quite well known, showed expressly that the proceeding in the state court declared only that the parties proceeded against were unable to meet their obligations as they came due; in 145 Fed. 865, 76 C. C. A. 409, the question we have here was referred to at page 868 but was not decided either there or at page 871; in 131 Fed. 57, 65 C. C. A. 295, the case was submitted to the jury in the District

Court from the aspect taken in the opinion of the court here but was disposed of in the Circuit Court of Appeals as a mere question of fact, without any disposition of the question of law now brought to our attention; the other cases cited were in the District Court and of course are not authority on an appeal from the District Court, as there has been no such mass of them as would indicate a general acquiescence in the proposition now maintained. 139 Fed. 244, did not raise or discuss the question we have before us, although cited to sustain the decision of the District Court in 173 Fed. 699.

Therefore, while disposed to give full effect to the rule in this circuit with regard to following decisions of Circuit Courts of Appeals of other circuits, we cannot go so far as to adopt the *Golden Malt Co. Case*, which is inconsistent with the settled practice, and which practically nullifies the statute to which we are asked here to give effect. Therefore, as this is really the only substantial proposition which stands in the way of affirming the judgment of the District Court, we are of the opinion that that judgment should be affirmed.

We think some additional exposition is necessary with reference to the power of the court to permit the intervention of receivers for the purpose of resisting adjudications in bankruptcy. This matter is pertinent with reference to this case and with reference to the two cases on appeal concerning *Everybody's Store, Incorporated*. The basis of the argument in opposition to permitting the receivers to intervene rests on the mere letter of the statute, found in subsection "b" of section 18 of the Bankruptcy Act of 1898. That limited the right of opposition to the bankrupt or some creditor. The plain purpose of this subsection was to fix a limited time in order that the proceedings might be expedited. It would be an extraordinary proposition that any general provision of law of this character, or of any other character, unless unusually specific, should pull up by the roots in any particular case the application of a fundamental rule governing courts proceeding on equitable principles, including bankruptcy courts, and so denying the power permitting the intervention of receivers or anybody else having a title of any kind whatsoever. The power to intervene has been construed in equity in the most liberal manner where the rights of third parties are involved. This point was authoritatively determined under the present Bankruptcy Statutes in the Second Circuit, with the approval of the Circuit Court of Appeals for that circuit, in 183 Fed. 703, 106 C. C. A. 139, 33 L. R. A. (N. S.) 454, of the decision of the District Court in *Hudson River Power Co.*, 173 Fed. 934. We think the uniform practice in this particular is in harmony with the general rules of equity, so that we would not be justified in disturbing it.

LEHIGH VALLEY R. CO. et al. v. CLARK et al.

(Circuit Court of Appeals, Third Circuit. August 25, 1913.)

No. 1,708.

1. COMMERCE (§ 91*)—INTERSTATE COMMERCE COMMISSION—AWARD OF DAMAGES—ACTION.

A suit brought by one in whose favor the Interstate Commerce Commission has made an award of damages by way of reparation, under the authority of Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act March 2, 1889, c. 382, § 5, 25 Stat. 859, and Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1911, p. 1301), is not a suit on the award, qua award, to recover the amount of the same, but a plenary suit for damages actually sustained by the plaintiff by reason of the violation of the act as conclusively found by the Commission, and he must prove facts from which defendants' liability may be properly inferred, and not merely conclusions of the Commission from facts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 143; Dec. Dig. § 91.*]

2. COMMERCE (§ 95*)—INTERSTATE COMMERCE COMMISSION—AWARD OF DAMAGES.

The procedure contemplated by the act, which provides that the suit shall proceed like other civil suits for damages, is a jury trial, unless waived, accompanied by the usual safeguards furnished by a proper application of the principles of evidence, with the exception that, as provided, the findings and order of the Commission are admissible as prima facie evidence "of the facts therein stated," which must be sufficiently clear and definite to advise the defendant of the violations charged.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. § 95.*]

3. COMMERCE (§ 95*)—INTERSTATE COMMERCE COMMISSION—AWARD OF DAMAGES.

It does not follow, from a finding by the Commission that a given tariff rate established by an interstate carrier is unreasonable and that a lower rate fixed by the Commission is reasonable, that plaintiff has suffered pecuniary damage by reason of the exaction of the former rate, nor, if so, that the measure of such damage is the difference between the two rates; nor is an order of the Commission, awarding plaintiff damages to the extent of the difference in rates by way of reparation, prima facie evidence of the defendant's liability in the subsequent action, which is a private suit for damages, and not for a penalty.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. § 95.*]

4. COMMERCE (§ 95*)—INTERSTATE COMMERCE ACT.

A report of the Commission, awarding damages to a plaintiff as reparation for excessive rates charged, *held* not to contain findings of fact, as required by Interstate Commerce Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384 (U. S. Comp. St. Supp. 1911, p. 1297), sufficient to constitute prima facie evidence of actual damage sustained by plaintiff.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. § 95.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Action by J. Mitchell Clark, William H. Mills, and J. Armstrong Rawlins, copartners trading under the firm name of Naylor & Co., against the Lehigh Valley Railroad Company, the Buffalo, Rochester & Pittsburgh Railway Company, the New York Central & Hud-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

son River Railroad Company, the Philadelphia & Reading Railway Company, the Central Railroad Company of New Jersey, and the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiffs, and defendants bring error. Reversed.

Edgar H. Boles, of New York City, and James F. Campbell, Abraham M. Beitler, John G. Johnson, and H. S. Drinker, Jr., all of Philadelphia, Pa., for plaintiffs in error.

Wm. Barclay Lex and Vivian Frank Gable, both of Philadelphia, Pa., and Frank Van Sant and Arthur R. Thompson, both of Washington, D. C., for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. In the court below, suit was brought by the defendants in error (hereinafter called the plaintiffs) against the plaintiffs in error (hereinafter called the defendant companies) under authority of the Act of Congress of February 4, 1887, amended by the Acts of March 2, 1889, and of June 29, 1906 (see 24 Stat. c. 104, 25 Stat. c. 382, and 34 Stat. c. 3591), to recover damages from the defendant companies, alleged to have been awarded by way of reparation to the plaintiffs, in certain proceedings had before the Interstate Commerce Commission.

As authorized by section 13 of said Act, the plaintiffs, on April 4, 1908, applied by petition to the said Commission, complaining that defendant companies, during certain named years, had exacted and collected from the plaintiffs the rate of \$2.00 per gross ton for the transportation of pyrites cinder, by rail from Buffalo, New York, to points of destination in Pennsylvania and New Jersey. The plaintiffs, as petitioners as aforesaid, attacked the rate of \$2.00 per gross ton on pyrites cinder, as excessive, unjust, unreasonable, and unduly discriminatory, and therefore in violation of the said Act and the Acts amendatory thereof, and prayed that the defendant companies be ordered to desist from exacting and collecting such unreasonable rate; that a lower rate be put in effect, and that reparation be granted to the petitioners. The defendant companies, having been served with a copy of said complaint, made answer thereto; issue was joined, and the cause regularly heard and argued by the parties. Thereafter, January 5, 1909, as alleged in the petition of plaintiffs in the court below, the Interstate Commerce Commission made a finding and report, which was duly filed, ordering the said \$2.00 rate on pyrites cinder to be reduced to a rate not exceeding \$1.45 per gross ton for the carriage thereinbefore named, but refused to award reparation to the plaintiffs; a certified copy of which finding, with the order of the Commission, is attached and made part of the petition and statement of claim of the plaintiffs. It is then alleged by plaintiffs that the defendant companies duly complied with this order of the Interstate Commerce Commission, and on or before February 25, 1909, established, and put in effect, and now have in effect, the aforesaid reduced transportation rate. It is further alleged that on May 9, 1909, the plaintiffs duly filed with the Interstate Commerce

Commission a motion for a rehearing on the question of reparation alone, which motion was granted, and notice of the granting of the same given to all parties, who appeared at the taking of additional testimony by the plaintiffs; that after hearing and argument, the Interstate Commerce Commission, on June 2, 1910, made a finding and ordered the defendant companies to make reparation to the petitioners, specifying the amount to be refunded in each case, a certified copy of the report, conclusions, and order of the Commission on the rehearing being attached as an exhibit to the petition and statement of plaintiffs in the court below. The plaintiffs aver that a true copy of the aforesaid order of the Commission, dated June 2, 1910, was duly served upon the defendant companies, and demand made that they should pay to the petitioners the sum claimed in their petition and set forth in the aforesaid order of the Commission, but that said defendant companies have wholly failed, neglected, and refused to pay the same, etc.

Upon the facts thus alleged, the plaintiffs aver in their petition and statement of claim in the court below, that they are lawfully and legally entitled to receive and recover from the said defendant companies the several amounts of money set forth, as and for damages and reparation, in accordance with the said order of the Interstate Commerce Commission, dated June 2, 1910.

Section 14 of the original Interstate Commerce Act provided that in an investigation made by the Commission, it shall be its duty to make a report in writing, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found." Section 16 provided for the refusal or neglect "to obey * * * any lawful order or requirement of the Commission," by authorizing the Commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States *sitting in equity*, and empowering such court, as a court of equity, to hear and determine the matter, on notice to the common carrier complained of, "in such manner as to do justice in the premises," with full power to conduct all such inquiries as the court may think needful to enable it to form a just judgment in the matter, "and on such hearing * * * the report of said Commission shall be prima facie evidence of the matters therein stated." And it is provided that, if it be made to appear to the court "that the *lawful order or requirement* of said Commission, drawn in question, has been violated or disobeyed," the court may issue a "writ of injunction or other proper process, mandatory or otherwise," to restrain the common carrier from further violation or disobedience of the order or requirement of the Commission, and enjoining obedience to the same, with power to issue writs of attachment or other process incident or applicable to writs of injunction or other proper process, mandatory

or otherwise, against such common carrier. (The italics here, as elsewhere, are ours).

It seems clear from these sections of the Act of 1887, as they originally stood, that Congress had not contemplated a distinction between reparation cases and other cases in which the order of the Commission was not complied with. Circuit Courts were vested with jurisdiction to entertain the complaint of a person interested, that an order had not been complied with, and to hear and determine the matter as courts of equity, giving the redress peculiarly appropriate to equitable jurisdiction, and for that purpose, all the findings of fact by the Commission, as well as all the evidence taken before the Commission, as set forth in the record, were before the court. As all the proceedings for the enforcement of the legal orders of the Commission were solely in equity, a difficulty was soon recognized in reparation cases. It is one thing to enforce by injunction or mandatory process the lawful ministerial order of the Commission, as to things to be done or not to be done in futuro by defendant carriers in the conduct of their business, and quite another thing to enforce an order for the payment of damages by such carriers for a past violation of law. The claim for such damages, as said by the Commission in *Heck & Petree v. Railroad Co.*, 1 Interst. Com. Com'n R. 775, "presents a case at common law in which the defendants are entitled to a jury trial," under the seventh amendment to the Constitution. As the statute provided for no trial by jury in the suits to enforce such awards, the Commission repeatedly held that it could make no award of damages in such case, for the reason that the defendants were entitled to have the amount assessed by a jury.

This state of things undoubtedly brought about the amendment to section 16 of the original Act, by the Act of March 2, 1889. By this amendment, Congress recognized the propriety of the suggestion made by the Commission, and added to section 16 of the original Act, the following:

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice, * * * it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the Circuit Court of the United States sitting as a court of law * * * alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause. * * * And it shall be the duty of the marshal of the district * * * to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days. * * * At the trial [of] the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated."

This amendment, made to preserve the constitutionality of reparation proceedings, left the jurisdiction, in cases not involving reparation, to the Circuit Courts sitting as courts of equity, as originally

provided. These cases arise either on a petition by the Commission or party interested, to enforce its order, or on an application for injunction by the party defendant, to restrain its enforcement. In either case, the entire record is before the court, and it can examine all the evidence before the Commission, or evidence in addition thereto, to determine the question of the *legality* of the order. The making of such an order is a ministerial function, though *quasi* judicial in the sense that it must be made in the course of an orderly procedure, in which the parties interested may be fairly heard and evidence fairly considered. These fundamental conditions appearing, the order is "*lawful*," and must be obeyed and enforced. It is as though Congress had enjoined as a duty the things embraced in such lawful order. It is in this view of a non-reparation case that the finding by the Commission of the reasonableness or unreasonableness of a rate is a finding of an ultimate fact, which will not be disturbed by a court of equity unless the legality of the proceeding in which it is made is successfully attacked.

In such cases, the judicial power of a court of equity is invoked, to enforce, the *lawful* order of the Commission, and involves no controversy requiring a trial by jury. It is the *lawful* order, *qua* order, of the Commission, as an administrative body, that is to be enforced; whereas, in reparation cases, there is a controversy at common law as to whether the damages awarded by the Commission or any damages are recoverable, and the mere order of the Commission, as we shall see, only figures in the case as a necessary condition precedent to the bringing of the action, though the findings of facts by the Commission, as set forth in its report, are *prima facie* evidence of the matters therein stated. The damages sought are only recoverable by the verdict of a jury and judgment thereon, as in ordinary trials at common law.

Section 14 of the original Act of 1887 is left unchanged by this amendatory Act of 1889. By the Act of 1906 (commonly called the "Hepburn Act") important amendments were made to the Act of 1887, as amended by the Act of 1889. The most important of these amendments was the enlargement of the powers of the Commission, by authorizing them, not only to find the rates of interstate carriers unreasonable or excessive, but to determine and fix and make mandatory what, in the opinion of the Commission, under all the circumstances, would be a reasonable rate. Section 14 was amended so as to read as follows:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

The effect of this amendment is, that in *non-reparation cases*, for reasons peculiar to such cases, as above pointed out, the Commission henceforth need make no findings of fact on which it bases its conclusions. In reparation cases, however, it is still bound to make

findings of all the facts, which it was its duty to make before the amendatory Act of 1906; not merely the facts relating to petitioner's particular tonnage and dates of shipment, but also all the facts on which the Commission based its conclusion as to the propriety of an award of damages.

Section 16 was also amended, so as to make still more clear the distinction between reparation and non-reparation cases. It provides that where, after hearing on a complaint, the Commission should determine that complainant is entitled to an award of damages, under the provisions of the Act, for a violation thereof, it "shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file in the Circuit Court of the United States for the district in which he resides * * * a petition setting forth briefly the *causes* for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit, the findings and order of the Commission shall be *prima facie* evidence of the facts *therein stated*. After other provisions, with which we are not here concerned, the section further emphasizes the distinction between reparation and non-reparation cases, as follows:

"If any carrier fails or neglects to obey any order of the Commission, *other than for the payment of money*, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the Circuit Court in the district where such carrier has its principal operating office, * * * for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise," etc.

As we have remarked, section 14, as amended by the Act of 1906, relieved the Commission of the duty of stating specifically the findings of fact on which it based its conclusions in cases where damages were not awarded, and it is simply required to make a report, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises. The District Court, as a court of equity, will consider the order it is asked to enforce as valid, when it appears to have been made in the course of a regular hearing and to be founded upon evidence and facts proved. Much light is thrown upon a situation of this kind by the recent decision of the Supreme Court in the non-reparation case of *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431. Mr. Justice Lamar, delivering the opinion of the court, said:

"In a case like the present the courts will not review the Commission's conclusions of fact (Int. Com. Comm. v. Del., etc., Ry., 220 U. S. 251 [31 Sup. Ct. 392, 55 L. Ed. 448]), by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551." So. Pac. Co. v. Int. Com. Comm., 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283.

So much for the conclusiveness of a decision or order of the Commission in a non-reparation case, where a court of equity is asked to enjoin the enforcement of such decision or order as the valid order of an administrative body. Such an order, if it stands the tests of legality laid down by the Supreme Court in the case above referred to, is conclusive upon a court of equity where such administrative order is sought to be enforced. But it is clear that, in a reparation case, though the award of damages by the Commission, following its finding of fact that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of the suit for damages authorized by the statute, it is not capable of enforcement as an administrative order, and is not of itself evidence of *liability*, *prima facie* or otherwise, in any judicial proceeding.

The amended Act of 1906, no less than the original Act, or the same as amended in 1889, expressly requires that the report of the Commission "shall include the findings of fact on which the award is made." The Act of 1889 and the Act of 1906 both provide that, where damages are awarded by way of reparation, they can be recovered or enforced only by a suit at common law in a Circuit Court of the United States, requiring a trial by jury. The Act of 1906 makes clear the plenary character of such a suit, by providing that it "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." It hardly needs that attention be called to what is so obvious, that both the "findings and order" are *prima facie* evidence only of the *facts* therein stated. This is very far indeed from declaring that the order itself, awarding reparation, is *prima facie* evidence of damages, or the proper measure thereof.

As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation thereof *in futuro*, in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the Act. The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof. It makes redress of a private injury actually suffered, possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by making it depend in certain cases upon the precedent award of reparation by the Commission, such award is not of the nature of the administrative functions conferred on that body.

In the case of *Western N. Y. & P. R. Co. v. Penn Refining Co.*, 137 Fed. 343, 70 C. C. A. 23, which was decided with reference to the original Act, as amended by the Act of 1889, we said:

"In proceedings at law under section 16, as amended, for the enforcement of an order or requirement of the commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

The judgment in this case was affirmed by the Supreme Court, with no criticism of the language quoted. *Penn Refining Co. v. West N. Y. & P. R. R. Co.*, 208 U. S. 208, 28 Sup. Ct. 268, 52 L. Ed. 456.

With this understanding of the true intent and meaning of the Interstate Commerce Act of 1887, as amended in the respects hereinbefore discussed, we may state as conclusions fairly resulting therefrom, the following:

[1] (1) That a suit brought by one in whose favor the Commission has made an award of damages by way of reparation, under the authority of section 16 of the Act, is not a suit on the award, *qua* award, to recover the amount of the same, but a plenary suit for damages actually incurred by the plaintiff, by reason of the violation of the act by the defendant as conclusively found by the Commission.

(2) In the prosecution of such a suit, plaintiff may avail himself, without further proof, of the conclusive administrative finding or order of the Commission that the defendant was guilty of the violation of the act complained of, but must prove the actual damages incurred by him by reason of such violation and for which damages alone the Act makes the defendant carrier liable.

(3) In addition to this advantage given to the plaintiff in the prosecution of such a suit, plaintiff need not examine witnesses or offer other proof, in the first instance, of the facts stated in the findings or order of the Commission, such findings or order being made *prima facie* evidence thereof.

[2] (4) Such suit is expressly required by the Act to be proceeded in "like other civil suits for damages," which can mean nothing less than that the "parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right."

(5) This essential right is not invalidated or impaired by the qualification of the rules of evidence, to the effect that "the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

(6) By reason of this qualification, the plaintiff may now avail himself of a new method to get these facts before the jury, and that method is this: There must be found somewhere and in some form sufficiently clear and sufficiently definite findings of the Commission, in which the needful facts are stated and by which the defendant is thus given due notice of the facts to be urged against him, so that he may, if he can, controvert their *prima facie* effect.

[3] (7) It does not necessarily follow, from a finding by the Com-

mission that a given tariff rate established by the defendant is unreasonable and that a lower rate fixed by the Commission is reasonable, that plaintiff has suffered pecuniary damage, by reason of the exaction by defendant of the former rate, or, if any such damage has been suffered, that the difference between the rate abrogated and the lower rate established is the measure of such damage. If any damage is shown, it may be either greater or less than such difference.

(8) The authorization of a suit for damages by one claiming to be injured by a specific violation of the Act by a carrier, is not the imposition of a penalty in addition to the fines imposed and made payable to the government for every specific violation of a requirement of the Act, but a remedy for the recovery of damages actually incurred by a private person because of the wrongful act of the carrier.

We turn to the consideration of the case, as presented in the record before us. The plaintiffs, in their petition to the court below, set forth the fact of their application to the Interstate Commerce Commission, charging against the defendant companies the exaction of an excessive and unreasonable rate per ton for the transportation of pyrites cinder between points in the state of New York and the states of Pennsylvania and New Jersey. They then set forth the statements made by the Commission in two several reports, in the first of which, dated January 5, 1909, the Commission finds the rate as complained of unreasonable, and directs that it thereafter be reduced to a rate named, but declines to award damages by way of reparation. They also allege that the defendant companies duly complied with the aforesaid order of the Commission within the time limited therefor. The petition then states that on May 8, 1909, the petitioners filed a motion with the Commission for a rehearing, on the *question of reparation alone*, notice of the granting of which was duly given to all parties who appeared at *the taking of additional testimony by the petitioners*, and that after hearing and argument, the Commission made a report, awarding damages as prayed for. The petition then concludes with a statement of the demand made from the defendant companies for the payment of the sum awarded, and of their refusal to pay the same.

At the trial, the plaintiffs offered in evidence these reports and orders of the Interstate Commerce Commission, as *prima facie* evidence of the facts found therein. After objection by counsel for the defendant companies, the said reports and orders of the Commission were admitted for what they were worth as findings of fact. Except that one witness was produced to prove that the award of the Commission had not been paid by the defendants, these two reports and orders constituted the only evidence produced by the plaintiffs, and after their admission by the court, plaintiffs rested their case. No evidence was offered by the defendants.

The first report, and the order made thereon January 5, 1909, is as follows:

"This complaint involves the reasonableness of the rate of \$2 per gross ton on pyrites cinder over the lines of the defendant companies from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey.

"Iron pyrites is a high grade ore containing a large percentage of both sulphur and metallic iron. It is imported, chiefly from Spain, by fertilizer and

chemical works located in this country. At these works this ore is burned in specially constructed furnaces, and from the arising sulphuric fumes sulphuric acid is obtained. The resultant product, pyrites cinder, contains approximately 60 per cent. of iron and a small residue of sulphur, usually from 1 to 3 per cent., the amount of residue determining the value of cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore. This pyrites cinder, the rate upon which complainants claim to be excessive, is shipped to blasting furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron. It is alleged by the complainants that pyrites cinder being a low grade commodity, valued at about \$1 per gross ton at Buffalo, is unable to move at the \$2 per ton rate; the output at the chemical works at Buffalo being from 20,000 to 25,000 tons per year, only one-quarter of which is sold. Pyrites cinder is also produced at chemical works in Bayonne, N. J., where it is valued at \$2 per ton, the difference between the value at Buffalo and the value at Bayonne being, it is claimed, accounted for because of the difference in freight rate to points of destination in New Jersey and Pennsylvania. This fact is emphasized by complainants that the iron pyrites bears a rate from New York, Philadelphia and Baltimore to Buffalo of but \$1.40 per ton, while the pyrites cinder for a return haul of but a part of the distance bears a rate of \$2 per ton, the cheaper commodity for a shorter haul being charged a greater amount than the higher grade commodity for a longer haul.

"The contention of the defendants by way of answer is that pyrites cinder should take a higher rate than iron ore between the same points, owing to the longer time consumed in loading the former than the latter, and because iron ore is consumed in greater quantities than pyrites cinder. It appears that it does in fact take much less time to load iron ore than pyrites cinder, and a car load of iron ore is slightly heavier than a load of pyrites cinder. The rate on iron ore is \$1.45 per ton to points of destination carrying a \$2 rate on pyrites cinder.

"We are of the opinion that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo, and an order will be made accordingly. Reparation will not be awarded."

The second report and order of June 2, 1910, made upon a rehearing and investigation upon the question of reparation alone, as applied for by the plaintiffs, is as follows:

"In the report made by this Commission following an inquiry into the reasonableness of the rate of \$2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey, the rate was found excessive and the defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied. *Naylor & Co. v. L. V. R. R. Co.*, 15 Interst. Com. Com'n R. 9.

"Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to \$1.45, the rate on iron ore. The complainant thereupon filed a motion for a rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. *Additional evidence* was taken and the parties were heard in oral argument.

"We now find that the rate of \$2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of \$1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations."

Then follow the specific awards against the different defendant companies.

Plaintiffs contend that this hearing and investigation applied for by plaintiffs on the question of reparation alone, though had more than a year after the former report denying reparation, was a rehearing

of the original application to the Commission, and that therefore the first report and such findings as were contained therein were part of the second report. While this may in some respects be true, it is also true that reparation had been denied at the first hearing, and that the second hearing on the question of reparation alone was a distinct proceeding on that issue. That it was so, appears by the statement of the Commission itself, that "additional evidence was taken and the parties were heard in oral argument." It does not follow that, because a given rate is found to be excessive and unreasonable, and is ordered to be discontinued and another rate established, the complainant has suffered or is entitled to damages by way of reparation. Notwithstanding such a finding and order, there are many circumstances and considerations, such as the relations between the parties, want of knowledge by the defendant companies of the facts bearing on the question of reasonableness, lack of intention to violate the law in that respect, or lack of proof of actual damage suffered by plaintiffs, which might influence the Commission or a jury in coming to the conclusion that the applicant was not entitled to an award of reparation or damages. And this was the conclusion of the Commission at the first hearing. The fact that, while pyrites cinder was paying \$2.00 per gross ton, from Buffalo, New York, to points in Pennsylvania and New Jersey, iron ore was being charged \$1.45 per ton, from the ports of Philadelphia and Baltimore to Buffalo, and that such difference was unreasonable, was not sufficient at the first hearing to convince the Commission that the applicant had suffered or was entitled to pecuniary damages. As said by the Supreme Court in *Parsons v. Chicago & N. W. Ry.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231:

"The only right of recovery given by the Interstate Commerce Act to the individual, is to the persons or person injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this Act; and before any party can recover under the Act, he must show, not merely the wrong of the carrier, but, that that wrong has operated to his injury."

And so we find that, in the second report in which reparation was awarded, the Commission states that additional evidence was taken and the parties were heard in oral argument. What this additional evidence was, or what were the facts which the Commission found, established by it, is nowhere stated in the report. So that we have nothing in the way of the findings of facts required by the statute upon which the award of reparation by the Commissioners was made. The second report does not state that reparation was awarded upon any supposed findings of fact in the first report. Nor could it well have been, because the Commission, though finding the charge made by the defendant companies to be unreasonable, distinctly declined to find that plaintiffs were entitled to reparation. It is reasonable to conclude, therefore, that the award of reparation was made upon the facts established by the additional evidence. Section 14 of the Interstate Commerce Act, as amended, is peremptory in its requirement that in such case the Commission should include in their report the findings of fact on which their award was made.

But, even if the reference to the first report were sufficient to incorporate all its statements and supposed findings of fact in the second report, yet the facts of which those statements or findings are the *prima facie* evidence, are wholly insufficient to support the plaintiffs' claim for damages.

As the Commission in its first report had refused reparation, it was relieved by the amendment of 1906 from the duty of including in its report the findings of fact on which its conclusion as to the unreasonableness of the rate was based. Such findings are not to be expected in that report. The statements in the opinion that most nearly approach in character findings of fact, are that iron pyrites is a high grade ore containing a large percentage of both sulphur and metallic iron; that it is imported chiefly from Spain by fertilizer and chemical works; the ore is burned at these works, and from the arising sulphuric fumes, sulphuric acid is obtained; that the resultant product, pyrites cinder, contains approximately 60 per cent. of iron and a small residue of sulphur, usually from 1 to 3 per cent., the amount of residue determining the value of the cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore; that this pyrites cinder is shipped to blast furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron.

Though these facts be taken by the jury as *prima facie* true, they clearly have no relevancy to the demand of the plaintiffs for damages. What follows is a summary by the Commission of the contentions of the plaintiffs and the defendant companies, without any finding by the Commission as to the facts embodied therein, except that, in stating the contention of the defendant companies, it does affirm some of the facts upon which it is founded.

But for the reasons already stated, even if these statements of the contentions of the parties are to be regarded as findings of fact, we are still of opinion that, however they may have justified the finding of the Commission as to the unreasonableness of the charge on pyrites cinder, and the order for its reduction to the rate charged on iron ore, they do not justify the jury in awarding damages to the plaintiffs. It does not at all follow, as plaintiffs seem to be under the impression that it does, that because the Acts make certain findings of fact *prima facie* evidence of such facts, it also determines their probative force.

Counsel for plaintiffs apparently does not much rely, if at all, upon these statements in the first report of the Commission, to which we have referred, as findings of fact sufficient for his purpose. The case was apparently tried in the court below and has been argued here by counsel for the plaintiffs, on the theory that the Commission having found as a fact that the rate exacted by the carriers was unreasonable, that that fact, together with the award of reparation, as set forth in the reports and orders of the Interstate Commerce Commission, must stand as *prima facie* proof of plaintiffs' case before the jury. As a matter of fact, that was plaintiffs' claim in their petition. What we have already said, should be sufficient to expose the fallacy of that theory. It is only as to the *facts* contained in the order,

that the order is made *prima facie* evidence. But the orders themselves of the Commission are not *prima facie* evidence as to the question of liability in a judicial proceeding. As well said by Judge McCall in *Darnell-Taenzer Lumber Company v. So. Pac. Co.* (C. C.) 190 Fed. 659:

"This must be so for two reasons: First, if the Congress intended that the order making the award should be taken as *prima facie* evidence of the liability of the carrier, then it would seem that it did a useless thing in requiring the Commission by the terms of the Act to make findings of fact in cases wherein awards for damages are allowed. * * * In such a case the court would be at a loss to know whether it would be controlled by the facts reported or the order made by the Commission in pronouncing its judgment."

But, upon this theory, the case was actually submitted to the jury, and presumably upon that theory determined by them. We find that the court below submitted the case to the jury, as follows:

"These amounts were awarded by the Commission against these railroads in favor of the plaintiff.

"The plaintiff has submitted to you evidence to establish the fact that these railroads have not, up to this time, paid these awards. They also submit to you the reports of the Interstate Commerce Commission, for the purpose of showing that that finding was made by the Commission, and that these awards in favor of the plaintiff were made against these railroad companies. This same Act of 1887, the Interstate Commerce Act, section 16, says that such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and the order of the Commission shall be *prima facie* evidence of the facts therein stated. You will notice that the Act of Congress says that the findings of the Commission shall be *prima facie* evidence of the facts therein stated. In the report, the facts stated are, as I have read them to you, that is, the Commission finds that \$2.00 a ton is an excessive charge on this ore, and it is excessive to the extent of the difference between \$1.45 per ton and \$2.00 per ton; and then it proceeds to state the number of tons that each of the railroads carried for the plaintiff at that excessive amount, and awards an amount to the plaintiff equal to the amount of the excessive charge on the number of tons carried. That is to say, it has found that these railroads owe this plaintiff the amount of money stated, and found in the report, because of the fact that the railroads charged them excessive freight. The act says that that shall be *prima facie* evidence. That means that it shall be established, *prima facie*, the facts therein contained unless contradicted or explained. The defendants have offered no evidence whatever, and leave the record as to the evidence the same as it was when the plaintiff closed its case. You have nothing, then, before you except that the Interstate Commerce Commission found that these railroads owe this plaintiff so much money, and that it has not yet been paid. The Act says that that finding of the Commission shall be *prima facie* evidence of the facts, and you will therefore say whether or not the plaintiff is entitled to recover the amount of money claimed against each railroad respectively."

We have quoted all that was said in submitting the case to the jury, that we may do no injustice to the learned and usually careful judge who delivered the charge. It is impossible to say that the jury were not led to believe that they were justified in considering that the order of the Commission, that these defendant companies should pay the plaintiffs so much money, was *prima facie* evidence of the defendants' liability therefor.

Since the argument and determination of this case, the opinion of the Supreme Court in *Pennsylvania Railroad Co. v. International*

Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, has been delivered, and by it the pivotal question involved in this case has, we think, been authoritatively and finally disposed of.

In that case, the Coal Mining Company had sued the Pennsylvania Railroad Company, as a carrier in interstate commerce, for \$37,268.00, being the difference between the published tariff rates paid by the plaintiff and lower rates resulting from rebates from the published rates allowed other coal dealers making like shipments over the same road, from the same point to the same destination.

It was objected by the defendant that, inasmuch as the suit was instituted by plaintiff in the court below, without first having made complaint to the Interstate Commerce Commission, and without any finding by that body that the facts stated constituted a rebate or discrimination prohibited by the Act, the court had no jurisdiction to entertain such suit. In disposing of this objection and sustaining the jurisdiction of the court, Mr. Justice Lamar, in delivering the opinion of the court, said:

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation. In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class. This departure from the published tariff was forbidden, and section 8 (24 Stat. 382) expressly provided that any carrier doing any act prohibited by the statute should be liable to the person * * * injured thereby for the full amount of damages sustained in consequence of any such violation, * * * together with reasonable * * * attorneys' fee."

"2. But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact that in its pleading the plaintiff does not claim to have been damaged, and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary, for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time, over the same route."

The question here raised is in principle precisely that raised in the present case. Here, as there, in its pleading the plaintiff does not claim specific damages, but contends that, as matter of law, it was entitled to recover, as damages, the difference between the tariff rate charged and the reasonable rate established by the Commission. No distinction in principle can be predicated upon the fact that, in the case under consideration by the Supreme Court, the action was based directly upon an alleged violation of section 2 of the Act, prohibiting the giving by a carrier of rebates, etc., as therein defined, and as to which no complaint to the Commission was required before bringing a suit. Nor

can any distinction be based upon the bringing of that suit under section 8, instead of under section 16.

In the present case, the action is brought under the provisions of section 16, authorizing a suit for damages, after complaint to and an order made by the Interstate Commerce Commission, but it is a private suit for damages, and not for a penalty, and, as expressly enjoined by the Act, is to be proceeded in "in all respects like other civil suits for damages." Otherwise, it would not comply with the mandate of the seventh amendment to the Constitution. There can be no question, therefore, but that what is said by the Supreme Court in regard to the nature of the damages recoverable in a suit before it, is applicable to the damages sought to be recovered in this suit.

We again quote somewhat at length the language of Mr. Justice Lamar in this respect. Referring to the case of *Parsons v. Railway*, 167 U. S. 460, 17 Sup. Ct. 892, 42 L. Ed. 231, and quoting therefrom, with approval, the following language:

"Before any party can recover under the Act, he must show not merely the wrong of the carrier, but that that wrong has in effect operated to his injury."

In the case before us, the wrong of the carrier is conclusively shown by the administrative finding of the Commission. He then says:

"Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government. * * *

"The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record. For example:

"If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute in any such case being then entitled to recover the full damages sustained; but the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper, but the purchaser, who paid the freight would have been the person injured, if any damage resulted from giving rebates. To say that the seller and buyer, shipper and consignee, could both recover, would mean that damages had been awarded to two where only one had suffered; * * * for it [the plaintiff] argues that, whenever it showed that a lower rate had been charged on contract coal sold in 1899, it was entitled to recover the same rate on shipments made by it to the same place on the same day in 1901, even though there had been no competition in the two sales, and without proof that there had been any fall in market prices, diminution in its profits, decrease in its business, or increase in its expenses. It claimed that it was a mere matter of mathematics, and that for every rebate on contract coal, plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury.

"6. To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime; would destroy the equality and certainty of rates; and, contrary to the statute, would make the carrier liable for damages beyond those inflicted, and to persons not injured. The limitation of liability to the persons damaged, and to an amount equal to the injury suffered, is not out of consideration for the carrier who has violated the statute. On the contrary, the Act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law, in its measure of fine and punishment, is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the government. If by the same act a private injury was inflicted, a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment, and the state of the market; so that, instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be, and whether greater or less than the rate of rebate paid.

"7. This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons Case, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed. In *Knuksen v. Michigan Central R. R.*, 148 Fed. 974 [79 C. C. A. 52], it was said by the Circuit Court of Appeals for the Eighth Circuit that to 'support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government or to corrective or coercive proceedings at the instance of the Commission.'"

[4] In conclusion, we are of opinion, first, that there were no sufficient findings of fact in these reports of the Commission, as required by the statute; second, that if any of the statements in the first report could properly be considered as findings of fact, within the meaning of the statute, so as to make such findings *prima facie* evidence of the facts found, they were not sufficient to support the plaintiffs' claim or make out even a *prima facie* case for damages. The plaintiffs were not bound to rely upon *prima facie* evidence. The whole field of inquiry was open to them,—the production of such testimony as could be found bearing upon the issue, and notably the additional evidence referred to by the Commission in its second report. Failing to produce evidence *prima facie* sufficient to show actual damage suffered, and the amount thereof, the defendants were not put to a reply, and the plaintiffs must suffer the consequence of their default.

We think for the reasons stated, the assignment of error, based on the exception to the refusal of the court to give binding instructions in favor of the defendant companies, must be sustained, and the judgment of the court below reversed. And it is so ordered.

AMERICAN SUGAR REFINING CO. v. DELAWARE, L. & W. R. CO.

SAME v. NEW YORK CENTRAL & H. R. R. CO.

(Circuit Court of Appeals, Third Circuit. August 19, 1913.)

Nos. 1,737, 1,738.

1. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—PROCEDURE.

The acts of the Interstate Commerce Commission in the exercise of its administrative functions must, in order to be effective, strictly conform to those provisions and requirements of the statutes by which its authority is prescribed and defined, and this is especially true as to those provisions relating to rate-making and rate-changing.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

2. CARRIERS (§ 30*)—INTERSTATE COMMERCE ACT—CONSTRUCTION AND OPERATION—RATES.

Under the specific and mandatory provisions of section 6 of the Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1911, p. 1289), which make it the indispensable duty of an interstate railroad carrier to file and publish schedules of all rates and any rules and regulations which in any wise "change, affect, or determine any part or the aggregate of such aforesaid rates," and prohibit it from charging or receiving any greater or less or different compensation than specified in such schedules, from extending to any shipper any privilege or facilities "except such as are specified in such tariffs," and from making any change in such rates except by plainly changing the schedules or filing or publishing new ones, after 30 days' notice, on the delivery of goods for carriage by a shipper, he has a contract right to the rates named in the schedule at the time on file and published, and to the benefit of all privileges and facilities specified therein which enter into such published rates.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. § 30.*]

3. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—POWER TO CHANGE RATES—PROCEDURE.

The Interstate Commerce Commission has no power to annul or change a rate, regulation, or practice established by a railroad company by its filed and published schedules, except by a formal order made in conformity to section 15 of the Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1911, p. 1297).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

4. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT—CONSTRUCTION—"REBATE."

The word "rebate," as used in the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and its amendments, refers only to such a discount, deduction, or drawback as creates a discrimination in favor of a particular shipper and against other shippers in like situation and destroys that equality of treatment in rates which it is the great purpose of the law to enforce.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 7, p. 5986.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT—"REBATE."

A deduction of two cents per hundred pounds from the freight charge on sugar shipped in carload lots to certain terminal points allowed by the rate schedule filed and published by an interstate railroad carrier to cover cost of transfer from refinery to station, which is allowed to all shippers alike, regardless of the actual cost of such transfer, is not a rebate within the meaning of the Interstate Commerce Act of February 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), nor is it a discrimination within section 3, or otherwise in violation of the act; the net rate being the same to all shippers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to *Gambie-Robinson Co. v. Chicago & N. W. Ry. Co.*, 94 C. C. A. 230.]

Buffington, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Actions at law by the American Sugar Refining Company against the Delaware, Lackawanna & Western Railroad Company and the New York Central & Hudson River Railroad Company. Judgments for defendants, and plaintiff brings error. Reversed.

For opinion below, see 200 Fed. 652.

Chauncey G. Parker, of Newark, N. J., William A. Glasgow, Jr., of Philadelphia, Pa., and James M. Beck, of New York City, for plaintiff in error.

John L. Seager, Douglass Swift, and Vredenburg, Wall & Carey, all of New York City (Albert C. Wall, of New York City, of counsel), for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. These cases are presented upon writs of error to the United States District Court for the District of New Jersey, to review judgments entered in that court, in February, 1913, in favor of the defendants in error, defendants below. They were tried together in the court below, the evidence in both cases involving the same questions of fact and law. They have been so argued here, and what we shall have to say in regard to the assignments of error in the first of the cases named in the caption, will apply also to the second.

The plaintiff in error is a corporation of the state of New Jersey, and on June 10th, 1911, brought an action in assumpsit against the defendant in error, in the New Jersey Supreme Court, to recover the sum of \$5,193.59, alleged to be due, with interest, for certain allowances or deductions from the through rate for sugar shipped in carload lots over defendant's road, from Brooklyn, New York, to trunk line points, according to the terms of the printed and published tariffs of the defendant, existing on file with the Interstate Commerce Commission and in force between the month of March, 1908, and the month of May, 1909, during which period the shipments were made.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

These shipments were all in carload lots and were all to different trunk line points. They were all specified in the bill of particulars annexed to the declaration, and were not in dispute. The plaintiff paid to the defendant, upon each shipment, the full amount of the rate, as fixed in the tariff, but never received the allowance, nor was it credited with the same, as deductions, mentioned and stipulated for in the said tariff schedule.

The defendant, being a corporation of the state of Pennsylvania, removed the case to the United States Circuit Court for the District of New Jersey, and then pleaded the general issue.

The parties, waiving trial by jury, agreed that the cause should be tried by the judge, and the case came on for trial, October 8th, 1912. After the conclusion of the evidence, all of which appears in the transcript of record, the learned judge, having reserved his opinion, later filed the same, together with his findings of fact; and as a conclusion of law he also found that the allowance mentioned in the tariffs was unlawful, and directed judgment in favor of the defendant, which was accordingly, on motion, duly entered.

The court, having refused the motions of the plaintiff for judgment in its favor for the amount claimed, the plaintiff excepted thereto and assigned said refusals as error.

It appears from the findings of fact, none of which are in dispute, that the controversy was between citizens of different states, and that the amount in dispute exceeded the jurisdictional amount; that the defendant was a common carrier of passengers and commodities, and was engaged in interstate commerce; that on or before March 2, 1908, it had duly filed with the Interstate Commerce Commission, at Washington, posted and kept open for public inspection, printed tariffs, which named rates for the transportation of sugar over its line from various New York stations, including Brooklyn, to western termini of trunk lines, or points west thereof; such tariffs were kept in force and effect from the last mentioned date until May 1st, 1909, and included a provision, as follows:

"Effective at the Seaboard March 2d, 1908.

"Allowances—Transfer of Sugar.

"51. Allowances for Transfer on sugar in carloads:

"On shipments of sugar in carloads delivered at New York, Brooklyn, N. Y., Jersey City or Hoboken stations, an allowance of two (2) cents per 100 pounds will be made for transfer, to be deducted from through rate when destined to western termini of trunk lines or points west thereof, the western termini points referred to being as follows: Allegheny, Pa.; Erie, Pa.; Salamanca, Pa.; Bellaire, Ohio; Parkerstown, W. Va.; Black Rock, N. Y.; Buffalo, N. Y.; Dunkirk, N. Y.; Pittsburgh, Pa.; and Wheeling, W. Va."

This provision of the tariff was not changed by the defendant until after May 1st, 1909, but on September 15th, 1908, was made applicable to shipments of sugar from all points within the lighterage limits of New York harbor.

The plaintiff was engaged in the business of refining and shipping sugar, and between March 5th, 1908, and May 1st, 1909, shipped over defendant's railroad, from Brooklyn, N. Y., to western termini

of trunk lines, or points west thereof, 25,854,300 pounds of sugar, in carload lots, and paid to the defendant, by its requirement, the full rates as stated and set forth in said tariff, without any allowance or deduction therefrom of 2 cents per 100 pounds, which was never thereafter paid or refunded to the plaintiff. The judge also found as a fact:

"That all of the said 25,854,300 pounds of sugar were delivered by plaintiff to defendant for transportation at its said station at the Brooklyn eastern district terminal, in Brooklyn, N. Y., and that all of said sugar was by the plaintiff transferred from the refineries of the plaintiff to the said station, by carting the same in wagons drawn by horses, at an expense to the plaintiff of at least 2 cents per 100 pounds, and the said sugar was received by the defendant at the said freight station for transportation over its line."

The amount due to the plaintiff from the defendant, if the provision in defendant's tariff as to such allowance is lawful, was not disputed, and amounted to \$5,170.86. The trial judge, however, decided as matter of law, that these allowances or deductions were unlawful, and it is to review this finding that the present writ is sued out.

It is not to be denied as a general proposition, that where a shipment is made in interstate commerce, the schedule of rates filed and posted by the shipper in conformity with the requirements of the Interstate Commerce Act, constitutes a contract between the shipper and carrier, binding upon both parties. As a corollary to this proposition, it is equally true that any amount exacted under protest from the shipper by the carrier, in excess of the rate prescribed in such schedule, for a service covered thereby, is recoverable by the shipper in assumption, or other appropriate action. The learned judge of the court below, without controverting either of these propositions, placed his judgment as to the law and facts upon two grounds. First, to quote from his opinion filed:

"The validity of these allowances was made the subject of investigation by the Interstate Commerce Commission, on its own motion, under section 13 of the act to regulate commerce, and on December 12th, 1908, were declared to be rebates and in violation of said acts and the acts amendatory thereof and supplementary thereto, in the matter of allowances for transfer of sugar. (Op. No. 742, 14 Interst. Com. Com'n R. 619.) No formal order annulling such allowance was entered in such cause, the Commission stating, in that behalf:

"No order will be made at this time, but the Commission will expect the carriers in question at once to conform their tariffs and practices to the purpose here announced. If this is not done, the Commission will take such steps to enforce compliance with its views in this connection, either by an order in this proceeding (jurisdiction of which is reserved for that purpose), or by such other means as it may deem advisable in the premises."

"In obedience to such decision, the defendants desisted from making such allowances, though no corrected tariffs in conformity therewith were filed by either defendant until after the expiration of the period covered by the claims in suit. * * * The effect of the Commission's decision was to eliminate such allowances from the filed tariffs. No co-operation by the defendants was required to bring about such result. They were as much bound to refrain from making such rebates from the time of such decision until it should be reversed or its operation suspended, as if the tariffs had never contained such allowances. To do otherwise, would subject the defendants to the penalties of the Commerce Act. Such decision was equally binding upon the shippers."

We are compelled to differ from this view, as to the legal effect of the decision and opinion of the Interstate Commerce Commission, as above referred to.

[1] A careful reading of the Interstate Commerce Act, and its amendments, makes it quite clear that the whole subject matter of rate making and rate changing, by carriers who are subject to the provisions of the said act, was intended by Congress to be controlled, either by its direct enactments, or, by the agency of the Commerce Commission, established by it for that purpose.

In the exercise, to that end, of the plenary power to regulate commerce, conferred by the Constitution, Congress has, in the interest of the public, denounced as unlawful certain practices theretofore in vogue, some of which it has penalized as being *contra bonos mores*, and others, for the purpose of insuring conformity to the scheme of regulation imposed by the act and obedience to the requirements and orders of its administrative agent. So far, however, as carriers are subjected by the act to the administrative authority of the Commission which it establishes, that authority must be strictly pursued. Not otherwise can its merely administrative orders be enforced. In other words, acts of the Commission, in exercise of its administrative functions, must, in order to be effective, strictly conform to those provisions and requirements of the act by which its authority is prescribed and defined.

Especially is this true as to those provisions of the act relating to the important and vital function of rate making and rate changing, which, aside from statutory regulation and the requirements of the common law, as to the duty of common carriers, can be exercised within the domain of that freedom of contract that is incident, under free institutions, to individual enterprise. This will abundantly appear from a brief review of such provisions.

[2] Section 2 of the act declares that if any common carrier, subject to the provisions of the act, directly or indirectly, by special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any other person or persons a greater or less compensation for services rendered, or to be rendered, in transportation, than it demands, etc., from any other person for a like service, it shall be deemed guilty of unjust discrimination, which is thereby prohibited and declared to be unlawful.

Section 3 denounces any undue or unreasonable preference or advantage made or given by any common carrier to any person, company, firm, corporation or locality.

Section 4 forbids such common carrier to receive any greater compensation for a shorter than for a longer haul over the same line or route.

Section 5 makes unlawful the pooling of freights and division of earnings.

These sections are concerned with specific inhibitions of acts and conduct on the part of the carrier, violations of which are denounced as misdemeanors and made the subject of indictment and prosecution, without reference to the action or non-action of the Commission.

In section 6, however, the law provides for the control of rate making through the instrumentality of the Commission created by the act. Its provisions cover the subject matter in great detail, and its requirements are specific and mandatory, which we quote, as follows:

"That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established.

* * * * *

"The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise *change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges*, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act.

* * * * *

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, *except such as are specified in such tariffs*," etc. (The italics here and elsewhere our own.)

Language is incapable of more clearly expressing the legislative intent and meaning, than does that which we have just quoted from section 6 of the act. The indispensable duty is imposed upon the carrier to "file with the commission * * * and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points." Again:

"The schedules, printed as aforesaid, * * * shall plainly state the places between which property and passengers will be carried, * * * and shall also state separately * * * all privileges or facilities granted or allowed and any rules or regulations which in any wise *change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges*, or the value of the service rendered. * * * Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property, *except such as are specified in such tariffs*."

The Commission is expressly authorized to reject any schedule which does not set forth the date at which it goes into effect.

When such schedules are once filed with the Commission, by its consent, and posted for the purpose of notice to all shippers, as required by the act, they may not in any respect be changed, altered, or modified, except in the manner prescribed in the act. Until so changed, every shipper delivers his goods for transportation to the carrier, subject to the terms imposed by such schedules, and until so changed, the carrier is under a contractual obligation to abide thereby. Such is the express mandate of the third paragraph of section 6, declaring:

"No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, that the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions."

No legislative requirement could be more explicit than this, and the new schedule of rates filed by the defendant company, in which it is stated that an allowance of 2 cents per 100 pounds will be made for transfer, to be deducted from the through rate, etc., was clearly binding upon the defendant company, until changed in the mode pointed out by the paragraph of section 6, above quoted.

There is no suggestion here that the defendant made any change in the schedule filed with the Commission, with or without 30 days' notice to the Commission and the public of the change proposed. No more is there any suggestion that the Commission has exercised its power to allow changes upon less than the notice specified, or modified in any way the requirements of the sixth section, in respect to publishing, posting and filing of tariffs. The same section forbids any carrier to "participate in the transportation of passengers and property," unless the rates required by the section "have been filed and published in accordance with the provisions of the act." It further forbids the carrier charging, collecting, or receiving "a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time." The section also requires such schedules of rates to plainly state "any rules or regulations which in any wise change, affect, or determine any part, or the aggregate, of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee."

There can be no question that, on its face, the schedule filed by the defendant in this case in all respects conforms to the requirements of this act, and especially to those to which we have above referred.

There is no pretense that any "refund" or "remittance" in any manner or by any device has been made of any portion of the through rates stated in the schedule, *except "such as are therein specified,"* as specially provided for in the act, and there is no suggestion that the schedule filed omits "any rules or regulations which in any wise change, affect, or determine any part or the aggregate of the rates, fares, and charges" provided for therein.

We shall comment presently upon the obvious fact, that the allowance or deduction of 2 cents per 100 pounds from the through rate, is in no wise a rebate, nor does it in any way affect the equality of charges to all shippers, nor constitute any discrimination in favor of one shipper over another.

[3] Such being the relation of the parties with reference to the schedules filed by the defendant, in what respect and to what extent is this situation affected by the action of the Interstate Commerce Commission, referred to in the opinion of the learned judge of the court below? The propriety of these allowances of 2 cents per 100 pounds, for transfer, was made the subject of investigation by the Interstate Commerce Commission, on its own motion, under section 13 of the Interstate Commerce Act. On December 12th, 1908, the Commission made a report, in which, as stated by the learned judge of the court below, these allowances were declared to be "rebates," and as such in violation of the Interstate Commerce Act. No formal order annulling such allowance was entered in the case, the Commission stating in that behalf:

"No order will be made at this time, but the Commission will expect the carriers in question at once to conform their tariffs and practices to the principles here announced. If this is not done, the Commission will take such steps to enforce compliance with its views in this connection, either by an order in this proceeding (jurisdiction of which is reserved for that purpose), or by such other means as it may deem advisable in the premises."

The authority to make such an investigation on its own motion is conferred upon the Commission by the statute. Acting strictly within the confines of the authority thus conferred, we do not question the right of the Commission, after due inquiry and opportunity for hearing accorded to the parties concerned, to make an order in accordance with its decision or finding, binding on the defendant, and that in pursuance of such order, it might obtain enforcement of the same in the manner provided by law.

Section 15 of the act prescribes with particularity the manner in which the Commission shall proceed after a full hearing upon a complaint made, or under an order for investigation and hearing on its own initiative. It provides that when the Commission shall be of opinion that any individual or joint rates demanded by a common carrier, subject to the provisions of the act, or any classifications, regulations, or practices whatsoever of such carrier or carriers are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of the act, the Commission is authorized to determine and prescribe what will be the just and reasonable rates or charges to be thereafter observed,

and what classification, regulation or practice is just, fair and reasonable to be thereafter followed—

"and to make an order that the carrier or carriers shall cease and desist from such violation, to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand or collect any rate or charge * * * in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation and practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission."

It appears from a careful reading of the report referred to, that the Commission has done none of these things, as required by section 15 of the act. It has made no order upon the defendant to desist from the practice condemned. It has prescribed no individual or joint rate or charge to be thereafter observed, or what practice, in its opinion, is just, fair and reasonable to be thereafter followed by the defendant. It is obvious that the orders here mentioned and described are essential to give effect to the opinion or finding of the Commission, and that without them, no such opinion or finding can be enforced against the parties concerned.

That this is so, is made more apparent by the requirement of this section, that all orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, etc., and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order. These time limitations are exacting and essential, but the Commission has made no order, judgment, or deliverance to which they are applicable, and for five months after the report of the Commission these schedules remained on file and in force and binding on the defendant. While they continued in force, the plaintiff had a right to demand from the defendant the rate of transportation which they disclosed.

We are not here concerned with the duty of the defendant, in regard to the investigation and report of the Commerce Commission. The schedule filed March 2d, 1907, was not changed thereby during the period in which the overcharge was exacted. If it was binding before December 12th, 1908, the schedule was equally binding after that date, and until it was changed, in accordance with the requirements of the law. The mere opinion of the Commission, as to the character of the deduction or allowance mentioned in the schedule, could not, ipso facto, affect the validity of the same, in face of the positive requirements and prohibitions of the statute in regard to changes in rates which have been filed and published by a common carrier. The policy of the law is that of permanence and stability, that the public may be assured of the rates to which they may be subjected for a transportation service, and that those rates cannot be changed, indirectly or without the formalities and notice expressly enjoined by the provisions of law to which we have referred. If it were otherwise, the result would be demoralization and confusion in the administration of this important public service. The language of Mr. Justice Harlan,

in *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 477, 31 Sup. Ct. 265, 268 (55 L. Ed. 297, 34 L. R. A. [N. S.] 671), speaking for the Supreme Court, though in another connection, is applicable here. He says:

"It is now an established rule, that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. * * * That rule was established in execution of a public policy which, it seems, Congress deliberately adopted as applicable to the interstate transportation of persons or property."

The power given to the Commission in this respect is confessedly a large and ample one, and for that reason, it is the more necessary that its exercise should be confined within the limits expressly prescribed by the statute. There is no provision in the act to regulate commerce, which permits a tariff provision to be set aside or be discarded or cancelled by the carrier, except by the filing of a new tariff, which was not done in this case until May, 1909, and there is no provision in the act by which the Commission can bring about a condition under which the carrier will be authorized to disregard a tariff provision, except by an order entered in pursuance of an investigation made under the provisions of section 15 of the act to regulate commerce, requiring the carrier to "cease and desist from such violation" of the act, as the Commission may find exists, and making such order effective "within such reasonable time, not less than thirty days * * * as shall be prescribed in the order of the Commission." We cannot, therefore, agree that the effect of the Commission's report or decision, as we have it in the record, was, ipso facto, to eliminate such allowances from the file tariffs.

We turn, then, to the second ground upon which the court below based its judgment, to wit, assuming that the decision of the Commission is not binding upon the plaintiff, and that it has a right to institute a suit in this court, in the first instance, for a violation of its contractual rights arising from the filing of these tariffs, nevertheless, it cannot recover, because the allowance or deduction for transfer, specified in the schedule, is but a "rebate," and violative of the act to regulate commerce.

We do not question that such practices on the part of common carriers, as "rebates," "unjust discriminations," "undue or unreasonable preferences," as defined and forbidden in the second and third sections of the act, are immoral and violative of a sound public policy, and that the penalties denounced in regard to them may be enforced, as direct violations of law, without reference to the administrative functions of the Commerce Commission. Nor do we doubt that the public policy thus especially declared by the statute, would restrain the enforcement of a contract founded upon such practices. Each of the acts condemned constitutes a criminal offense, and is either defined by the statute or by the inherent meaning of the act as designated.

[4] We think what is connoted by the word "rebate," as used in the act, is clearly set forth in the second section, which classes it with other acts by which unjust discrimination may be practiced. Such unjust

discrimination consists, to quote the act, in demanding, collecting, or receiving—

"from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them, a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions."

A rebate is nowhere in the act declared illegal, except where it produces this result.

It is true, the word "rebate" has an etymological or dictionary meaning, which includes any discount or deduction from a stipulated payment, charge, or rate not taken out in advance of payment, but handed back to the payer after he has paid the stipulated sum, even when such discount or deduction is equally applied to all from whom such payment is demandable. It is perfectly apparent, however, that in the Commerce Act the word is used in an offensive sense, and refers only to such discount, deduction or drawback as is the basis of a discrimination in favor of a particular person and against other persons in a like situation, and destroys that equality of treatment in rates, to which the public are entitled and which it is the great purpose of the law to enforce. An undiscriminating rebate is not a criminal offense, nor in any way interdicted or denounced by the law.

[5] It is established by the evidence, and not denied, that this allowance or deduction of 2 cents per 100 pounds for transfer, from the through rate on shipments of sugar, in carload lots, delivered at the stations named, was applicable to all shippers, without discrimination and regardless of whether such shippers paid more or less than 2 cents per 100 pounds for transfer from the refinery to the station, or whether they paid anything at all for such a service. It is sufficiently obvious, therefore, that to all shippers from the stations named and over the designated routes, an equal net freight charge was made. The language in which this deduction is stipulated for in the published schedule, on its face is applicable to all shippers alike demanding or receiving the same or a like service. As we have said, there is no evidence whatever that any discrimination among shippers was made, as to this net rate, demandable for sugar shipped in carload lots from the stations named in the schedule.

We are not concerned here with the scrutiny applied by the Commission to the motives actuating the carrier, in using the words "for transfer," in connection with this allowance or deduction. It may have been, for all we know, the purpose of the carrier to give some plausible excuse for making the net rate under the guise of an allowance for transfer. But we are dealing here with the substance of things, and not with their appearances, and the fact remains, however we look at it, that there was no discrimination among shippers as to any service, for which the carrier had the right to demand compensation. The allowance was made to all shippers alike, whether they actually expended 2 cents per 100 pounds in transfer from the refineries to the station, as it appears the plaintiff did, or more or

less than that sum, or nothing at all. The result was precisely what it would have been if the schedule had named the net rate after the allowance was deducted, as the through rate. It would have been equal to all shippers alike, who delivered their sugar at the place designated by the carrier for its reception, no matter how unequal the cost may have been, of carting such sugar to such receiving station. The defendant was not obliged, in the performance of its public duty, to equalize the accessorial expenses of its shippers.

It was its duty to receive all the sugar of its customers for transportation at designated places on its line, and to charge each shipper the same rate as every other, for a transportation service that was to begin when the sugar had been delivered into its custody for that purpose. The fact that the cost of bringing the sugar to the places designated for its reception by the carrier, was greater to some refiners than it was to others, did not and could not constitute an inequality in the rate of transportation by the carrier. A concession of 2 cents per 100 pounds from the through rate, to all shippers alike, had no tendency to equalize this varying cost to the refiners, in carting their sugar to the receiving station of the defendant company. It left the advantages and disadvantages of the varying distances between the refineries and the station precisely the same as they were before. Nevertheless, this varying cost "for transfer" was not necessarily an unnatural or improper motive for the concession on the part of the defendant company, if it chose to so state it, the important fact being that it was a flat rate deduction to all shippers alike and without discrimination.

Speaking, therefore, of the allowance in the schedule as one "for transfer," does not in any wise alter the real character of the situation. Those who were nearest the station and had short hauls, or none at all, in order to deliver their goods, had a natural advantage over those further away, but this would have been the case, whether a deduction was made or not, as long as that deduction was indiscriminating.

The allowance here in question is not a rebate, because it was not a concession from the published schedules, but an allowance in accordance with them. *Peavey & Co. v. Union Pac. Ry. Co.* (C. C.) 176 Fed. 409. Moreover, it was not discriminatory or preferential in its character, and had none of the characteristics of a rebate offensive to either the common law or the statute.

We are of opinion, therefore, that the second ground upon which the learned judge of the court below places his judgment, is inadmissible, and that there was no such offensive rebate, within the meaning of the statute, practiced by the defendant, as would render void the shipping contract between the plaintiff and defendant.

The judgments below should be reversed and entered in favor of the plaintiff for the full amount of the claim as ascertained by the findings of fact, which are not now in dispute.

And it is so ordered.

BUFFINGTON, Circuit Judge, dissents.

UNION RY. CO. v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1913. Rehearing Denied October 10, 1913.)

No. 2,323.

1. COURTS (§ 508*)—FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.

A suit in a federal court by one railroad company against another to prevent the latter from obtaining the benefit of a judgment in a state court authorizing it to construct a grade crossing over complainant's railroad on the ground that it would be inequitable was not a suit to obtain a decree acting on the state court nor forbidding action in that court, and was therefore not within the prohibition of Judicial Code, § 265 (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]; Rev. St. § 720 [U. S. Comp. St. 1901, p. 581]), forbidding, except in a single case, the granting of an injunction by any court of the United States to stay proceedings in a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

2. COURTS (§ 508*) — FEDERAL COURT — JURISDICTION — INJUNCTION AGAINST DECREE OF STATE COURT.

Diverse citizenship of parties gives a federal court in equity jurisdiction to enjoin the enforcement of a state court decree to the same extent as such relief would be obtainable in a state court of equity, but no further.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

3. RAILROADS (§ 91*)—CROSSING OTHER RAILROADS—GRADE CROSSING—STATUTES.

Shannon's Code Tenn. § 1504, provides that all railroads of the state have power to construct their roads so as to cross each other if necessary by the main trunks or branches, or to unite with each other as with branches. Sections 1845 and 1854-1857, relating to the condemnation of land by railroads, provide for the setting apart by metes and bounds of the land condemned and that in estimating the damages the jury shall give the value of the land without deduction. *Held* that, there being no statutory provision as to the method of crossing, the courts have no jurisdiction to require other than a grade crossing unless the conditions surrounding the crossing at the point proposed are such that a grade crossing would be practically destructive of the objecting railroad company's franchise to operate a railroad at that place.

[Ed. Note.—For other cases see Railroads, Cent. Dig. §§ 249-259; Dec. Dig. § 91.*]

4. RAILROADS (§ 91*)—CROSSING OTHER RAILROADS—GRADE CROSSING—EFFECT.

Evidence *held* insufficient to show that condemnation of a grade crossing for defendant's railroad over the right of way of complainant's road at a point near where several spurs and sidings were laid from complainant's main line, just north of complainant's railroad yards at N., would result in a practical destruction of complainant's franchise to operate a railroad at that place, so as to require the construction of the crossing under complainant's tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 249-259; Dec. Dig. § 91.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Bill by the Illinois Central Railroad Company against the Union Railway Company. Decree for complainant, and defendant appeals. Reversed and remanded, with directions.

This is an appeal from the final decree of the District Court perpetually enjoining appellant from making a crossing over appellee's right of way and tracks at grade, or in any way except by a subway or underpass. Appellee operates a through line of railroad from Chicago to New Orleans, by way of Memphis. Appellant is organized as a corporation under the general railroad laws of Tennessee, operating at and in the vicinity of Memphis; its principal business being that of a belt line. Under the statutes of Tennessee, railroad companies are empowered to condemn lands of other railroad companies for crossing purposes, and the benefit of these statutes extends to appellant. Shannon's Code of Tennessee, §§ 1504, 1868; *Memphis & State Line R. Co. v. Union Railway Co.*, 116 Tenn. 500, 527, 95 S. W. 1019; *Collier v. Union Railway Co.*, 113 Tenn. 96, 118, 83 S. W. 155.

In constructing its road according to its charter, appellant sought to cross appellee's main line at a point about two miles south of Memphis. The circuit court of Shelby county, Tenn., which has jurisdiction over condemnation proceedings under the statutes referred to, upon due notice and appearance by appellee, found as a fact that it was necessary that appellant have a right of way through appellee's property over and across a designated strip of land, adjudged appellant's right to condemn the strip so designated, and appointed a "jury of view" to ascertain damages for the condemnation and taking of such right of way. The jury heard the proofs adduced by the parties, set apart by metes and bounds the strip in question, and assessed appellee's damages at \$3,250. It is conceded that the crossing so allowed was a grade crossing, and that the damages were awarded on that basis. Appellee excepted to the jury's report, and asked that it be set aside and a new writ of inquiry awarded, for the reasons, among others: (a) That the jury disregarded the evidence as to the feasibility of putting the tracks underneath the tracks of appellee; (b) that the evidence introduced showed damages many times greater than those awarded by the jury; that the award was so inadequate that an appeal therefrom under a statutory bond would be insufficient protection to appellee's constitutional rights; and (c) that the jury disregarded evidence as to the necessity of establishing an interlocking plant for insuring safety in the operation of trains.

Without waiting for action upon its exceptions, appellee filed its bill in the court below (then the Circuit Court), alleging the pendency of the condemnation proceedings in question, and that appellant would, unless restrained, "probably procure an order or take such proceedings as will authorize it to construct its tracks at grade across the railroad of your complainant." It further alleged the award of damages, the fact that no order had yet been entered confirming the jury's report, and that appellant would on a day named (being the day on which the bill of complaint herein was filed) ask the Circuit Court "to make such an order or take such proceedings as will authorize it to go upon complainant's property and lay its tracks across complainant's tracks." The bill alleged complainant's willingness that appellant construct its line from one side of complainant's tracks to the other, "provided it is done by going underneath complainant's tracks," but alleged that a crossing at grade would inflict irreparable injury upon complainant, not only because of the risk of collision between trains of the two companies, but also because of the financial loss and material interference with transportation through being required, under the laws of Tennessee, to stop all of its trains before reaching the crossing. The bill further alleged, as a ground of equitable jurisdiction, that the condemnation proceeding was in a court of law, and that appellee's defenses were equitable in character and so could not there be considered.

An order was made restraining appellant not only from attempting to cross, at grade, appellee's right of way at the proposed point, but also from further

prosecuting the condemnation proceedings. The preliminary injunction later issued, as well as the final decree, omit the provision restraining the prosecution of the condemnation proceedings. By decree upon final hearing the court found an underpass with 16 feet clearance feasible and practicable; that it could be constructed at a cost of \$26,000 above the cost of a grade crossing; that a crossing at grade at or near the point in controversy would seriously and unnecessarily impair the value of complainant's railway, would interfere with the proper operation of its trains, would largely and unnecessarily increase the danger to passengers and train operators, and would subject complainant to serious and irreparable damages. The perpetual injunction was made upon a condition (accepted by complainant) that the latter pay one-half the estimated cost of the subway, subject to certain minor limitations not necessary to be stated.

J. W. Canada, of Memphis, Tenn., for appellant.

C. N. Burch and H. D. Minor, both of Memphis, Tenn. (Blewett Lee and C. L. Sivley, both of Chicago, Ill., of counsel), for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. [1, 2] This appeal presents the broad question whether a court of equity, upon the case here presented, may lawfully forbid a railroad company crossing at grade the right of way and tracks of another railroad company under the authority of the Tennessee statutes. We set aside as without merit the contention that the decree complained of violates section 265 of the Judicial Code (formerly section 720 of the Rev. Stat. [U. S. Comp. St. 1901, p. 581]), which forbids, except in the single case there stated, the granting of injunction by any court of the United States to stay proceedings in any court of a state. The decree does not act upon the state court, nor does it in terms forbid action in that court. It in effect seeks to prevent appellant from obtaining the benefit of a judgment claimed to be inequitable. The existing diversity of citizenship between the parties gave to the federal court precisely the same jurisdiction as vested in a court of equity of the state of Tennessee. In other words, appellee is entitled in the federal courts to the relief obtainable in the state court, but to no greater relief. *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 9 Sup. Ct. 237, 32 L. Ed. 630; *Marshall v. Holmes*, 141 U. S. 589, 599, 12 Sup. Ct. 62, 35 L. Ed. 870; *Smyth v. Ames*, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; *Ewing v. City of St. Louis*, 5 Wall. 413, 419, 18 L. Ed. 657; *Bank of Kentucky v. Stone* (C. C. 6th Cir.) 88 Fed. 383, 398.

The authority of a court of equity to enjoin the proposed grade crossing must be considered in the light of certain uncontroverted propositions:

[3] The Tennessee Railroad Act (Code, § 1504) provides broadly that:

"All the railroads of the state have power to construct their roads so as to cross each other, if necessary, by the main trunks or branches, or to unite with each other as with branches."

There is no other statutory provision as to method of crossing. The general condemnation statute, which applies to railroads, provides for the setting apart by metes and bounds of the land condemned, and that

in estimating the damages "the jury shall give the value of the land without deduction," etc. Sections 1845 and 1854-57. Counsel on both sides rightly concede that the state circuit court (which is the only tribunal given original statutory jurisdiction over this proposed condemnation) had no authority to decree any crossing except at grade. That court clearly had complete jurisdiction to grant or deny appellant's right to the crossing. If not convinced of its legal necessity, it was its duty to deny the application. It was, however, so convinced, and granted it. That court had also complete jurisdiction over the subject of damages resulting from a grade crossing, and a court of equity could not properly interfere with the exercise of such jurisdiction because of the difficulty of questions affecting the amount of damages. *Dixon v. Louisville & N. Ry. Co.*, 115 Tenn. 362, 366, 89 S. W. 322. Moreover, the general rule is that equity will not interfere to control condemnation proceedings still pending in a special statutory tribunal (*Pennsylvania R. Co. v. National Docks, etc., Co.* [C. C.] 56 Fed. 697; *Ewing v. City of St. Louis*, supra); and the laws of Tennessee afford complete remedy by review in the Supreme Court, upon the merits of the preliminary inquiry, as to the right of condemnation. *Tennessee Central R. Co. v. Campbell*, 109 Tenn. 655, 660, 73 S. W. 112. But it is because of the lack of power in the state circuit court, to provide for any method of crossing except at grade, that the remedy in equity is invoked, on the ground of irreparable injury and inadequacy of remedy at law. Appellee cites many authorities in support of the proposition that, in the absence of statute regulating the manner in which one railroad shall cross another, a court of equity has power to determine the relative rights of the two companies; and that where the rights of the public or of one or the other of the intersecting lines would be materially injured, such crossing may be enjoined. We pass by these decisions (with one exception) as inapplicable in view of the decision of the Supreme Court of Tennessee, to which we shall presently refer. The exception mentioned is *Chicago, B. & Q. Ry. Co. v. Chicago, etc., Ry. Co.*, 91 Iowa, 16, 58 N. W. 918, in which it was held that a court of equity has jurisdiction to prevent by injunction a crossing at grade. This decision is invoked as specially pertinent because the Tennessee condemnation statute is largely borrowed from the Iowa statute. Even if the decision of the Supreme Court of Iowa were based upon a provision also contained in the Tennessee statute, the decision, made long after the adoption of the statute by the Legislature of Tennessee, would not be binding upon us. But the persuasive force of the opinion is impaired, if not destroyed, by the fact that it invokes a section of the Iowa Code providing that a corporation may "construct and carry its railway *across, over or under* any railway, canal or watercourse, when it may be necessary in the construction of the same, and in such case it *shall so construct its crossings as not necessarily to impede the travel*, transportation or navigation upon the railway, canal or stream so crossed." (Italics ours.) This provision is not found in the Tennessee statute. A decision made in view of such a statute, that equity might interfere to prevent a grade crossing, is a long way from assert-

ing the existence of such power in the absence of such statutory provision.

We are cited to no decision of the Tennessee courts asserting the power of a court of equity to enjoin a grade crossing; and, so far as we have been able to discover, the courts of that state have never judicially decreed a right to a railroad crossing except at grade. The courts of Tennessee have, on the other hand, liberally construed the statutory right of crossing given to the junior road, and rigidly asserted the jurisdiction of the circuit court. For example: It has been held that a discretion as to the location of the proposed line, even as respects the place of crossing another railroad, is vested in the company desiring to cross, provided there is not a substantial departure from the course and direction indicated by the charter. *Tennessee Central R. Co. v. Campbell*, 109 Tenn. 655, 664, 73 S. W. 112; *Memphis, etc., R. Co. v. Union Ry. Co.*, 116 Tenn. 500, 533, 95 S. W. 1019. And in *Dixon v. Louisville & Nashville Ry. Co.*, supra, it was said that the circuit court "has as much right to construe the contract [between the parties to a condemnation proceeding] and the common-law and statutory right of the complainant to crossings, if to be built at the expense of the railroad, as the chancery court has."

The decision of the Supreme Court of Tennessee in the unreported case of *Jackson Railway & Light Co. v. Jackson Southeastern Railroad Co.*, decided May 8, 1909, is, in our opinion, a conclusive denial of the power of a court of equity to require that a crossing be otherwise than at grade, unless perhaps where such crossing would be practically destructive of the franchise of the senior road. In that case the circuit court awarded a grade crossing, and following the assessment of damages the case was removed to the Court of Civil Appeals, whose judgment, upon petition of both parties, was reviewed by the Supreme Court on certiorari. Among the defenses presented was that it was the duty of the circuit judge, and within his province, to require that the crossing in question should be overhead rather than at grade. This contention was overruled in the following language:

"However desirable it may be to avoid grade crossings, and whatever may be the tendency of legislation to require that overhead crossings of railroads and of public highways should be made, yet in this state the policy has not been adopted by the Legislature, and we do not think, *in the absence of a statutory requirement*, that it is *within the power of the courts* to adopt such a policy. There is nothing in our statutes which suggests that the Legislature ever contemplated giving this power to the courts. In the absence of such legislation the authorities invoked by the Jackson & Southeastern Railroad Company whose track was to be crossed cannot be regarded as controlling in this state. So far as we have been able to discover, the cases in which overhead crossings have been required are rested upon statutory enactments, and the text of Mr. Elliott, in his work on Railroads, in support of the principle that such a crossing should be required, is based, we think, upon such cases. *To adopt the policy thus recognized would be judicial legislation.*" (Italics ours.)

It is true that the petitioner in the Jackson Case was organized under the street railway law and not under the general railroad law of Tennessee, but we find no differences in the applicable statutes which should affect the decision of the question we are considering. It is

also true that the Jackson Case was heard at law, and not in equity; but the proposition broadly asserted would seem to apply equally to courts of equity as well as courts of law. If, as there asserted, there is nothing in the Tennessee statutes suggesting that the Legislature ever contemplated giving to the courts the power to adopt a policy of requiring crossings otherwise than at grade, and that to adopt such policy would be judicial legislation, it must be equally true both in equity and at law. The language quoted is the utterance of the highest court of the state, not with reference merely to a question of general law, or of strictly private rights, but with respect to the public policy of the state regarding public and quasi public rights. It should not be disregarded or its binding force lessened by the mere fact that the decision was announced in a case at law rather than in equity. We are not unmindful of the grave dangers attendant upon grade crossings, and of the tendency of many railroads (including appellee), as well as of much modern legislation, to eliminate such crossings so far as practicable, especially when not interlocked; but the question whether a given method of crossing should or should not be allowed is, after all, largely one of state policy; and, so long as that policy is declared by the highest court of the state to be opposed to the requiring of crossings other than at grade, the remedy does not rest in the federal courts.

We should not, however, be understood as holding that relief could not be had in equity, provided the grade crossing in question were sought to be made at such a point, and under such topographical or other conditions, as to be practically destructive of appellee's franchise to operate a railroad at that place. In the Jackson Railway Case, the proposition that the defendant company could not dispute the petitioner's *right to the route selected* by it as most feasible was made with this qualification, "unless it be that the acquisition of the easements across its tracks will destroy or materially impair the use to which it has been dedicated by the defendant." This manifestly relates only to the question of the extent to which the petitioner's selection of crossing point should be regarded as conclusive upon the question of necessity of crossing at the selected point.

In *Cincinnati, N. O. & T. P. R. Co. v. Morgan County, Tenn.*, 143 Fed. 798, 800, 75 C. C. A. 56, 58, in which equity was invoked to restrain the crossing at grade of a highway over the tracks of a railroad company, under the order of the county court, the present Mr. Justice Lurton (formerly a justice of the Supreme Court of Tennessee, but then speaking for this court), said:

"It may be that the crossing of a railroad at grade might, under certain circumstances, be absolutely destructive of the franchise to operate a railway, and the damage so resulting irreparable at law. In such a case, if one should arise, a court of equity might find itself able to grant relief under the well recognized head of equity jurisdiction in respect of damages incapable of redress by an action at law. But we have been unable to discover any authorities of moment where a court of equity has intervened to restrain a crossing unless there has been a taking of property for the purpose which was forbidden by statute as necessary to the enjoyment of the general fran-

And after citing authorities the learned justice continued:

"The most that has been made out in this case as a reason for enjoining a grade crossing is that such a crossing will to a certain extent inconvenience the business of the railroad company."

And after a discussion of the testimony relating to that proposition, it was said that:

"It would take a more than ordinary case to justify a court of equity in substituting its judgment for that of the semi-legislative body intrusted with the whole subject of public highways."

In the Morgan County Case the judgment in condemnation was made by the county court, which was a "semi-legislative" body; but the reference thereto is not without pertinency to the case before us, for not only is the court here asked to interpose its judgment against the policy of the Legislature of the state, but also to supersede by its own judgment the determination of the state circuit court.

The facts of the instant case do not bring it within the exceptions stated in the Morgan County Case.

The rule prevailing in one or more of the other circuits (*Hardin v. Union Trust Co.*, 191 Fed. 152, 156, 111 C. C. A. 632), that a decree sustained by findings of fact which there is evidence to support will not be reviewed by the appellate court, has never been adopted by this court. It is our duty to apply our own judgment to the testimony. However, we doubt whether the trial judge (who did not hear and see the witnesses) intended to find the facts more favorably to appellee than we do.

[4] It is true that a grade crossing at the point in question will inconvenience appellee in the operation of its trains, as well as present the element of danger inherent in grade crossings, even (although to a less degree) when interlocked. The most prominent inconvenience asserted lies in the fact that appellee's road at the point of crossing includes two double tracks (north-bound and south-bound, respectively), used not only for high-speed passenger service, but for a large number of other trains daily, and that the grade crossing unprotected by an interlocker system (which system cannot be enforced under the Tennessee statutes) requires (under the statutes) the bringing of all trains to a full stop before crossing. Again, at the crossing point the appellee's road is at a downgrade from north to south, and that of appellant at a downgrade from east to west. An underpass is shown to be much less expensive than an interlocked grade crossing. It, of course, eliminates interference with the movement of trains on the surface-road. But the point of crossing, while about two miles south of Memphis proper, was north of appellee's important Nonconnah Yards, with which the tracks in question were connected by switches. A few hundred feet south of the projected crossing were one or more tracks connected with spurs or sidings serving neighboring industries; about 1,100 feet south of the crossing was a junction which connected with the Nonconnah Yards; 1,400 feet south of this junction was a grade crossing of the Memphis & State Line Railroad. Although, when the testimony was taken, an interlocking system for the protection of the last-named crossing was in process of construction, and the yard junc-

tion (and possibly the junction with the industrial spurs) was protected by an interlocker, yet the crossing in question was practically within appellee's yard limits, and, notwithstanding the interlocking system employed, passenger trains could safely be moved only under full control, which is said to be 30 miles an hour, and much less than the high speed at which trains may be operated under favorable conditions. On the whole, we are convinced that the inconvenience resulting from this grade crossing, while certainly substantial, presents, under all the circumstances, no more than the average case of interference by unprotected grade crossings in yards outside city limits; and as to high-speed trains not so serious an interference as if located outside of yard limits and at a considerable distance from other junctions and crossing points. On the other hand, while an underpass with 16 feet clearance would seem, comparatively speaking, feasible and practicable, a clearance of 21 or 22 feet is always desirable, and seems to be regarded necessary for complete convenience of operation and perfect safety of employes riding upon the tops of cars. Moreover, the conditions as to drainage of the subway, and as to the grade and curvature of the tracks proposed to be passed through it, impress us as being as objectionable and attended with as much danger as the grades at which the two roads would cross at the surface. Were the question of crossing at grade or under grade submitted here purely as a question of original equitable discretion, to be exercised merely upon a balancing of conveniences and inconveniences, we should, especially in view of the inherent dangers of a grade crossing, be inclined to decide in favor of the underpass. But, in our opinion, the case falls far short of amounting to a practical destruction of appellee's franchise, or of presenting such an extraordinary and unusual case of impairment of such franchise, as to justify equitable interference with appellant's rights under the statutory condemnation proceedings.

For these reasons the decree of the District Court must be reversed and the case remanded, with directions to enter a decree dismissing the bill of complaint, and with further directions to ascertain, either with or without reference to a master as the District Court may determine, what, if any, damages have been suffered by the defendant by reason of the injunction issued in this cause, and to award the amount recoverable by defendant on account thereof by virtue of the bond given upon such injunction.

BLACKSTONE et al. v. EVERYBODY'S STORE, Inc., et al. ZUCKER et al.
v. SAME. In re EVERYBODY'S STORE, Inc.

(Circuit Court of Appeals, First Circuit. September 10, 1913.)

Nos. 1,024, 1,025.

1. BANKRUPTCY (§ 74*)—JURISDICTION—INSOLVENCY.

In an involuntary bankruptcy proceeding against a corporation, the court will not at the outset investigate and settle the ultimate rights of the parties in respect to titles, to reduce the apparent assets of the al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

leged bankrupt, in order to show insolvency and bring the estate of the debtor within the bankruptcy law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 108; Dec. Dig. § 74.*]

2. BANKRUPTCY (§ 60*)—ACT OF BANKRUPTCY—APPLICATION FOR RECEIVER—INSOLVENCY.

Where the appointment of a receiver at the instance of the debtor itself is relied on as an act of bankruptcy, the question of adjudication depends solely on the question of solvency or insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

3. BANKRUPTCY (§ 74*)—ACTS OF BANKRUPTCY—INSOLVENCY—FRAUDULENT TRANSACTIONS.

Creditors of an alleged bankrupt, in support of an involuntary bankruptcy petition, were not entitled to claim that a transfer of certain property to the alleged bankrupt, which would not operate fraudulently on the substantive or beneficial rights of such creditors, if it should stand, was nevertheless invalid, and should be disregarded in determining the corporation's solvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 108; Dec. Dig. § 74.*]

4. BANKRUPTCY (§ 467*)—PROCEEDINGS—ANSWER—EXTENSION OF TIME.

It is within the discretion of the court to grant an alleged bankrupt more than the statutory five days in which to answer, and a ruling extending the time will not be reversed, except on grounds of pure error involving injustice.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

5. BANKRUPTCY (§ 88*)—INVOLUNTARY PETITION—PARTIES—RECEIVERS.

Bankr. Act July 1, 1898, c. 541, § 18b, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429), providing that a bankrupt or any creditor may appear and contest an involuntary petition, does not deprive the court of power to admit other parties, who are legitimately interested in the questions involved in the petition for adjudication; and hence it was not error, in involuntary bankruptcy proceedings against a corporation in the hands of receivers, to permit the receivers to appear and resist the adjudication, though they were under no obligation to do so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109–112; Dec. Dig. § 88.*]

Appeals from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

In the matter of bankruptcy proceedings against Everybody's Store, Incorporated, alleged bankrupt. From a judgment dismissing the petition, complainants appeal. Affirmed.

Lee M. Friedman and Harvey H. Pratt, of Boston, Mass. (Friedman & Atherton, Julius Nelson, Tyler, Corneau & Eames, and Jacobs & Jacobs, all of Boston, Mass., on the brief), for appellants.

Boyd B. Jones, of Boston, Mass. (Charles F. Choate, Jr., Frederick H. Nash, and William M. Morgan, all of Boston, Mass., on the brief), for appellees.

Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 207 F.—48

ALDRICH, District Judge. In this case (that of Everybody's) the petition for an adjudication of bankruptcy was dismissed by the District Court upon consideration of the pleadings and proofs, and we see no reason for disagreeing with that result.

The position of the petitioning creditors involves a novelty, because they seek in limine, in a bankruptcy proceeding, to invoke processes of property elimination in order to bring the case within the jurisdiction of a bankruptcy court.

[1] We do not think it the policy of the bankruptcy law that bankruptcy courts should at the outset seek to investigate, settle, and adjust ultimate rights in respect to titles, for the purpose of reducing apparent assets, and thus bringing the estate of a debtor within bankruptcy jurisdiction. It is difficult to believe that Congress intended that courts should adopt inquisitorial methods with respect to a person's business, to the end that his affairs should be thrown into bankruptcy.

It cannot reasonably be supposed that the bankruptcy statute intended that bankruptcy courts should anticipate questions as to the validity of record titles, which may possibly, at some future time, be raised by creditors of concerns who are strangers to the proceeding under the petition for adjudication. There is no reasonable and proper machinery for the adjustment of such ultimate rights in such a preliminary proceeding, and those who may have the right to avoid apparent titles would not be concluded by results based upon an investigation to which they were not a party. It would probably be the duty of any one in charge of the creditor interests of a concern like Everybody's Store to hold to the apparent titles, in all reasonable ways, in a situation like this, where the titles are voidable, rather than void, until some proper party in interest invokes the supposed right of avoidance.

Under a petition for an adjudication of bankruptcy, the court is not so much concerned with particular questions of ultimate rights as with the broader and more general question whether the bankruptcy law shall be put in operation. Remedies through bankruptcy proceedings are somewhat in derogation of the rules for relief which obtain in the ordinary course of common-law and equity proceedings; still the purpose of the bankruptcy statute is beneficent, and it should be so administered as to reasonably conserve the interests of creditors, and not to unreasonably wreck the apparent titles and the business of a debtor.

This court, now sitting as an appellate court of bankruptcy, has to consider two cases contemporaneously—this one instituted by certain creditors of the Everybody's Store, Incorporated, and that of certain petitioning creditors of the concern of William S. Butler & Co., Incorporated. Both debtors are corporations, and the corporate and creditor rights and interests are doubtless more or less interrelated and interlocked.

Prior to the two petitions in bankruptcy, other creditors of the respective corporations had instituted proceedings in equity, and in each case receivers had been appointed and put in charge of the affairs of the business establishment.

In each bankruptcy proceeding the petitioners rely upon the receivership appointment in the prior equity case as an act of bankruptcy; but we are only concerned in this case with the prior equity proceeding instituted by Everybody's Store in so far as it bears upon the particular question whether such receivership appointment should be accepted as an act of bankruptcy. While in each bankruptcy petition the creditors rely upon the receivership appointment as an act of bankruptcy, it must be borne in mind that the cases differ in one very substantial sense, because in this case (that of Everybody's) the receiver was appointed under a bill in equity which, in stating its case for a receiver, expressly alleges solvency; while in the other (the Butler Case) the receiver was appointed under a bill in which an allegation of solvency is absent. This case (that of Everybody's) differs from the Butler Case in another respect, in that a temporary receivership was applied for under the debtor's own bill in equity, rather than that of its creditors, and thus the particular question here is made to rest upon that clause of section 3a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), which declares that it shall be deemed an act of bankruptcy for a person, being insolvent, to apply for a receiver or trustee for his property.

[2] Under a petition like this, where the application is by the debtor itself, the question of adjudication depends solely upon the question of solvency or insolvency.

We pass by definitive determination of any question as to the nature of the order appointing the receiver, and also all questions with reference to the definition to be given to the words solvency or insolvency in this connection, because we agree with the conclusion of the District Court that, upon the present aspect of the preliminary question involved, the alleged bankrupt corporation should be accepted as solvent in fact and solvent in law, whether the word "solvent" is to be defined as at the common law or according to the bankruptcy statutes.

[3] Now, as to the sole question—that of solvency or insolvency.

The petitioners admit in argument, and the proofs fairly show, that the corporation known as "Everybody's" was solvent, provided certain property, roughly estimated to be \$250,000, or more, which it holds under a transfer from the Butler Company, is to be accepted as an asset for present purposes; but the petitioners seek to disestablish apparent title—record title—by showing it to be based upon transactions without consideration, and therefore fictitious and fraudulent. We do not think it reasonably open to the creditors of Everybody's to raise this issue at this stage of the proceedings. The transaction which is questioned is at most a voidable one—one to be avoided, perhaps, by the Butler creditors, if it operates fraudulently upon their interests, and possibly by other interests, if fraudulently affected. The transaction in question would not operate fraudulently upon the substantive or beneficial rights of the creditors of Everybody's, if it should stand, and any possible beneficial interests which they may have in forcing a proceeding which would compel the affairs of this concern to be wound up in bankruptcy, rather than in

some other recognized and well-ordered way, would not be such as to entitle them to raise the issue, and bring in such parties as would be necessary, if such an ultimate question were to be determined preliminarily in order to establish bankruptcy jurisdiction. We look upon the proposition involved in the petitioner's contention as one which relates more to the question of a wholesome and orderly administration of the bankruptcy law than to any question of beneficial, substantial, or abstract right. Under this view we have no hesitation in holding that it is not within the reasonable right of the petitioning creditors to raise an issue of this kind, for the purpose of disestablishing the record title and of minimizing the apparent assets of their debtor, to the end that its affairs shall be settled in bankruptcy, rather than in some of the other regular channels of justice.

The authorities cited by the petitioners upon this question as to assets and titles hardly bear out the proposition which they urge. They generally relate to intervention proceedings after adjudication, rather than to the question of the scope of the inquiry in a preliminary hearing upon the question of adjudication, and to situations where proper parties are before the court, and where the questions involved are as to what property ultimately vests in the trustee; in other words, what are the ultimate available assets? And the authorities go to the extent, of course, of holding that the trustee gets no better title than that which the bankrupt had.

[4] Other questions raised relate to the power exercised by the court in extending the time for answers and in admitting the receivers who desired to appear in opposition to the adjudication in bankruptcy.

The statute expressly clothes the court with power to grant more time than the statutory five days. An application for an extension of time in a situation like this calls for the exercise of discretion, and, an extension being granted by the court of first instance in charge of the proceedings, it must be accepted as a step taken in the field of discretion, and one not to be disturbed, except upon grounds of clear error involving injustice.

[5] It may not be the imperative duty of a receiver, and it may not be the absolute right of a receiver, in charge of an estate like this, to appear and resist bankruptcy adjudication; still it may be in the interests of orderly proceedings that he should do so, and, standing as the receivers do, as representatives of the equity court, it was quite within the power of the bankruptcy court, as well as within reasonable considerations of comity between courts, that the receivers should be permitted to appear and be heard upon the questions involved in the bankruptcy proceeding. While some of the authorities cited by the petitioners in bankruptcy go to the extent of saying it is not the duty of a receiver to appear, we do not understand that they sustain, in any sense, the proposition that it is not within the power of the bankruptcy court to permit any interested person, at the proper time and under proper circumstances, to appear and be heard upon questions in which he is interested. Section 18b provides that the bankrupt or any creditor may appear. That is a grant of right to bankrupts and to creditors, but the statute in no sense declares against

the power of the court to admit other parties who are in a legitimate way interested in the questions involved in the proposition of adjudication. The case on which the petitioners chiefly rely is that of *In re Columbia*, 112 Fed. 643, 50 C. C. A. 406. That case had reference to a claimant who sought to appear after adjudication, with a view of having the adjudication set aside; and therefore it has no controlling application to the question involved here, which relates to the discretionary power of the court to permit a party to be heard upon the original question of adjudication.

The decree of the District Court is affirmed, with costs.

JOHN B. STEVENS & CO. v. FRANKFORT MARINE, ACCIDENT &
PLATE GLASS INS. CO.

FRANKFORT MARINE, ACCIDENT & PLATE GLASS INS. CO. v. JOHN
B. STEVENS & CO.

(Circuit Court of Appeals, Ninth Circuit. September 8, 1913.)

No. 2,255.

1. INSURANCE (§ 539*)—EMPLOYER'S LIABILITY POLICY—NOTICE—DUTY TO
GIVE—TIME—"IMMEDIATELY."

An employer's liability policy provided that on the occurrence of an accident, whether any claim was made in respect thereof or not, the insured should immediately, and at the latest within ten days, or within the time fixed for giving notice of accidents under liability insurance policies by any special law of the state in which the policy is issued, give notice in writing of such accident to the insurer, etc. *Held*, that the word "immediately," as so used, did not mean instantly, and did not require the insured to give notice before assured itself had knowledge of the accident by which the employé in question was injured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3403-3410.]

2. TIME (§ 15*)—"IMMEDIATELY."

Where notice of an act is required to be given "immediately," the word implies reasonable notice in view of all the circumstances of the case.

[Ed. Note.—For other cases, see Time, Dec. Dig. § 15.*]

3. INSURANCE (§ 513*)—EMPLOYER'S LIABILITY POLICY—DEFENSE OF ACTION—
COSTS AND ATTORNEY'S FEES ON APPEAL.

Where an employer's liability policy bound the insurer to defend an action against assured for injuries to a servant, regardless of the insufficiency of the notice of injury, for which the insurer denied liability under the policy and refused to defend, the assured was not only entitled to recover costs and attorney's fees paid in defense of the action in the superior court, but was also entitled to recover costs and attorney's fees expended on appeal of the case to the Supreme Court.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 513.*]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by John B. Stevens & Co. against the Frankfort Marine, Accident & Plate Glass Insurance Company. Judgment for plaintiff for less than the relief demanded, and both parties bring error. Reversed and remanded for new trial.

J. W. Quick and L. B. Da Ponte, both of Tacoma, Wash., for plaintiff.

R. S. Holt, U. E. Harmon, and Hudson, Holt & Harmon, all of Tacoma, Wash., for defendant.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The policy of insurance upon which this action was brought indemnified the plaintiff (plaintiff in error here), John B. Stevens & Co., a corporation, against loss arising from legal liability for damages on account of bodily injury or death suffered by any of its employes from accidental causes, not exceeding the sum of \$5,000, and also against the costs of defending an action or actions to recover such damages. While the policy was in force one I. B. Merrill, an employe of the assured, was injured, and on October 28, 1909, commenced an action to recover damages therefor. The plaintiff immediately sent the summons and complaint in the action to the insurance company, with the request that it take the defensive proceedings provided for by the policy, which the insurance company refused to do, for which reason the plaintiff was compelled to defend the action at its own cost, incurring expense therefor in the sum of \$1,073.95. The Merrill action resulted in a judgment against the assured for \$6,100, which on appeal was affirmed by the Supreme Court of the state of Washington, in which state the suit was brought, and which judgment was paid, with interest and costs, by the plaintiff in the present action.

In its answer to the plaintiff's amended complaint, the insurance company set up, among other things, that the policy sued on was issued to the plaintiff in the state of Washington, and that Merrill received the injuries alleged in the complaint on or about June 15, 1909, which fact the plaintiff at the time well knew, but that, notwithstanding such knowledge, the plaintiff did not give notice of the injury, or of the accident from which it arose, in writing or otherwise, to the insurance company "until the latter part of October or the first part of November following the said accident and injury," and for that reason the defendant insurance company denied any liability to the plaintiff under the policy and refused to undertake the defense of the action of Merrill, and further pleaded in defense of the present action that—

"by reason of the failure of the said plaintiff to give the said notice, and its failure to investigate the accident and to preserve the testimony, the evidence became destroyed and the witnesses scattered, and at the time the action referred to in plaintiff's complaint was brought, by reason of the neglect of the plaintiff to properly attend to the matter, and by reason of certain changes and alterations that it had made in the structure at which the accident occurred, it was no longer possible to successfully defend the said action."

In the plaintiff's reply to the insurance company's answer it admitted that the policy sued on was issued in the state of Washington, and admitted that it gave no notice of the accident or injury to Merrill prior to October 19, 1909, but denied that it knew of the injuries or accident on or about June 15, 1909, or at any time prior to October 19, 1909, and alleged that immediately upon learning thereof it gave due notice of the same to the insurance company. In its reply the plaintiff also admitted that there was an alteration made in the structure where the accident happened, but alleged that the same was slight and immaterial, was made prior to the time that the plaintiff knew of the accident, and that it was not claimed by Merrill to have been responsible for the accident or connected therewith in any way, and that the structure was totally destroyed by fire without the plaintiff's fault prior to the time that the suit brought by Merrill was or could have been tried, and could not have been available for use as evidence in that action.

The clause of the policy in suit in respect to the giving of notice is as follows:

"That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of accidents under liability insurance policies by any special law of the state in which the policy is issued, give notice in writing of such accident to the company," etc.

The policy also contains this clause:

"That if any legal proceedings are taken to enforce a claim against the assured, which would be covered by this policy if the assured were legally liable in respect to such claim, the company shall, at its own cost, undertake the defense or settlement of such legal proceedings in the name and on behalf of the assured, and shall have entire control of such defense, whether legal liability on the part of the assured in respect to the claim is proven as the result of such proceedings or not. If the company shall at any time offer to pay to the assured the full amount for which the company might be liable to indemnify the assured in respect to the claim sought to be enforced, it shall not thereafter be bound to defend any legal proceedings, nor be liable for any costs or expenses which the assured may incur in defending the same; but the company shall not be responsible for any damages alleged to have been sustained by the assured in consequence of any action or omission of the company in connection with such claim or proceeding. The assured shall, at all times, under the direction of the company, render all reasonable and necessary assistance to enable the company to effect settlements, or to properly conduct a defense, or to prosecute an appeal, or to secure information or the attendance of witnesses."

The court below on the trial of the action refused to allow the assured to prove that it had no notice of the accident or injury to Merrill until October 19, 1909, on which day it received a letter from Merrill's attorneys giving the notice and demanding a settlement for the injury, and on which day it was admitted that the assured sent the letter to the insurance company; and the trial court refused to allow the assured to prove the facts with respect to the happening of the accident, and refused to allow it to prove that the defendant insurance company—

"was not prejudiced by not having notice sooner; that all of the witnesses were available at the time that notice was given to the defendant of the accident."

It was stipulated at the trial:

"That judgment was rendered on the 10th day of February, 1910, in the superior court of the state of Washington in and for Pierce county, against the defendant John B. Stevens & Co., in favor of I. B. Merrill, in the sum of \$6,100, together with costs."

The plaintiff was allowed to show that the Merrill case was appealed to the Supreme Court of the state, and by it affirmed, and that Stevens & Co. paid the judgment, including interest and costs, aggregating \$6,539.30, and also paid \$250 to the attorney who defended the suit in the superior court of the state, but the trial court refused to allow proof of the amount paid the attorney for services rendered on the appeal of that case—to all of which rulings the plaintiff reserved exceptions, as it did to the instructions given by the trial court to the jury, which told them "that while there could be no recovery against the defendant on account of the loss it sustained in paying the judgment which Merrill recovered, because they did not give the ten days' notice, yet that the insurance company undertook to defend that suit, regardless of whether the ten days' notice was given, and that it was its duty when called upon to do so, without requiring the plaintiff, John B. Stevens & Co., to release it beforehand on account of any judgment that might be obtained. So you will not concern yourselves with that part of the pleading that goes to the liability or claimed liability on account of the judgment which John B. Stevens & Co. had to pay in the end. You will confine your attention to the evidence introduced here regarding those costs and expenses which the plaintiff was put to in defending the case in the superior court of Pierce county after the defendant company refused to defend it"—but was not entitled to recover the costs and attorney's fees incurred on the appeal of the case. For the costs incurred in the superior court, amounting to \$286.40, the jury accordingly returned a verdict in favor of the plaintiff company.

The plaintiff duly excepted to the charge of the court to the jury, and in other respects already indicated, which rulings are the basis of the writ of error sued out by the corporation John B. Stevens & Co.

The other of the two writs here considered together was sued out by the insurance company, and challenges the action of the trial court in allowing the recovery by the plaintiff company of the costs incurred in the superior court in defense of the Merrill action—the insurance company having moved for a peremptory instruction to the jury to find in its favor, and also for judgment notwithstanding the verdict, both of which motions were denied and to each of which an exception was reserved; the contention of the insurance company being that the assured failed to give the notice required by the policy, which deprived it of the right to have the case defended.

[1] It will be seen, therefore, that the controlling point in the case is whether by the terms of the policy in question the assured was required to give notice of the injury sustained by its employé before it had any notice of such injury. The court below held that it was, both by its rulings in respect to the plaintiff's offer of proof and in its instructions to the jury, and thereby, in our opinion, committed

clear error. As said by this court in *Empire State Surety Co. v. Northwest Lumber Co.* (C. C. A.) 203 Fed. 417:

"It is self-evident that a party cannot give notice of an accident in respect of which a claim can be made until he himself is informed of it, or has knowledge concerning it, and he could not be expected so to do."

Nor does the clause in the policy involved in this case undertake to require the assured to give such notice, regardless of its knowledge or information on the subject. We repeat the clause:

"That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of accidents under liability insurance policies by any special law of the state in which the policy is issued, give notice in writing of such accident to the company," etc.

Not only is there here no express requirement for the impossible giving of notice of something not known to have occurred, or concerning which the assured has no information, but the very terms in which the provision is couched indicate that no such unreasonable interpretation is permissible.

[2] The notice is here required to be given "immediately, and at the latest within ten days, or within the time fixed for giving notice of accidents under liability insurance policies by any special law of the state in which the policy is issued." If the word "immediately" was not thus qualified, and stood alone, it would, under the well-established law upon the subject, be held to imply a reasonable notice in view of all of the circumstances of the case. *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; *Guarantee Co. v. Mechanics', etc., Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514; *Germania Insurance Co. v. Boykin*, 12 Wall. 433, 20 L. Ed. 442; *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291; *Edgefield Mfg. Co. v. Maryland Casualty Co.*, 78 S. C. 73, 58 S. E. 969; *Woodmen's Accident Association v. Byers*, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777; *Phillips v. Ben. Soc.*, 120 Mich. 142, 79 N. W. 1. And that the insurance company in this instance did not mean the word "immediately" to be taken and enforced literally is conclusively shown by the fact that it immediately followed it with the words:

"And at the latest within ten days, or within the time fixed for giving notice of accidents under liability insurance policies by any special law of the state in which the policy is issued."

We have examined the decision of the Supreme Court of Victoria in the case of *Victorian Stevedoring & General Contracting Co., Limited, v. Australian Accident Insurance and General Guarantee Co., Limited*, 19 Victorian Law Reports, 139, cited in the brief of the insurance company. Two of the learned judges sustained a position like that taken by the defendant in error herein. The third judge concurred in the judgment, but rested his opinion upon a different point, not material to this case. But the judge who tried the case, and who

was also a judge of the Supreme Court of Victoria, had been of a different opinion, and wrote in part as follows:

"* * * The defendants undertook to recoup to the plaintiffs any sum not exceeding £1,000, which they might have to pay for injuries caused by the negligence of their workmen or other employes in the service of the plaintiffs or by their works to third persons. The policy recites certain facts, and then puts in the provisos which raise the questions in dispute. The first proviso that was made refers to the conditions annexed to the policy, and makes them a part of the contract; and it is contended on behalf of the defendant that those conditions are really conditions precedent to a person's title to recover, or, rather, that noncompliance with them is a bar to the right to recover.

"The first condition is that 'upon the occurrence of any injury notice in writing thereof shall within seven days be given by the insured to the company at their office where this policy has been issued.' Did the parties really mean, when they said that, that if notice was not given exactly within seven days—if a few minutes over the time, for instance, elapsed, or if it became impossible to give it by reason that the plaintiffs did not themselves know of the accident earlier—that their right to be reimbursed under the terms of the policy would be at an end, that they were to lose the £1,000? Was it meant that the defendants should be entitled to say: 'You have given notice five minutes too late, and we will therefore keep your premiums and pay you nothing?' The very statement was absurd. I cannot believe that the parties intended anything of the sort. What they did intend was to place an obligation on the plaintiffs to give notice, thereby entitling the defendants to compensation if they sustained any injury for want of that notice. It was never intended that the mere fact that notice was not given should be a complete answer to an action. * * * So far as relates to the first condition, I have no doubt whatever that what the parties meant was: 'You shall give me notice of the occurrence of any injury. If you don't give notice, you may be still entitled to recover; but I shall get from you any damages I may sustain from want of that notice.'"

[3] We are of the opinion that the court below was in error in holding that the policy in suit required the assured to give notice of the injury to its employes, regardless of its own knowledge or information upon the subject, and in holding that the assured was not entitled to its costs and attorney's fee expended on the appeal of the Merrill case, as well as to its costs and attorney's fee paid in defense of that action in the superior court of the state of Washington.

The judgment is reversed, and cause remanded for a new trial.

In re LANE LUMBER CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. September 8, 1913.)

No. 2,243.

BANKRUPTCY (§ 257*)—SALE OF ASSETS—BID—ACCEPTANCE—WITHDRAWAL.

A bankrupt's trustee having the assets of a lumber corporation for sale, petitioner filed with him two papers entitled "proposals to purchase" in which he proposed to purchase certain property and assets of the bankrupt, subject to the confirmation and approval of the court. After specifically describing quantities of lumber and pieces of real estate, one of the proposals recited that the bid was made as a bid on the property as a whole, and that a deposit of \$1,000 was made as evidence of good faith, to be returned in case of nonacceptance. It further provided for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

delivery of abstracts of title to petitioner's attorney by the trustee and for return of such deposit after examination in case the title was unsatisfactory, and, if petitioner should fail to complete the contract on the proposal being accepted and approved by the court, the damage for such failure should be limited to the payments made. The other proposal had reference to timber lands and was practically the same. The trustee petitioned the referee for confirmation of the sale to petitioner, alleging that he believed the "proposals to purchase" should be accepted and the sale confirmed after 10 days' notice to creditors. The referee published notice to creditors "of a proposed sale of the property to petitioner," but 5 days before the day set for the hearing petitioner notified the trustee that he withdrew his proposals and elected not to complete the sale. *Held*, that the proposals were not mere offers which the petitioner could withdraw at any time before acceptance by the trustee but were contracts to purchase based on a sufficient consideration; the trustee having done all that devolved on him to do when he approved the proposals, advised confirmation, and took the necessary steps to that end.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. § 257.*]

Petition for Revision of Proceedings of the District Court of the United States for the Northern Division of the District of Idaho, in Bankruptcy; Frank S. Dietrich, Judge.

In the matter of the bankruptcy proceedings of the Lane Lumber Company, Limited. Petition by Duval Jackson to be relieved from a bid for the purchase of certain of the bankrupt's property. Denied.

Samuel L. Boyd, as trustee in bankruptcy of the Lane Lumber Company, Limited, a corporation, bankrupt, was duly authorized by the United States District Court in and for the District of Idaho, Northern Division, to sell at private sale all of the real and personal property of the bankrupt subject to the approval of the court. On June 24th Duval Jackson, petitioner herein, filed with the trustee two papers substantially alike, entitled "proposal to purchase" certain property. In them Jackson "proposes to purchase," subject to the confirmation and approval of the court, certain property and assets of the Lane Lumber Company. After specifically describing quantities of lumber and pieces of real estate, one of the offers continues:

"The prices set opposite and several items mentioned in said schedule are not deemed accurate by the undersigned, but the bid is made as a lump bid on the property as a whole.

"For this property the undersigned offers you the sum of \$69,519.40, of which sum I deposit with you at this time the sum of \$1,000 as evidence of my good faith, to be returned to the undersigned in case you fail to secure the acceptance and confirmation by the court to this proposal. The further sum of \$39,000 is to be paid by the undersigned on July 24, 1912, and the further sum of \$29,519.40 is to be paid September 24, 1912, at which time you are to convey to me all the property aforesaid by good and sufficient deeds and instruments of conveyance, and deliver actual possession thereof to the undersigned.

"Upon the making of the payment of the further sum of \$39,000 I agree that the insurance now on the said property shall be properly indorsed so as to make the same payable in the first instance to you as trustee in bankruptcy as your interest may appear, in order to protect your estate in the payment of the further sum of \$29,519.40; the remaining interest in the insurance to be carried, of course, on my behalf.

* * * * *

"Within fifteen days from this date you are to deliver to my attorneys abstracts of title covering all of the real property herein described, showing unincumbered title clear of incumbrances, save those mentioned herein, for the examination of my attorneys. Should their examination disclose that the title to any of the tracts is defective in so substantial a manner as to af-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fect my willingness to go on with this transaction, I have the right, within fifteen days after receipt of said abstracts, to require you either to clear said title or to refund me the initial payment, in case you are unable to do so. Should this proposal to purchase be accepted by you and approved by the court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal is to be limited to such payments as have been made."

In the other offer, after a minute description of certain timber lands, which belonged to the bankrupt corporation, the following language appears:

"As an evidence of my good faith in making this bid, I hand you herewith the sum of \$1,000 and I offer you for the said timber land the sum of \$70,480.60, payable \$35,000 on December 24, 1912, and \$34,480.60 March 24, 1913, each of said payments to bear interest at the rate of six per cent. per annum from July 24, 1912, interest to be paid at maturity on each payment.

"I have had no opportunity to determine your title to these timber lands, or to determine the quantity of timber upon them, and I am therefore compelled to rely upon the representations contained in the above specifications and the prices set forth in your schedule. It is understood and agreed as a condition of this proposal that I have until September 24th in which to examine the titles and to scale the timber lands in order to determine whether or not the estimates of values comprehended in said inventory are correct, and whether or not the title to said land is as represented in said schedule. If I find it to fail in a substantial particular thereof I am entitled to have my original payment of \$1,000 returned to me on demand on or before December 24, 1912. No trifling variation shall be sufficient to vitiate this proposal on my part.

"At the time of making the last payment, you are to convey to me the whole of the property therein scheduled by good and sufficient deeds and instruments of conveyance, and to deliver to me the right of possession of the whole of said lands and every part thereof save only the property referred to as being in litigation. As to this, quitclaim deeds of your interest will be sufficient.

"Should you fail to accept this bid or fail to have your acceptance confirmed by the court and be thereby not enabled to consummate to the conditions specified in this proposal, then, and in that event, you are to return to me the said sum of \$1,000 hereby deposited with you as evidence of good faith.

"Within thirty days from this date you are to furnish abstracts to me showing unincumbered title clear of incumbrances, save those mentioned herein, for the examination of my attorneys. Should their examination disclose that the title to any of the tracts is defective in so substantial a manner as to affect my willingness to go on with this transaction, I have the right within fifteen days after receipts of said abstracts, to require you either to clear said title or to refund me the initial payment in case you are unable to do so. Should this proposal to purchase be accepted by you and approved by the court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal is to be limited to such payments as have been made."

Thereafter, on June 27th, the trustee filed a petition with the referee in bankruptcy praying for confirmation of sale of the real and personal property of the bankrupt to Duval Jackson. The trustee set forth that he believed each of the "proposals to purchase" should be accepted and the sale confirmed after ten days' notice to the creditors, as was required in the order of sale. Thereafter, on June 29th, the referee published a notice to the creditors and other persons interested that the petition of the trustee for approval and confirmation "of a proposed sale" of the property to Jackson would be heard on Monday, July 15th. On July 10th Duval Jackson, who had made the proposals referred to, sent a telegram to the trustee saying:

"I withdraw my two proposals under date of June twenty-fourth, nineteen hundred and twelve, for the purchase of the timber lands, real estate, property and assets of the Lane Lumber Company, Limited, a Corporation, involuntary

bankrupt. All bids or propositions made by me are hereby withdrawn and have also sent you notice to that effect by mail to-day."

On July 15, 1912, before the hour set for the confirmation of the sale, Jackson caused to be filed with the referee in bankruptcy two papers notifying the trustee that he desired to and did withdraw "each and all of the proposals and propositions made in reference to said property and each and every part of the same" and requesting that the amount deposited with the proposals be returned. The referee proceeded to a hearing of the application for confirmation of sale to Jackson and made an order to the effect that, a hearing having been had pursuant to a notice to creditors at which no objections were made "to the sale of the said real and personal property referred to" in the petition of the trustee filed June 27, 1912," the sale of the real estate and personal property referred to, save and except certain logs and lumber, the appraised values of which were to be deducted from the purchase price to be paid by Jackson, was confirmed. The only reason why the sale of all of the property covered by one of the offers was not confirmed in strict accordance with the offer of Jackson was that, in order to meet a payment which would become due soon after the sale by the estate of the bankrupt, it was necessary for the trustee to procure funds out of the only resources to be availed of by sale of certain property. It is found that Jackson knew that on August 1st such payment would be due, and that the trustee had no money on hand with which to pay the indebtedness, and that the trustee was relying upon the fulfillment of the purchase by Jackson in order to raise money to meet the payment. Thereafter the referee ordered the trustee to pay Jackson the \$2,000 theretofore deposited. On review, the order of the referee was reversed by the District Court, whereupon in due course the case was brought to this court by a petition asking that the decree of the District Court be set aside.

Frank W. Reed and Eugene V. Boughton, both of Cœur d'Alene, Idaho, and Clay H. Alexander, of Kansas City, Mo., for petitioner.

E. N. La Veine, of Cœur d'Alene, Idaho, for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). Correct solution of this case is dependent upon the construction of the writings referred to in the statement. We must look for the real intent of the parties, as evidenced by the language they have used, and in that way arrive at a proper legal effect.

The contention of the petitioner is that he had a right to withdraw his offers or bids at any time before the acceptance thereof by the trustee because they were merely offers to contract in the future. But we must hold otherwise.

Jackson accompanied his proposal with the money transmitted to the trustee as an evidence of good faith in making his bid and in his offer went into detail sufficiently far to specify conditions with respect to the title to the property, times, and manner of payment. Furthermore, to protect himself against failure to complete fulfillment of any part of his bid, he limited the damage to the amount of such payments as he had made when he offered to buy from the trustee. He made a bid by which he fairly agreed to take the property described, provided always the conditions with respect to title could be fulfilled by the trustee. It is of no controlling force that he called his offer a proposal to purchase. We must look into all the provisions of the writings. Doing so, it is plain that his payment of \$2,000 was intended to be applied on the purchase price of the prop-

erty with the understanding that, if he should fail to complete the purchase, no damages could be recovered beyond the limit of the sum paid to the trustee.

It clearly appears that, after due notice to all creditors, the court made and filed an order "approving and authorizing private sale of the real and personal property by the trustee, subject to the approval of the court after due notice to all creditors." Again, after he had received the bids of Jackson, in submitting his action to the court for confirmation, the trustee set forth:

"That, in order to deliver said property to the purchaser, it is necessary * * * to have given ten days' notice as required in the order of sale herein, given to all the creditors, so that the creditors herein may determine whether or not they desire (for) said sale to be confirmed by the court."

It was also set forth that much of the property was deteriorating in value by being kept, and that great expense would attach unless "said sale" was confirmed and the property converted into money.

As we read the several writings by the parties, we gather that it was the intention of the trustee to sell to Jackson and that it was the intention of Jackson to buy in accordance with his offer and under the conditions named therein. The trustee seems to have done all that devolved upon him to do. He approved of the bids of Jackson, set forth the offers in his petition to the court, and advised confirmation of sale by the court, and acted in all respects with prompt and careful regard for the interests of the estate. *Mason v. Wolkowich*, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765. As was said by the learned judge of the court below:

"There was an acceptance and a partial performance on the part of the trustee; the estate parted with a consideration. Having induced the officers to refrain from looking elsewhere for a purchaser and to incur expenditures in reliance upon his promises, Jackson cannot be heard to say there was no consideration."

The circumstances connected with the whole transaction made the relationship one of contract between the trustee and Jackson. In *re Jungmann*, 186 Fed. 302, 108 C. C. A. 380. If the offer was one which could be withdrawn by Jackson at any time, it would have been wholly unnecessary to have made a cash deposit or to have entered into the detail employed in the written bids. While the sale to Jackson was not confirmed as to a part of the property included in one of the offers, it would have been confirmed in strict accord with the offer of Jackson, had it not been for Jackson's refusal to proceed to carry out his agreement. This feature of the case, however, loses importance, because the record shows that Jackson gave his notice of withdrawal to the trustee and the referee before the hour for hearing the petition for confirmation and with knowledge of the financial condition of the estate. His position was that he would not complete the purchase and desired to withdraw his offers; but, as it was his unwillingness to perform which created the situation, the trustee was not obliged to go through the useless formality of obtaining confirmation of the sale in strict accord with Jackson's offer.

Holding that there was a contract and that Jackson has no right to a return of the money, the decree of the lower court is affirmed.

THE TRANSFER NO. 20.

THE OLYMPIA.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

Nos. 214 215.

COLLISION (§ 95*)—MEETING TOWS—FAULT OF TUG.

The tug Olympia with two scows in tow tandem was passing down East river near the Astoria shore on an ebb tide when both the scows came into collision with a car float on the port side of transfer tug No. 20 which was bound up with a tow on each side. The tows approached each other on either side of Hallett's point and exchanged signals for passing port and port. Held, on conflicting evidence, that the collision took place below the point, where the transfer had properly stopped to allow the other tow to pass, and was due solely to the fault of the Olympia in keeping too close to the shore.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Mary A. Quigley, executrix, etc., against the steam tug Transfer No. 20, the New York, New Haven & Hartford Railroad Company, claimant, and steam tug Olympia, the Goodwin Sand & Gravel Company, claimant; Cleary Bros. against the same. Decrees against the Olympia, and her claimant appeals. Affirmed.

The following is the opinion of the District Court by Hough, District Judge:

Libelants are owners of two scows which constituted the tandem tow of the Olympia on January 11, 1912, when, with the tide ebb, the weather clear, the wind negligible, and in broad daylight, successive collisions occurred between the scows and the tow of the Transfer No. 20 near Hallett's Point Light. The Transfer 20 was in charge of two car floats, one on each side.

The Olympia was bound down the East river, and the No. 20 was bound the other way. It is either admitted or clearly proven that each vessel blew the usual one whistle and each saw the other across Hallett's point and thereupon exchanged and understood a one whistle signal. It is also admitted that under these circumstances it was the duty of the Transfer to remain below Hallett's point until the Olympia and her tow had gotten clear, and the duty of the Olympia to go clear of the point by a proper margin of safety. Nevertheless a collision occurred, which cannot be accounted for except by negligence on the part of one or both masters distinctly more glaring than is usual in litigation of this class.

The question of fact presented by the evidence may be stated thus: If the collision happened below Hallett's point (that is, nearer Manhattan), then the Olympia must have been at fault; if it happened above the point, then the Transfer did not live up to the agreement that she made by the exchange of two whistles, and she is at fault. Those in charge of the Transfer and her tow all agree that after the exchange of one whistle the Transfer immediately stopped her engines and remained behind the point at a distance of not over a hundred feet from the Astoria shore, but that the Olympia, cutting too close to Hallett's point, went clear herself but dragged first one and then the other of her tows against the car float.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Those in charge of the Olympia agree that with a flotilla, which was a little more than 420 feet long (from the bow of the tug to the stern of the after scow), they shaped their course in the true tide and passed Hallett's Point Light 400 feet off with the tow directly astern, but that nevertheless the Transfer, advancing nearly 400 feet beyond the place where she should have been, caught the tow before it could get by.

The evidence from the Olympia also asserts that, if that tug had tried to do what the Transfer says was done, the tide-set at Hallett's point is so strong that she could not have gotten close enough to effect the necessary contact. All the witnesses in this case were examined in open court; no attack upon the credibility of any of them has been made; and the court must turn, to decide as to the weight of evidence, from the interested witnesses to those who had no connection with the navigation of either tug or tow. Captain McKinnon was in charge of a dredge working in the neighborhood. He confirms in substance the original course of the Olympia, but after she had gotten clear of his dredge he watched her no further, and it is perfectly possible that the Olympia might have done that which produced collision after Captain McKinnon ceased to see her.

The master of the Anna W. was on the 102d street pier, and he does assert that he saw the two tows in very close proximity, 200 feet "off the Light."

The master and mate of the Intrepid passed the Olympia (bound east) above Hallett's point, and by looking backwards they observed the tows very close together (but thought that they had barely gone clear) about 75 feet above Hallett's Point Light.

It is to be observed that the last three witnesses enumerated do not confirm the story of the Olympia as to the distance by which she cleared the Light. On the other hand, the keeper of the lighthouse and another observer declare that they were on shore and watching at the moment of collision, and both agree that the collision occurred 150 feet below the Light and when the starboard side of the Transfer's tow was not more than a hundred feet from the shore. This is positive and unimpeached testimony from wholly disinterested witnesses and confirmatory in every detail of the statements as to navigation made by those in charge of the Transfer.

This case must be decided by the weight of evidence. In my judgment that weight is on the side of the Transfer, and it results that each of the libels first above named will be sustained against the Olympia and dismissed as against the Transfer.

Foley & Martin, of New York City, for appellant.

J. T. Kilbreth, of New York City, for Transfer No. 20.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decrees affirmed, with interest and costs of this appeal to No. 20 against the Olympia.

CINCINNATI, H. & D. RY. CO. v. SHERIFF OF CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. June 14, 1913.)

No. 229.

SHERIFFS AND CONSTABLES (§ 47*)—COMPENSATION—POUNDAGE FEES.

Though out of proportion to the work done and risk taken, the fees and poundage of a sheriff on a levy issued out of the state court before removal of the action to the federal court, and discharged on the giving of a bond, should be fixed and taxed at the amount to which he is entitled under Laws N. Y. 1892, c. 418.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 72-74; Dec. Dig. § 47.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Charles A. Bruce and the Corporate Organization & Audit Company against the Cincinnati, Hamilton & Dayton Railway Company. Defendant seeks by writ of error to review an order fixing and taxing the fees and poundage of the sheriff of New York County under an order of attachment issued by the state court before removal of the cause. Affirmed.

Following is the opinion of Coxe, Circuit Judge, in the District Court:

This case comes here on a motion by the sheriff of the county of New York for an order fixing and taxing his fees and poundage upon a levy made under a warrant of attachment issued out of the Supreme Court of the state, prior to the removal of the action to this court. The warrant was regularly issued and under it the defendant's property was duly attached pursuant to the provisions of sections 644, 647, 648, 649 and 709 of the New York Code. The property consisted of stock and bonds and a deposit of \$20,607.97 held by a New York banking house as security for a demand note of \$500,000, owned by the bankers. Subsequently a bond was given and the attachment was duly discharged by an order of this court.

Although the amount claimed by the sheriff is grossly out of proportion to the work done and risk taken by him, I see no answer to his claim. He seems to have done everything which the law required in making the levy. He could not have taken the property into his possession because the bankers insisted that they held a valid lien upon it. His action resulted in securing the plaintiffs' claim as effectually as if he had the securities in his possession. The sheriff has done his work and is entitled to the fees allowed by the state statutes. The proposition that the fees are out of proportion to the work done is one which should be addressed to the Legislature and not to the courts. Under the law as interpreted by the New York authorities, I think the sheriff is entitled to his fees. See chapter 418, vol. 1, Laws of New York, 1892, p. 868; *Jones v. Gould*, 114 App. Div. 120, 99 N. Y. Supp. 789; *Jones v. Gould*, 119 App. Div. 817, 104 N. Y. Supp. 935; *Plummer v. Power Co.*, 88 App. Div. 452, 85 N. Y. Supp. 107.

The question was recently determined by this court, Judge Noyes writing the opinion, in *Lindsey v. Rubber Co.* (D. C.) 197 Fed. 775, where the situation was substantially the same as in the case at bar.

The motion is granted.

S. F. Hartman and Stanchfield & Levy, all of New York City, for plaintiff in error.

F. A. O'Neill, of New York City, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Judgment affirmed.

PERFECTION COOLER CO. v. CORDLEY et al.
(District Court, D. Massachusetts. August 26, 1913.)

No. 83 (C. C. 521).

PATENTS (§§ 62, 328*)—ANTICIPATION—WATER COOLER.

Evidence considered, and *held* insufficient to show anticipation of the Newell patents, No. 895,781 and No. 895,782, for water coolers by an unpatented structure, under the rule that to establish the identity of the two structures, after the lapse of a number of years, something more

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
207 F.—49

than oral testimony is required, and in view of the fact that, conceding identity, the evidence that the use of the alleged anticipating structure antedated the Newell invention rested entirely on the recollection of witnesses and was not clear.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 78; Dec. Dig. § 62.*]

In Equity. Suit by the Perfection Cooler Company against Henry G. Cordley and others. On supplemental bill in the nature of a bill of review, filed by defendants by leave of court March 26, 1913. Supplemental bill dismissed.

For former opinion, see 199 Fed. 440.

A. S. Pattison, of Washington, D. C., James A. Tirrell, of Boston, Mass., and Livingston Gifford, of New York, N. Y., for complainant. Ellis Spear, Jr., of Boston, Mass., A. P. Greeley, of Washington, D. C., and W. K. Richardson and Harrison F. Lyman, both of Boston, Mass., for defendants.

DODGE, Circuit Judge. This bill, filed by the defendants, has been answered by the plaintiff. The additional evidence tending to prove or disprove the additional facts alleged in the bill has been taken. The question presented is whether it requires any modification of the conclusions arrived at by Judge Colt, upon which his decree, entered September 16, 1912, and adjudging certain claims of the patents sued on valid and infringed, was entered. See 199 Fed. 440.

The main defense before Judge Colt was that the patents sued on, being United States patents 895,781, August 11, 1908, and 895,782, of the same date, both to Isaiah Newell, were void for want of invention, in view of the prior art. 199 Fed. 444, 445. As to alleged anticipations, Judge Colt's opinion refers only to the "Rose invention," covered by United States patent 715,609, December 9, 1902, and to a so-called Estes cooler. 199 Fed. 445.

Under their supplemental bill, the defendants have undertaken to establish an anticipation of Newell by a water cooler apparatus said to have been devised by Charles R. Towle, of Haverhill, Mass., and to have been in public use at a factory in Haverhill from and after some time in June, 1900. Newell applied for his earlier patent July 22, 1902, and for his later patent September 26, 1903. Proof that the Towle cooler embodied the inventions covered by the Newell claims, which this court has sustained, and was in public use, as the supplemental bill alleges, from and after June, 1900, would entitle the defendants to have the decree of September 16, 1912, superseded by a decree dismissing the plaintiff's bill, unless Newell can claim an earlier date for the inventions described in his first patent than July 22, 1900, two years before his first application.

Newell died in 1909, pending the litigation here and elsewhere in which the validity of his patents has been questioned. The plaintiff contends that his date of invention was in 1899. The Court of Appeals for the District of Columbia, upon appeals from the Patent Office in interferences to which he was a party, affirmed decisions by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Commissioner of Patents awarding priority to him. In those proceedings Newell alleged conception and disclosure in the spring of 1899, and reduction to practice in the early summer of 1899. His adversaries alleged conception in August, September, or November, 1901, and reduction to practice in February, 1902. In the opinion of the court it was said:

"Taking, therefore, any date between the fall of 1899, or the early part of 1900, * * * as a date for the reduction of the invention to practice, we think neither concealment nor abandonment can be charged against Newell."

It was also said in the same opinion, regarding a large number of exhibits offered by Newell, that they show him to have been engaged constantly, from the summer of 1899 up to and after the date of his application, in experimenting on and improving his original invention. *Rose v. Clifford*, 31 App. D. C. 195, 199, 200.

Judge Colt's opinion in this court contains nothing further in reference to these questions than the following:

"In view of the evidence in the present record and the decision of the Court of Appeals in *Rose v. Clifford*, supra, it seems to me that the complainant has fixed the date of the Newell invention at a time prior to the *Rose* invention which was in interference in that case, and which is covered by his patent, No. 715,609, dated December 9, 1902."

The defendants further assert, in their supplemental bill, the recent discovery by them of evidence to prove that an exhibit, claimed by Newell to be the first cooler embodying his improvements and to have been built by him in the spring or early summer of 1899, was not in fact built before 1902, and that other cooler exhibits claimed to have been made by Newell in 1899 were not in fact made until 1902 or thereafter. If these facts are established by their evidence, they also are sufficient to prevent Newell from being regarded as the first inventor, and will require the decree of September 16, 1912, to be set aside in the defendants' favor.

A previous opinion in this case, dated March 22, 1913, has stated the grounds upon which the defendants have been allowed, after the case had once been decided here, to introduce evidence for the above purpose; the record on their pending appeal having been returned here for that purpose.

1. Is the evidence taken since March 22, 1913, under the supplemental bill, sufficient to prove the Towle cooler to have embodied the sustained claims of the Newell patents, and to have been in public use from and after June, 1900?

The first question here is: Precisely what was the Towle cooler? It has been described by several witnesses for the defendants, principal among whom are Charles R. Towle, who says he contrived it, and Charles H. Morse, who says he made it. Charles R. Towle has been associated with Fox, in whose factory at Haverhill the public use claimed to have been made of the Towle cooler is said to have taken place, since 1895, as foreman of a department in that factory. Charles H. Morse is a tinsmith in Haverhill, employed by W. C. Bennett & Co., of that place, from 1899 to 1907, and subsequently by their successor, O. F. Bennett. Towle says he made a rough sketch,

explained it to Morse, and got him to construct the device according to the sketch. The sketch is not produced, but what Morse is said to have constructed, or part of it, is made a defendants' exhibit, marked "Fox Factory Cooler." It consists of an outer wooden box, 27 inches long, 15 inches wide, and 15 inches high, with an inner metallic lining; a space being left between lining and box wherein is found an insulating packing. Within is a smaller metallic tank, 11 inches long, 5 inches broad, and of nearly the height of the metallic casing of the box. A pipe leads from this tank through the metallic lining and the box, provided outside the box with a faucet from which the handle is absent. Another pipe leads from inside the lining through the outside of the box. This appears to have been intended also to carry a faucet outside the box, but no faucet is now there. Morse says he constructed this apparatus according to Towle's sketch and instructions; the wooden box being furnished by Towle.

This "Fox Factory Cooler," as it stands, when first brought forth for use in litigation involving Newell's patents, was taken in 1910, according to the defendants' evidence, from under the sink in the making room of the Fox factory. It then contained rubbish, and had not been used as a water cooler since 1904. The witnesses Towle and Morse, above mentioned, say that it had, when originally constructed, two covers, now missing, a larger cover for the larger part of the metal-lined box, and a smaller cover for the smaller tank within; the smaller cover being provided with a hole having beveled edges and adapted to receive the neck of an inverted water bottle or carboy. They say, also, that each of the two outlets mentioned was provided with a faucet. Upon completion, according to them, the device was put to use in the making room referred to; ice being placed in the box outside the smaller tank, water for drinking being contained in that tank, supplied to it from bottles or carboys supported in an inverted position by its cover, their necks projecting downward through the cover below the level of the water in the tank beneath. From this tank the drinking water was drawn, as required, through the connected outlet and faucet. The place of the water drawn from the tank would then be immediately supplied from the bottle above, through the water in which air would bubble until the air pressure again balanced. The drinking water was kept cool by the ice or melted ice kept surrounding it in the box; the water from melted ice being withdrawn as necessary through the other outlet and faucet.

Assuming it to be true that the exhibit produced was, when complete, constructed and operated as above, I cannot doubt that it embodied all the inventions covered by the Newell claims in controversy.

But, under the decisions in this circuit, the burden is on the defendants to establish the identity of structure, between what is patented and what they claim to have anticipated it, by something more than oral testimony, even of the highest character, when, as here, there has been a considerable lapse of time; and for this purpose "concrete, visible, contemporaneous proofs which speak for themselves" are necessary. *Emerson, etc., Co. v. Simpson, etc., Corp.* (C. C. A.) 202 Fed. 747. The exhibit "Fox Factory Cooler," as it stands, can hardly be

said to speak for itself. Without its covers, at least, it does not furnish in itself a complete demonstration that the Newell claims were embodied in it. Oral testimony has to be resorted to for that purpose, and all the testimony relied on for the purpose comes from witnesses who testify after a long lapse of time. None of their testimony was taken before 1911, while the original construction of the exhibit is said to have been in 1900, and by agreement of all it had not been in operation since 1904. Whether it sufficiently answers the above description of what is required in a situation like this is by no means clear.

Conceding, however, that from the exhibit as we now have it, faucets, covers, and an inverted bottle supported by one cover in the requisite position may be inferred, the defendants' purposes require, as against Newell's first patent, that its use before July 22, 1900, be shown. Towle and Morse testify, with positiveness, that after they had made the exhibit above it was put into use, in its completed form, in the "making room" of Charles K. Fox's shoe factory, in Haverhill, and that this was done in 1900, at the beginning of the warm weather. Towle says it was in the first part of June, 1900. Morse does not undertake to fix the month, but says he moved to Haverhill in the fall of 1899, and did his work on this exhibit at the beginning of the following summer. There is no serious dispute that during the warm weather drinking water was kept in the making room referred to, in various forms, that coolers of more than one kind were there tried, and that during one of the summers between 1899 and 1904 a cooler wherein the drinking water was supplied from inverted bottles over a tank—whatever its precise interior construction—was installed by Towle and used there for a time. As to the precise date of this installation and use there is much conflict, and many witnesses have testified on each side. Of all these witnesses, Towle and Morse claim to have been more immediately concerned with the installation than any others, and their testimony regarding the date is therefore first considered.

Like all the other witnesses, they gave their testimony, now before the court, more than 10 years after the summer of 1900. Little confident reliance can be placed upon the mere recollection of any witness, after such a lapse of time, when the question is in which of two or three successive summers such an event as this occurred, even if his recollection be aided by reference to an established date of some other event. Especially when recollections are in conflict, something corresponding to the tangible proofs required to establish identity of structure would seem equally essential, even for a preponderance of evidence. Written memoranda made at the time might supply what is here necessary to supplement recollection; but neither side has been able to produce anything of this kind bearing directly upon the date which is in dispute. The nearest approach to anything of the kind is found in the evidence of Miss Thompson, called by the defendants. She says she kept the books of W. C. Bennett & Co., Morse's employers, from 1896 to 1907. The books so kept by her, down to 1906, were destroyed near the end of 1908; but before their destruction, late in 1907 or early in 1908, she says she found in them, after a search made at Mr. Towle's request, a journal charge against

him, under date of June 18, 1900, in her writing, for "making water cooler." This date she wrote down at the time she found it on a piece of paper, which she gave Mr. Towle. Independently of what she found, she does not undertake to fix the date of making the cooler. Towle says Miss Thompson told him in 1908 that the date she found was in 1900, but does not produce the paper she gave him. Miss Thompson's testimony, given three years after her search of the books, and Towle's testimony, not only that as to the statement of Miss Thompson to him, but also his testimony that the cooler was built in June, 1900, have to be considered in connection with an affidavit shown to have been made by him in 1910, a year before he testified in this case, and two years after Miss Thompson's search, wherein he stated that the cooler was built "in the spring of 1899."

Towle's statement in this affidavit of 1910 is that he "directed C. A. Lawson to have a cooler made as follows," etc.; and in his testimony here he admits that the cooler he then referred to was the Towle cooler here in question. Lawson himself is a witness for the defendants, on whose behalf he testified as follows: Up to 1905 he was selling drinking water in Haverhill from the Smiley spring. Early in 1900 he got the business of the whole shop at the Fox factory, another dealer having before that divided it with him. About May 1, 1900, he put into the making room a syphon cooler which he describes. This was later replaced by a cooler so described by him as to identify it with the Towle cooler. Towle had it made, Lawson agreed to pay half the costs, and Towle agreed that this should entitle Lawson to make others like it for his own use. He made such others, the next year and thereafter until 1904, to the number of about 20. It was about the middle of June when the Towle cooler was first put into the Fox making room. He or his employes kept it supplied with drinking water and ice from the time it was installed until its use there was discontinued in 1904.

As to Lawson, it appears that in October, 1904, he wrote in reply to inquiries by James H. Griffin, opposed as counsel at the time to Newell in the interference proceedings above mentioned, that the Towle cooler was put into the Fox shop the last of June or the first of July, 1900, but he could not give the exact date. But it appears that in February, 1910, Lawson also swore to an affidavit stating that "in the spring of 1899 he shared with Mr. C. R. Towle, of Haverhill, Mass., the expense of making a water cooler," of which he proceeded to give a description agreeing with that given by Mr. Towle. Lawson's first testimony in this case was given in the spring of 1911; but when again examined, in April, 1913, he declared that he was not so sure of the date of the Towle cooler installation as he had been in 1911. He had been a business competitor of Newell, and admitted that they were not particularly friendly. None of the above are circumstances which encourage reliance upon his recollection regarding the date here in question, without regard to testimony still later given by him on the plaintiff's behalf, after his examination as a witness for the defendants had been concluded, and which appears to have been the result of representations made to him by the complainant's

agents or counsel, no representative of the defendants being present, regarding discoveries said to have been recently made as to matters affecting his testimony.

Lawson's connection with the installation of Towle's cooler has seemed to me to make him a witness second only in importance to Towle and Morse on the question of date. Next after him seems to come Edward J. Hayden, employed by him in the delivery of Smiley spring water during the seasons of 1899, 1900, and 1901. He says his delivery route included the Fox making room during these seasons, and according to him a cooler answering Lawson's description of his syphon cooler was there in use at the beginning of the season of 1900; but, because it did not work well, it was replaced after a short trial by Towle's cooler, and this happened about the end of the second week in June. Hayden also says he accompanied Towle to Bennett's, when Towle left the sketch for his cooler there, and heard him explain the sketch. Hayden says, further, that he supplied the Towle cooler with water, when completed, daily during the remainder of the season of 1900 and during the whole season of 1901, after which he left Lawson's employ. He continued to work in Haverhill until 1907 or 1908, since when he has been at his home in Nova Scotia. Within two or three years prior to his examination in 1913, he had corresponded with Lawson regarding the Towle cooler. Before he left Haverhill he had been interviewed by Mr. Griffin, above mentioned, concerning it.

M. K. Wentworth, a competitor of Lawson's in the spring water business in Haverhill, testifies to having seen an inverted bottle cooler, which he so describes as to identify it with Towle's, in the Fox making room about the last of June, 1900, again during the season of 1901, and again during the season of 1902. In 1905 his concern recovered the Fox factory business from Lawson; but he saw nothing more of the Towle cooler then, as above stated, until he saw the exhibit "Fox Factory Cooler" in January, 1910, under the sink there. His visits to the Fox factory during the seasons of 1900, 1901, and 1902 were for the purpose of regaining his former trade there in spring water. But Wentworth, like Towle and Lawson, made an affidavit in February, 1910, containing the statement that a cooler like Towle's was used in the Fox factory "early in the year of 1899." At the time these affidavits were given, Wentworth was actively allied with Rose, one of Newell's adversaries in the interference proceedings, and he seems, indeed, to have been the person by whose efforts the exhibit "Fox Factory Cooler" was brought to light in 1910 from its position underneath the sink in the Fox making room, where it had lain in disuse since 1904.

Rose was defendant in 1910 in a suit upon the Newell patents, brought by the present plaintiff in the District Court for the New York Southern district. In that suit Rose has now submitted, without a hearing, to a decree against him. But in 1911 he took evidence before an examiner, to be used in it, tending to prove anticipation of Newell by the use of the Towle cooler in the Fox making room as early as June, 1900, which is here asserted. Evidence was

also taken by the plaintiff to meet that taken by Rose. Much of the present record consists of evidence thus taken in 1911, brought into the present case by stipulation. The witnesses referred to above, except Hayden, are among those whose testimony was originally given for use in the New York suit; Charles R. Towle, Lawson, and Wentworth having also been recalled and further examined for the purposes of this case. The defendants' record here includes the testimony of 8 other witnesses claiming to have worked in the Fox factory during the season of 1900, or immediately after it, examined on Rose's behalf in 1911; and the plaintiff's record the testimony of 8 other witnesses making similar claims, then examined on the plaintiff's behalf. Besides recalling some of those then examined by them, the defendants have, for the purposes of this case, examined 12 additional witnesses claiming to have worked in the Fox factory in 1900 or 1901. The plaintiff has recalled some of the 8 witnesses of this class whom it examined in 1911, but has called no others in addition.

Of the 12 witnesses for the defendants above referred to, 3 (Chisholm, Howard, and E. D. Garland) were examined by the plaintiff in reply, after the conclusion of the defendants' evidence. The plaintiff moves to strike out their depositions, as not properly in rebuttal of any evidence introduced by it, and as taken at a time not affording a proper opportunity to meet it. The evidence of the 3 witnesses referred to is undoubtedly of a kind which ought to have been taken before the defendants closed their evidence; but the motion to strike it out is denied, no application having been made to the court at the time for an opportunity to contradict it. The circumstances under which it was taken, however, cannot be disregarded in estimating the weight to which it is entitled.

The evidence of all these former employes at the factory, called by both sides, has been examined. It is voluminous, and, of course, conflicting. Discussion of it in detail, and of the various considerations arising from it, which tend to encourage or discourage reliance upon the recollection of the witnesses, respectively, regarding the time during which the Towle cooler was in use in the making room, or the time at which such use began, would greatly extend this opinion, but, it is believed, without corresponding advantage. Were the question one to be determined by a mere preponderance of the evidence directly bearing upon it, without regard to the requirement of tangible proofs above referred to, I should be prepared to hold it proved that the Towle cooler was used, as the defendants contend, in the making room beginning in June, 1900, and thereafter during successive seasons until 1904. A numerical preponderance is not here referred to, but the preponderance arising from comparison of the testimony of those witnesses whose recollection, on the whole, seems to me most likely to be right.

But I am nevertheless unable to hold that the evidence as a whole, unsupported as it is by anything in the nature of tangible proof, is sufficient for that clear conviction of the truth of this conclusion which is necessary for the decision that the anticipation of the Newell claims

by the Towle cooler, alleged in the supplemental bill, is sufficiently established. The following considerations, some of them already indicated, obstruct any such clear conclusion, even upon an apparent preponderance of the evidence, because of the uncertainty they suggest, in the case of each witness, whether his recollection of what happened 10 years before he testified is really an unbiased recollection:

Newell, the patentee, lived in Haverhill, and was well known there from 1899 until the time of his death. Towle says he knew him in 1900, that he visited the making room during the summer of that year, knew that the Towle cooler was in use, and late in the summer of 1900 questioned Towle about it, near Newell's place of business, on Wingate Street, in Haverhill, and said Towle was using his invention. Towle discontinued its use in 1904 because Griffin, opposed to Newell in the interference proceedings, while attending the taking of testimony on Newell's behalf in Haverhill, in September, 1904, called at the factory inquiring about it, and informed Towle that there was liable to be trouble over its use, as it was a patented article. Attempts were made, at about the same time, by both parties, to find persons in Haverhill who could testify in those proceedings regarding the date of the Towle cooler. In 1910 and 1911 attempts were again made by both parties in the suit against Rose to discover witnesses in Haverhill upon the question of this date, and this time upon a more extensive scale, resulting, as has appeared, in the taking of much of the evidence now before the court; and since Judge Colt's decision, in September, 1912, when the present defendants appear to have first heard of Towle's cooler, both parties to this suit have conducted still further investigations for the same purpose, in Haverhill, with much zeal, and many days have been spent there by the agents of each party and their counsel in searching for and examining witnesses. Not a few of the witnesses examined have talked with representatives of both sides of the controversy. Towle has, during all this time, continued to be foreman of the making department in the Fox factory. Fox, owner of the factory, was director in a water company whose interests were opposed to Newell's. There are indications that, as would be natural, the attitude of Towle and Fox upon the question of the Towle cooler was understood by Haverhill shoe workers acquainted with affairs in the factory, though I find nothing to show influence exerted by them upon any witness. It is difficult to suppose, however, that any witness, examined about the date of Towle's cooler, has not heard or taken part in discussions about it before he came to testify, or that in making up his mind regarding it he has been wholly unaffected by the opinions of others. Whether the cooler was in the Fox making room in 1900, or not until later, appears to have been a familiar and often disputed question, at least since 1904.

The plaintiff has relied much on the evidence of Miner, a witness who delivered Smiley spring water for Lawson during the season of 1900, and produces a book containing entries of customers and deliveries made at the time—upon a paragraph published in the Haverhill Gazette of August 3, 1900—and upon a bill for a refrigerator produced by Lawson when the plaintiff examined him, dated July 21,

1900, and said by him to be the bill for the refrigerator out of which he made his syphon cooler, put into the making room, according to his first testimony and that of Hayden, at the beginning of the season of 1900, found unsatisfactory, and replaced in June by the Towle cooler. Miner says he never saw this syphon cooler during the season of 1900, except at a stand set up by Lawson on Merrimac street, Haverhill, for the sale of Smiley spring water; that it was used there for about a month, and then taken to Lawson's house. The newspaper item mentions the establishment of the stand, but says nothing about any cooler used there. Lawson assigns the production of the refrigerator bill, of Miner's book, and of the newspaper item as the reasons for his final doubt whether the Towle cooler can really have been installed as early as June, 1900, in substitution for his syphon cooler. The plaintiff insists that these pieces of evidence have proved that date impossible. This I cannot accept as a necessary conclusion; there being nothing more than Lawson's recollection to prove that the refrigerator bill really fixes the date of construction of his syphon cooler. I see no necessary reason why, notwithstanding the pieces of evidence referred to, Lawson's original account may not be true. It must be conceded, however, that they further obstruct a clear conviction from the whole evidence in favor of the date alleged by the defendants for the Towle cooler.

2. Is the evidence taken under the supplemental bill sufficient to prove that the coolers which Newell claims to have made in the early part of 1899 were not in fact made until later, or not before 1902?

At the hearing before Judge Colt, the record in the interference proceedings above mentioned was one of the plaintiff's exhibits. Judge Colt's opinion does not refer to anything in that record, though his decision in the plaintiff's favor refers, as has been stated, to the final decision in the interference proceedings. The defendants now attack Newell's testimony, found in that record, regarding three exhibits put in evidence by him during that testimony. They have been since offered by the plaintiff in this case as (1) "Newell Coil Pipe Inverted Bottle Cooler," (2) "Newell Diaphragm Inverted Bottle Cooler," and (3) "Newell Diaphragm Center Feed Inverted Bottle Cooler."

Newell, as is not disputed, moved his place of business in Haverhill from Wingate street to Washington street late in August, 1900. Regarding the above three coolers he testified that he completed (1) at his Wingate street place in the spring of 1899; that, when he produced it, it was "just as it was when he first made it"; that he completed (2) perhaps a week or two later than (1). The above he later corrected by stating that (1) and (2) were made, not in the spring, but in the early summer, of 1899. He stated that he made (3) after having operated (1) and (2), and that he completed it not later than the last of July, 1899. In his best judgment all three exhibits were the same when he produced them as when he first completed them; no changes in them had been made. All three were operated at his Wingate street place as soon as they were completed.

Close examination of certain brass faucets forming part of (1) and (3) of the above exhibits discloses the mark upon them, "Pat'd Aug.

1, '99." This fact is said to have been first discovered by Rose's counsel in the New York suit against him, and by these defendants not until after Judge Colt's decision. It does not appear to have been noticed during the interference proceedings. The manufacturer of these faucets, examined in the Rose Case, has testified that no faucet so marked could have been made at a time earlier than three or four weeks after August 1, 1899.

I agree with the defendants that the mark on these faucets shows Newell to have been in error in stating that these coolers were made by him in the spring or summer of 1899, and also shows that Cram, a witness for Newell in the interference proceedings and for the plaintiff in this case, could not have seen all three in operation by Newell at Wingate street during the same period, or before July 1, 1899, as he says he did, and shows that Foster, also a witness for Newell in the interference proceedings and for the plaintiff here, could not have seen any of them, as he says he did, in 1898. But I do not think it necessarily follows that either of these three witnesses made the erroneous statements referred to knowing them to be false, or that their testimony that the coolers were in operation by Newell at his Wingate street place for some time before he left it, about September 1, 1900, is wholly discredited. To this extent it is supported by other witnesses, and is not to be disregarded, unless the defendants have proved, as they contend, that cooler (1), which Newell says he made first, was not in fact made before January, 1902.

To prove this, they rely upon the testimony of Stultz, formerly employed by a plumbing concern in Haverhill called the Haverhill House Heating Company, and upon entries which he identifies in the books of that concern. Stultz's testimony now before me was taken in April, 1912, in the suit against Rose. He says he made cooler (1) for Newell in January, 1902, and he identifies "Newell Entry No. 11" in one of the books as a contemporaneous entry of the work, made by him. The entry contains in itself nothing sufficient to connect it clearly with cooler (1), or with any such cooler. It was not dated when made, though carried into the ledger by the bookkeeper under date of January 24, 1902. Stultz, though he did not testify until 1912, went over the books with Rose 6 or 8 years before his testimony was given, and found for Rose the entries here relied on. It is Stultz's recollection alone, after 2 years at least had passed since January, 1902, upon which reliance must be placed if his statement is to be accepted. I do not find it necessary to discuss the evidence produced by the plaintiff tending to show that Stultz's entry on the books bears traces of alteration since it was first made. I should in any case hesitate to accept his testimony as proving that cooler (1) was not made before 1902. It is evidence from Haverhill, brought forward for the first time after Newell's death, although within the knowledge of parties opposed to Newell from a time considerably before his death. I am unable to regard it as sufficient to prove the fact asserted.

Statements on cross-examination by McAree, one of the plaintiff's witnesses, are also relied on by the defendants. His testimony was taken for the Rose Case, and he was also called by the defendants in this case. Like Stultz, he was a former employé of the Haverhill

House Heating Company. The defendants claim that he identified coolers (2) and (3) as made by the company, and only after Newell had moved to Washington street. I am not satisfied that his answers referred to really mean just this; but, if they do, they still leave it possible for these coolers to have been made in 1900. I cannot find it proved that they were not made in 1899 upon the strength of Mc-Aree's statements.

The defendants seek to draw, from the books of the Haverhill House Heating Company and from an examination of the testimony of these and other witnesses in connection with them, further conclusions inconsistent with Newell's claim to have made the cooler exhibits above mentioned in 1899. According to the defendants, the first inverted bottle cooler Newell ever made is shown to be what is referred to as the "engine house cooler," installed in an engine house in Haverhill July 1, 1901. Without discussing these subjects in detail, I have been unable to find in the evidence bearing upon them sufficient definite support for the defendants' conclusions.

3. The defendants insist that the Towle cooler must be found, even on the plaintiff's evidence regarding it, to have been in use in the Fox making room before September 26, 1901, and thus to have anticipated Newell's second patent. But I am unable to discover enough in the evidence, taken together, to warrant the finding that any definite date, even in 1901, is the date upon which the use of the Towle cooler then actually began.

For the reasons above stated, I must dismiss the defendants' supplemental bill, and allow the interlocutory decree for the plaintiff to stand as entered September 16, 1912.

Ex parte MOOLA SINGH et al.

(District Court, W. D. Washington, N. D. September 10, 1913.)

No. 2,532.

1. ALIENS (§ 54*)—ADMISSION—RIGHT TO ENTER—DETERMINATION OF FACTS—JURISDICTION OF COURT.

Under Immigration Act Feb. 20, 1907 (34 Stat. 904, 906, c. 1134 [U. S. Comp. St. Supp. 1911, pp. 511, 515]) §§ 20, 21, 25, providing for the deportation of aliens not entitled to enter the United States, a final determination of all the facts with relation to the qualifications of aliens to enter the United States, or their deportation within the time limited, is within and exclusive jurisdiction of the immigration officers and the Secretary of Labor; the jurisdiction of the federal courts to review the determination of such officers being limited to ascertaining whether the aliens have been denied a fair and full hearing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. HABEAS CORPUS (§ 96*)—REVIEW OF ERRORS—DEPORTATION.

Where aliens were represented by counsel in deportation proceedings, and given every opportunity to present all the facts bearing on their qualifications to enter the United States, a full and fair hearing was accorded them, and the court was precluded on habeas corpus from re-ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

amining the issues presented, merely because it was contended that the conclusions of the immigration officers, based on the testimony presented, were erroneous.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 81; Dec. Dig. § 96.*]

Petition for writ of habeas corpus by Moola Singh and 72 other Hindoo aliens to obtain a release from a deportation warrant. Writ denied.

Herbert W. Meyers, of Seattle, Wash., for petitioners.

C. F. Riddell, of Seattle, Wash., and E. B. Brockway, of Tacoma, Wash., for respondent.

NETERER, District Judge. Moola Singh and 72 other Hindoos filed a petition praying a writ of habeas corpus, and allege that they were former residents of the Philippine Islands, and at this time are unlawfully detained by the immigration authorities at Seattle, Wash.; that they have resided in the Philippine Islands for periods varying from several months to several years; that they were lawfully admitted by the immigration officers at the city of Manila; that they came to the city of Seattle, and were arrested, tried before the commissioner of immigration in Seattle, and the Secretary of Labor, denied admission, and ordered deported. They further allege that they were not accorded a fair trial, and pray that they may be discharged from custody and permitted to enter. Notice of application was served upon the United States Attorney, and the hearing came regularly before the court; both sides being represented.

[1] The question to be determined by this court is: Were the petitioners accorded a trial, and is the action of the Secretary of Labor *res judicata*. Section 20 of the Immigration Act of February 20, 1907 (34 Stat. 904, c. 1134 [U. S. Comp. St. Supp. 1911, p. 511]), provides:

"That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. * * *"

Section 21 provides:

"That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this act. * * *"

Section 25 provides:

"* * * That in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Labor."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The admission of aliens into the United States is regulated by Congress. The supervision is confided to the department of immigration charged with the enforcement of laws regulating the admission. The final determination of all of the facts with relation to the qualification of aliens to enter the United States or their deportation within the time limit fixed by act of Congress for reasons therein given is intrusted to the proper immigration officers, "whose decision is final, unless reversed on appeal to the Secretary of Labor." By the act of Congress these officers are made the sole and exclusive judges of the existence of the facts establishing qualification, and no other tribunal is vested with authority or power by Congress to re-examine and consider the sufficiency of the evidence on which these officers acted. So long as the officers clothed with this authority act within the limits placed by Congress, courts have no right to interfere. The authority of the immigration officers and the jurisdiction of the courts depend upon power conferred by Congress. It is a matter of legislation. No discretion is vested in the courts. Congress has the right to legislate upon the subject, prescribe rules, fix limits, and confer authority where it deems wise in legislating upon the subject at hand. The supreme authority is conferred upon the immigration officers. The jurisdiction of the court is limited to ascertaining whether the petitioners were denied a hearing. *Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Yamataya v. Fisher*, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721; *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; *Lee Moon Sing v. United States*, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

[2] An examination of the record which is presented upon this hearing establishes to my mind conclusively that a fair and full hearing was accorded to each and every one of the petitioners. They were represented by counsel and given every opportunity of presenting all facts bearing upon their qualification. A hearing having been accorded, the court is precluded from a re-examination of the issue presented, merely because it is contended that the conclusion of the immigration officers, based upon the testimony presented, was wrong. *Chin Yow v. United States*, *supra*.

The petition for writ is denied.

UNITED STATES, to Use of CHIEF ALL OVER et al., v. BAILEY et al.
(District Court, D. Montana. August 18, 1913.)

No. 937.

UNITED STATES (§ 67*)—ACTION ON CONTRACTOR'S BOND—LIMITATION—"FINAL SETTLEMENT."

Under Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), which gives a right of action on the bond of a contractor for government work in favor of persons supplying labor or materials but limits the time for bringing such action to one year "after the per-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

formance and final settlement of said contract," the "final settlement" dates from the settlement and certification of the contractor's accounts after completion of the work by the proper auditor in the Treasury Department.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*

For other definitions, see Words and Phrases, vol. 3, p. 2804.]

At Law. Action by the United States, to the Use of Chief All Over and others, against B. J. Bailey and others. Judgment for plaintiffs.

W. H. Meigs, of Great Falls, Mont., for plaintiffs.

Freeman & Thelen, of Great Falls, Mont., for defendants.

BOURQUIN, District Judge. This action is pursuant to Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), by unpaid laborers of a subcontractor of contractors with the United States, upon public work, against said contractors and their bondsmen. The case is tried by the court upon an agreed statement of facts, wherefrom it appears that the contract with the United States provided for the construction of irrigation works to reclaim arid lands under the control of the Secretary of the Interior; that the work would be done to the satisfaction of the chief engineer of the United States, and, when completed to his satisfaction and a release of all claims against the United States on account thereof was executed by the contractors, final payment of the balance due the latter would be made; that the contract was "completely executed," proof thereof made by the contractors to the satisfaction of said chief engineer, and release of all claims as aforesaid filed, August 18, 1908; that the contractors' claim in connection therewith was examined, settled, and certified in the amount due thereon by the Auditor for the Interior Department on September 10, 1908; and that the "last check or payment made" to the contractors was dated on or about September 10, 1908. The action was commenced on September 4, 1909. The issue is whether or not it was timely commenced. The court is of the opinion that it was. The aforesaid statute provides that like actions "shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later." It creates a right, liability, and remedy in behalf of those in like situation to the beneficiaries herein, conditioned upon action commenced within a stipulated time. It is in its nature remedial and to be liberally construed, but the condition must be performed or the right, liability, and remedy expire. The statute has made time of their essence. The prescribed time involves two events—performance and final settlement—and it is only after both have occurred that the time aforesaid begins to run.

"Performance" and "final settlement" are not synonyms. The first is the agreed work done; the second is the ascertainment or adjustment of the balance of rights and liabilities arising therefrom—in this case, determination by the United States of the balance due the contractors. This latter was not accomplished until the contractors' ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

counts were settled and certified by the auditor aforesaid. When the contract was entered into, the law was (it is part of the contract) and now is that all claims, demands, and accounts wherein the United States is concerned shall be settled and adjusted in the Treasury Department. Section 236, Rev. St. (U. S. Comp. St. 1901, p. 130). To that end, the third auditor of said department is designated as auditor for the Interior Department, to receive, examine, settle and certify all accounts relating to the department last mentioned, that treasury warrants may issue for amounts or balances due claimants. Act July 31, 1894, c. 174, 28 Stat. 205-207 (U. S. Comp. St. 1901, pp. 148, 149).

When this is done and not until then, in respect to government contracts performed, there is final settlement thereof, though further time be necessary for mere ministerial acts, to issue and deliver warrants. In no other wise can there be final settlement of contract obligations of the United States, and this is the final settlement contemplated by the Act February 24, 1905, aforesaid. And from the date of said auditor's settlement and certificate forthwith as the evidence thereof, the limited time within which actions like unto this must be commenced, begins to run.

Judgment will be entered for plaintiff.

In re CODORI.

(District Court, M. D. Pennsylvania. September 6, 1912.)

No. 2,155.

BANKRUPTCY (§ 262*)—REAL ESTATE—SALE BY TRUSTEE—DOWER.

Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), provides that the trustee shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by equitable or legal proceeding on the bankrupt's property. *Held* that, since in Pennsylvania a widow is entitled to dower only in what remains of her husband's estate after payment of debts, an order directing a bankrupt's trustee to sell his real property located in Pennsylvania free of liens contemplated a sale discharged of the inchoate dower right of the bankrupt's widow; and hence a sale subject to such rights would not be confirmed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262.*]

In Bankruptcy. In the matter of bankruptcy proceedings of William F. Codori, bankrupt. On exceptions to the confirmation of a sale of bankrupt's real property. Confirmation refused, and trustee directed to readvertise and sell.

Donald P. McPherson, of Gettysburg, Pa., for exceptions.

Chas. S. Duncan, of Gettysburg, Pa., and Robert Snodgrass, of Harrisburg, Pa., opposed.

WITMER, District Judge. The referee ordered the real estate to be sold at public sale free from all liens and incumbrances. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trustee advertised and sold it "free of all liens and incumbrances under order of sale by the referee in bankruptcy, except the inchoate dower interest of Carrie S. Codori, the wife of William Codori, the bankrupt." The property was purchased by the bankrupt's wife, and the sale confirmed nisi by the referee. The matter is here for final confirmation, with exceptions.

The exceptions are chiefly founded upon the allegations that the sale was not made in accordance with the terms of the order of court, and in compliance with the act of Congress relating to bankruptcy as amended by the act of June 25, 1910, and that it proved prejudicial to the rights of the bankrupt's creditors. In this way the question is presented whether the order of the referee authorizing and directing sale of the bankrupt's real estate free and discharged of liens and incumbrances carries with it the power to discharge and convey it free and absolved from the widow's inchoate right of dower.

Whether the right to dower under the order, if sold accordingly, would have been extinguished, depends entirely upon the amendment of section 47a (2) of the Bankruptcy Act, since before, a sale would not have so operated. *Porter v. Lazear*, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865; *In re Shaeffer* (D. C.) 5 Am. Bankr. Rep. 248, 105 Fed. 352. By the provisions of section 70, subd. 5, the trustee is invested with the bankrupt's title to all property which he, prior to the filing of the petition, could have transferred, or by judicial process might have been sold for him. And as to such property the trustee, by section 47a (2), as amended by the act of June 25, 1910, "shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceeding thereon." The trustee, therefore, as has often been decided, concerning such real estate of the bankrupt in his possession, is in the position of a lien creditor. The amendment had the effect of vesting in the trustee the enlarged rights, remedies, and powers of a judgment or other creditor having a lien upon the bankrupt's real estate (*Bank of North America v. Penna. Motor Car Co.*, 235 Pa. 194, 83 Atl. 622), enabling him to sell such real estate acquitted and discharged of the inchoate right of the widow's dower, to the same effect as by a sheriff's sale after levy on proper writ of execution.

In Pennsylvania the widow's right to dower in her husband's real estate has not been favored, so as to exclude the just demands upon it for his debts. She is entitled to dower only in what remains of her husband's estate after payment of debts. His land has always been held as an asset or chattel for the payment of his debts; and the sale of his land on judgment, mortgage, or other lien whatever has been held to bar the wife's right of dower in such land. *Director of the Poor v. Royer*, 43 Pa. 146. Hence the order to sell free and discharged of liens by the enlarged authority conferred by the amendment, placing the trustee into the position of a lien creditor, contemplated the discharge of the widow's inchoate right of dower, and the trustee had no authority to sell otherwise. To have done so beyond doubt operated to the prejudice of the bankrupt's creditors, since it

is well understood that real estate is not as desirable with as without such interest as the trustee attempted to reserve.

Confirmation of the sale is refused, and the trustee is directed to advertise again and sell as directed by the referee.

NEW PADDOCK-HAWLEY CO. v. FAYETTEVILLE WAGON WOOD & LUMBER CO. et al.

(District Court, W. D. Arkansas, Ft. Smith Division. September 6, 1913.)

1. CORPORATIONS (§ 474*)—SUBROGATION (§ 26*)—BONDS—TRANSFER—OWNER-SHIP.

Bonds having been issued by a bankrupt corporation, certain of them were pledged to a trust company as collateral to a note for money borrowed from the trust company through the bankrupt's financial agent, the P. H. Co. The proceeds of the note were delivered to the P. H. Co., and credited to the bankrupt. Extension or renewal notes were made which were paid by the P. H. Co. and charged in the same way, and the unsold bonds were delivered to the P. H. Co. by the trust company. *Held* that, the P. H. Co. not being liable on the note, to secure which the bonds were pledged, its claim against the bankrupt being on an open account only, it was not the owner of the bonds so surrendered by the trust company, nor was it subrogated to the trust company's lien.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854; Dec. Dig. § 474; * Subrogation, Cent. Dig. § 67; Dec. Dig. § 26.*]

2. CORPORATIONS (§ 543*)—INSOLVENCY—SALE OF ASSETS BY COMMITTEE.

A sale of the assets of an insolvent corporation by a committee of its creditors does not differ in any respect from a sale made by an assignee, receiver, or trustee in bankruptcy, and is not a sale in the usual course of business which will confer on the purchaser the rights of a bona fide purchaser for value, without notice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2161; Dec. Dig. § 543.*]

3. CORPORATIONS (§ 472*)—INSOLVENCY—SALE OF ASSETS BY COMMITTEE—BONA FIDE PURCHASER.

An insolvent corporation in the hands of a committee of creditors had in its possession certain bonds issued by the bankrupt, for which the corporation had acted as fiscal agent, but which it did not own, having received the same from a pledgee to hold and deliver to the bankrupt. The creditors' committee, in order to liquidate the corporation's assets, sold all of the bonds to two persons who organized complainant company to take over and operate the same, and in this way acquired possession of the bonds, which, in addition to having overdue unpaid coupons attached, were, as to some of them, past due as to the principal. *Held*, that complainant acquired no title to the bonds; it being bound by the knowledge of its organizers as to the facts with reference thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841; Dec. Dig. § 472.*]

4. CORPORATIONS (§ 472*)—BONDS—BONA FIDE PURCHASER—SALE TO PLAINTIFF.

Where plaintiff purchased certain corporate bonds after maturity from a bona fide purchaser before maturity, plaintiff, though purchasing with notice of an intervening equity, acquired a title freed from such equity, and subject only to the defenses of limitations, laches, and estoppel.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841; Dec. Dig. § 472.*]

5. LIMITATION OF ACTIONS (§ 25*)—BONDS—LIMITATIONS.

The five-year statute of limitations applies to an action on corporate bonds, and runs against interest coupons as well as the bonds to which they are attached.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 113, 118-131; Dec. Dig. § 25.*]

6. LIMITATION OF ACTIONS (§ 157*)—BONDS—LIMITATIONS—OVERDUE INTEREST COUPON—PAYMENT.

Payment of an overdue interest coupon attached to a corporate bond, against which the statute of limitations has begun to run, does not interrupt the statute as against the bond, nor as against any other overdue coupon attached thereto.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 631-634, 636; Dec. Dig. § 157.*]

7. LIMITATION OF ACTIONS (§ 157*)—CORPORATE BONDS—PAYMENTS.

A suit was brought on certain corporate bonds March 16, 1912. Eight of the bonds fell due March 18, 1906, and on December 20, 1911, there was paid on each of them \$15 as interest "from March 18th to September 18, 1906." There was no unpaid coupon covering this period of time. *Held*, that the payment should be considered as having been made on the bonds, and hence relieved it from the bar of limitations; the date of the payment constituting a new point from which the statute would begin to run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 631-634, 636; Dec. Dig. § 157.*]

8. CORPORATIONS (§ 473*) — ACTS OF OFFICERS — CORPORATE BONDS — ENFORCEMENT—LACHES.

Where complainant corporation was wholly controlled and directed by two individuals, and its only place of business was their office, and they habitually spoke of the property as their own, complainant having left to them the enforcement of payment of certain bonds of the bankrupt defendant, and having indefinitely postponed their collection, when ample authority and sufficient cause existed for foreclosure proceedings, complainant's right to enforce the bonds was barred by laches.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842-1853, 1855; Dec. Dig. § 473.*]

9. ESTOPPEL (§ 97*)—EQUITABLE ESTOPPEL—RIGHT TO ENFORCE.

Where complainant corporation owned the controlling stock in a bankrupt company, and complainant's officers put out a statement of the bankrupt's assets to a commercial agency, in which no mention of certain bonds of the bankrupt claimed to be owned by complainant was made as a liability, such statement was sufficient to estop complainant to enforce a claim for the bonds against the bankrupt's estate, even as against creditors of the bankrupt who had not paid for the information.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 289; Dec. Dig. § 97.*]

In Equity. Suit by the New Paddock-Hawley Company against the Fayetteville Wagon Wood & Lumber Company and W. W. Key, its trustee in bankruptcy. Decree dismissing bill.

Read & McDonough, of Ft. Smith, Ark., for plaintiff.

E. B. Wall, B. R. Davidson, and McDonald & Grabel, all of Fayetteville, Ark., for defendant.

YOUNG, District Judge. This is a suit in equity by the New Paddock-Hawley Company, a corporation of Nebraska, as the alleged

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

holder and owner of certain bonds of the Fayetteville Wagon Wood & Lumber Company, a corporation of Arkansas, to foreclose a deed of trust given by the latter to secure those bonds. The deed of trust was given on real estate in Washington county, Ark. By an amendment to the bill it is sought to include land in Carroll county, Ark., purchased since the execution of the deed of trust. The Fayetteville Wagon Wood & Lumber Company was adjudicated a bankrupt on the 28th day of February, 1912. W. W. Key was elected trustee on the 15th of March following. The bonds sued on number 64.

The answer of the trustee sets up the following defenses: (1) That the plaintiff is not the holder and owner of the bonds. (2) That the Fayetteville Wagon Wood & Lumber Company does not owe any of them. (3) That plaintiff did not acquire the bonds in good faith for value before maturity in the usual course of business without notice. (4) That plaintiff has been guilty of laches, and is therefore precluded from asserting its claim. (5) The five-year statute of limitations is pleaded as to principal and interest. (6) By an amendment the trustee sets up as an estoppel certain conduct and representations by J. E. and D. A. Baum, stockholders and officers of plaintiff.

The issuance of the bonds and the execution of the deed of trust were authorized on the 13th of March, 1902, by a resolution of the stockholders, and afterwards on the same day by a resolution of the board of directors of the Fayetteville Wagon Wood & Lumber Company. The resolution authorized the issuance of \$40,000 in bonds, in denominations of \$500 each, numbered 1 to 80, inclusive, with interest at the rate of 6 per cent. per annum. It was provided that 8 of the bonds should mature each year after the execution, making the last to mature 10 years after execution. At that time the capital stock of the Fayetteville Wagon Wood & Lumber Company was \$50,000, divided into 2,000 shares of \$25 each. George W. Cleveland held 460 shares; Gaius Paddock, 460 shares; George E. Hawley, 460 shares; Orville Paddock, 459 shares; Leslie H. Weston, 120 shares; Emmet W. Lucas, 40 shares; Wiley T. McNair, 1 share. Gaius Paddock, George E. Hawley, and Orville Paddock held all the stock issued to them as trustees of the Paddock-Hawley Iron Company, a corporation doing business at St. Louis, Mo. George W. Cleveland and Leslie H. Weston were president and secretary, respectively, of the Fayetteville Wagon Wood & Lumber Company. Gaius Paddock and Orville Paddock were directors both of the Fayetteville Wagon Wood & Lumber Company and the Paddock-Hawley Iron Company. George E. Hawley was also a director of the latter company. The Paddock-Hawley Iron Company was the financial agent of the Fayetteville Wagon Wood & Lumber Company, and most of the business of the latter was done through the former.

[1] The deed of trust and bonds were signed in the name of the Fayetteville Wagon Wood & Lumber Company by George W. Cleveland, as president, and Leslie H. Weston, as secretary. The Colonial Trust Company of St. Louis was made trustee in the deed of trust. The bonds and deed of trust were taken to St. Louis; but the bonds

were not sold. The Fayetteville Wagon Wood & Lumber Company borrowed from the Colonial Trust Company the sum of \$40,000, and executed its note therefor in the name of the corporation by its president, with George W. Cleveland, L. H. Weston, Gaius Paddock, George E. Hawley, and Orville Paddock as indorsers. The note ran for six months, with the privilege of renewal. The bonds were deposited as collateral to the note, and the Trust Company was authorized to sell any or all of them at not less than 97½ cents on the dollar and accrued interest, and to apply the proceeds to the payment of the note. The bonds bore date March 18, 1902. Interest was payable semiannually, and was evidenced by coupons attached to the bonds. It appears from the testimony that the note bore date March 28, 1902. The proceeds of the note were delivered to the Paddock-Hawley Iron Company, and credited on its ledger on its account with the Fayetteville Wagon Wood & Lumber Company. The expense of preparing the bonds and attorney's fees for examination were paid by the Paddock-Hawley Iron Company, and charged on its account with the Fayetteville Wagon Wood & Lumber Company. As the interest coupons fell due, they were paid by the Paddock-Hawley Iron Company, and charged in like manner. The bonds which matured in 1903 and 1904 were likewise paid by the Paddock-Hawley Iron Company and charged. The extension or renewal note was paid and charged in the same way, and the unsold bonds were delivered to the Paddock-Hawley Iron Company by the Colonial Trust Company. In the meantime 12 of the bonds, representing \$6,000 of face value, had been sold by the trustee. They were bonds numbered from 45 to 48, inclusive, which fell due March 18, 1907, and 49 to 56, inclusive, which fell due March 18, 1906. The testimony shows that \$26,000 of bonds, 52 in number, were delivered by the Colonial Trust Company to the Paddock-Hawley Iron Company. These, with the 16 that had been retired, and the 12 that had been sold, made the 80, the original issue. The bonds retired were numbered from 65 to 80, inclusive. Those delivered to the Paddock-Hawley Iron Company were numbered from 1 to 45, inclusive, and 57 to 64, inclusive. From these facts it is clear that the Paddock-Hawley Iron Company never became the owner of any of these bonds. The indebtedness to it from the Fayetteville Wagon Wood & Lumber Company was represented by the debit balance on the books of the former, and the credit balance on the books of the latter. There was no sale of the bonds to the Paddock-Hawley Iron Company, nor was there any agreement by which it should hold the bonds as security. It was not subrogated to the lien of the Colonial Trust Company, because it was under no obligation to pay the note as security for which the bonds were pledged. The Paddock-Hawley Iron Company was in no way liable on that note. It was neither a surety nor indorser. *Ætna Life Insurance Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537. According to the testimony of its president, Gaius Paddock, it was the custodian of the bonds before they were pledged. It received the proceeds of the note, and gave credit on its account. It charged on that account all amounts which it paid

out. When the bonds were returned, it stood in the same relation to them that it did before they were pledged to the Colonial Trust Company. It afterwards pledged the bonds for its own debts. This was done without authority from the Fayetteville Wagon Wood & Lumber Company. George W. Cleveland sold all his stock in the latter company, and ceased to have any connection with it in December, 1902. L. H. Weston was then elected president. He ceased to be an officer and stockholder of the company in August, 1905. J. H. Berry then became president. He seems never to have understood the situation with reference to the bonds. His testimony indicates that he assumed that the Paddock-Hawley Iron Company was the purchaser and owner of the bonds, and, in addition, that the Fayetteville Wagon Wood & Lumber Company owed the balance shown on its account. The Paddock-Hawley Iron Company managed the affairs of both companies. It is clear that up to this time the Paddock-Hawley Iron Company not only did not own the bonds, but had no interest in them. In September, 1904, the Paddock-Hawley Iron Company became so badly involved that its business and all of its assets were placed in the hands of a committee of its creditors. This expedient was resorted to in order to avoid proceedings in bankruptcy. This committee proceeded to convert these assets into cash, to ascertain who the creditors were, and to apply the amount collected to the payment of their claims pro rata. The committee paid from the assets of the estate 30 per cent. upon each claim allowed. Shortly after the committee took charge, it began negotiations with J. E. and D. A. Baum of Omaha, Neb., looking to a sale to them of all of the assets. These negotiations continued for a period of 22 months, until the 20th of July, 1906, on which date a sale was consummated. In accordance with the agreement between the committee and J. E. and D. A. Baum, they took a bill of sale from the board of directors of the Paddock-Hawley Iron Company of all its assets, without inventory, in consideration of the sum of \$240,000. This included all collateral pledged by the Paddock-Hawley Iron Company with its creditors, and balances on book accounts. This was done with the consent and advice of the committee. At that time the 8 bonds which fell due March 18, 1905, and the 8 bonds which fell due March 18, 1906, were unpaid. All of those falling due in 1905, and 4 of those falling due in 1906, 12 in all, were among those claimed to have been included in the purchase. Three overdue interest coupons were attached to each bond, except those which fell due in 1905. Manual delivery was not made of these bonds. J. E. and D. A. Baum did not obtain possession of all of them until August, 1911. The Baums were not bona fide purchasers for value in the usual course of business, without notice.

[2] The sale of the assets of an insolvent corporation by a committee of its creditors does not differ in any respect from a sale made by an assignee, receiver, or trustee in bankruptcy. That character of sale is not a sale in the usual course of business. *Kinney v. Paine*, 68 Miss. 258, 8 South. 747. This sale made by the creditors' committee in a lump, without inventory, was not a sale in the

usual course of business, and did not constitute the Baums bona fide purchasers of the bonds. The 12 overdue and unpaid bonds were not only notice so far as they were concerned, but were notice as to the remainder of the bonds. The overdue coupons on 56 of the bonds were, under the circumstances, notice of dishonor. It is true that unpaid interest coupons are not alone sufficient to discredit negotiable paper. *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681; *Morgan v. U. S.*, 113 U. S. 476, 5 Sup. Ct. 588, 28 L. Ed. 1044.

[3] But in this case the unpaid coupons did not stand alone. In connection therewith were the following facts: (1) Liquidation of the ostensible owner on account of insolvency. (2) The possession of the assets of the ostensible owner by a creditors' committee. (3) Sale of bonds in connection with sale of the stock of goods, without inventory. (4) The known desire and effort of the creditors' committee to collect all obligations due the ostensible owner and convert all assets into cash to apply to the payment of the debts of the ostensible owner. (5) Eight of the bonds being 16 months, and 2 of them 4 months, past due.

These added facts were ample to charge J. E. and D. A. Baum with notice, and to let in the equitable defenses of the Fayetteville Wagon Wood & Lumber Company.

The New Paddock-Hawley Company was organized by J. E. and D. A. Baum for the sole purpose of taking over all the assets of the Paddock-Hawley Iron Company. It was organized on the 19th day of July, 1906, by J. E. Baum, and D. A. Baum, and F. C. Hawley. J. E. and D. A. Baum owned every share of the stock. D. A. Baum was president, and J. E. Baum was secretary and treasurer. They constituted a majority of the board of directors; the other director being Daniel Baum, Jr. On the next day immediately after the sale by the committee to J. E. and D. A. Baum they conveyed the same assets to the New Paddock-Hawley Company in consideration for stock in that corporation. To say that under those circumstances the corporation did not have the same notice, which its president and secretary and majority of its board of directors had would be ludicrous, not to say farcical.

[4] With regard to the 12 bonds purchased from Mrs. D. Zaner through the Commonwealth Trust Company, the situation is different. The uncontradicted testimony shows facts establishing that Mrs. Zaner was a bona fide purchaser for value of those bonds. It is true that the New Paddock-Hawley Company did not purchase these 12 bonds until after maturity. Ordinarily that is sufficient to charge a purchaser with notice of an intervening equity; but that rule does not apply in the case of a purchaser after maturity from a bona fide purchaser before maturity. *Miles v. Dodson*, 102 Ark. 422, 144 S. W. 908; *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431; 7 Cyc. 938. As to these 12 bonds, the plaintiff has a good title, subject, however, to the defenses of limitation, laches, and estoppel.

[5] The bill in this case was filed on the 16th of March, 1912. The five-year statute of limitations applies. It runs against interest coupons as well as obligations to which they are attached. *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228. Therefore, all coupons which matured more than five years prior to March 16, 1912, are barred by limitations.

[6] The payment of an overdue interest coupon attached to a bond, against which the statute has begun to run, does not interrupt the running of the statute against the bond, nor against any other overdue coupon attached to the same bond. There are, however, no bonds included among the 12 purchased from Mrs. Zaner, against which the five-year statute had run.

[7] As stated, this suit was brought on the 16th day of March, 1912. Eight of these bonds fell due March 18, 1906. On the 20th of December, 1911, there was paid on each one of these eight bonds the sum of \$15 as interest "from March 18, 1906, to September 18, 1906." There was no unpaid coupon covering this period of time. Therefore, the payment in each case was on the bond, and relieved it from the bar of the statute of limitations. The date of payment constituted a new point from which the statute would begin to run.

The next question is that of laches and estoppel. Laches may alone be a sufficient defense. *Sullivan v. Portland, etc., R. Co.*, 94 U. S. 806, 24 L. Ed. 324; *Richards v. Mackall*, 124 U. S. 188, 8 Sup. Ct. 437, 31 L. Ed. 396. In this case acts constituting estoppel are added to laches. The facts relied upon by the trustee relate to the conduct and alleged misrepresentations of J. E. and D. A. Baum. The consideration of those questions involves the consideration of the sufficiency of the facts to constitute estoppel, and whether the New Paddock-Hawley Company can be bound by the conduct and representations of the Baums. These two points will be considered together. As already stated, the New Paddock-Hawley Company was organized on the day before the transfer to J. E. and D. A. Baum of the assets of the Paddock-Hawley Iron Company, for the purpose of taking over those assets, and issuing its stock therefor. The Baums agreed to pay to the creditors' committee for those assets \$240,000 in deferred payments, falling due annually during a period of five years. In this purchase the Baums did not assume any of the debts of the Paddock-Hawley Iron Company. The notes given for the purchase price were to be divided in such amounts as the committee might indicate for its "convenience in distribution," the interest rate and date of payment remaining the same. The second and third paragraphs of the proposal of the Baums to the creditors' committee submitted to the creditors of the Paddock-Hawley Iron Company under date of March 2, 1906, were as follows:

"Second: Understanding that there are unsecured Schedule A claims, amounting to \$246,000.00, we offer to any such creditor who may, within thirty (30) days so elect, in exchange for his pro rata share in cash and note distribution, the same pro rata share of \$70,000.00 in cash and \$176,000.00 in the preferred stock of the corporation above referred to.

"Third: We will guarantee four per cent. (4%) annual dividends on the stock issued as above provided for, for the first ten (10) years, and five per

cent. (5%) for the next five (5) years, and we agree to redeem any of such stock at par at the end of fifteen (15) years, the holders of which may so elect upon written notice being given us by the holder thereof, six (6) months before the expiration of fifteen (15) years from this date; and we shall likewise have the option to purchase said stock at par at any time upon six (6) months' written notice to the holder thereof.

"A reference to this proposal shall be made upon the face of such certificates, and a copy of this paragraph shall be embodied therein."

The corporation referred to was the one to be organized.

This proposition was accepted and carried out substantially. The only apparent reason for the organization of the New Paddock-Hawley Company was to obtain additional time for the payment of the purchase price. Preferred stock was given to the unsecured creditors for their pro rata share of cash and notes, with a guaranty of an annual dividend, and an agreement to redeem the stock at par at the expiration of 15 years at the option of the holder and the option on the part of the Baums to purchase any part of the stock at par upon six months' notice. The organization of the corporation was simply a device to secure additional time, if it was desired by the Baums. The obligation of the Baums made it necessary for them to have and maintain control of the corporation. The New Paddock-Hawley Company carried on for a year or more at St. Louis the same character of business that the Paddock-Hawley Iron Company had carried on. It then sold all of its stock of goods, and retained its notes and accounts. It opened an account with the Fayetteville Wagon Wood & Lumber Company. The first item on that account, as shown by a copy filed with the referee in bankruptcy, was entered under date of October 1, 1906. The item is a charge, "To balance \$26,314.44." Eighteen other items follow, entered from time to time; the last one being March 6, 1907. Under date of March 15, 1910, this item appeared: "Interest to date at 6%, \$10,-417.50." Credits are entered under different dates; the last one being under date of February 18, 1910. The balance due March 15, 1912, is stated to be \$35,107.38. So far as the testimony shows, no demand was ever made for the payment of any part of this balance, or for the payment of principal and interest on the bonds, either by the New Paddock-Hawley Company, or by the Baums, until the fall of 1911. From the time of the purchase of the assets of the Paddock-Hawley Iron Company by J. E. and D. A. Baum, daily reports were made to them by J. H. Berry, president of the Fayetteville Wagon Wood & Lumber Company. No stockholders' meeting of the latter corporation was held after September 23, 1905, on which date Berry was elected president, until the 28th day of October, 1911. From July 20, 1906, J. E. and D. A. Baum held about 95 per cent. of the stock. Although they were not officers of the corporation, they were recognized by Berry as owners of practically all of the stock, and they controlled the business. At different times Berry urged upon them the holding of a stockholders' meeting and the necessity of some action with regard to the bonds and account, so that a statement could be made in which they would not appear as liabilities. His attitude is shown by the following letter:

"Sept. 7, 1909.

"Mr. D. A. Baum, 16th and Harney Streets, Omaha, Neb.

"Dear Sir: I have just been advised by H. K. Wade, cashier of the McIlroy Banking Co., that the bank insists upon a financial statement being made, and am advised by our attorney that it will not be advisable for me to file such a statement under the present conditions. Any statement which I would make would necessarily be made out in accordance with the books, and a statement made from the books would be worse than useless, as they show the bond account to be \$31,000.00 and the P. H. I. Co. account to be something like \$26,000.00, and we now owe the bank \$5,000.00. The result would be the statement would show that the capital stock is impaired almost to the vanishing point. Of course, I understand that you, as owner, have something like 92% of stock, and have taken up the P. H. I. Co. stock as well as to keep the bonded indebtedness out of the way; but these facts are not shown on the books. We would be glad to hear from you in the matter. It seems to me that we ought to have a stockholders' meeting to reorganize in some way, so as to get the affairs of the company straightened out on the books."

The significant part of the letter is the following sentence:

"Of course, I understand that you, as owner, have something like 92% of stock, and have taken up the P. H. I. Co. stock as well as to keep the bonded indebtedness out of the way; but these facts are not shown on the books."

The reference to keeping "the bonded indebtedness out of the way," used in connection with the making of a statement for the purpose of obtaining credit, shows that Berry entertained the idea that the bonds would not be enforced against such persons as could be induced to extend credit to the Fayetteville Wagon Wood & Lumber Company. There is nothing to show that anything was ever said by J. E. or D. A. Baum to disabuse Berry's mind of that idea. On the contrary, there is positive testimony showing that J. E. Baum sought to confirm that impression and extend it generally to all persons contemplating extending credit to the Fayetteville Wagon Wood & Lumber Company.

Under date of June 30, 1910, J. E. Baum made to R. G. Dun & Company for general circulation to its subscribers the following statement of the affairs of the Fayetteville Wagon Wood & Lumber Company:

"Assets.	
Shops & real estate.....	\$ 30,000 00
Alpena sheds, real estate, and timber lands (est).....	17,000 00
Office furniture and fixtures.....	1,500 00
Machinery and appliances.....	31,000 00
Stock on hand (estimated).....	57,093 45
Bills receivable.....	None
Accounts receivable.....	13,520 63
Cash on hand and in bank.....	581 99
	<hr/>
	\$150,696 07
"Liabilities.	
Bills payable.....	15,049 94
Accounts payable.....	2,840 09
Bonds outstanding.....	31,000 00
Capital stock.....	100,000 00
	<hr/>
Total	\$148,890 03
"The capital stock and bonds of this company are all owned by J. E. and D. A. Baum.	
[Signed] J. E. Baum."	

The statement of the ownership of the stock and bonds could have had no other effect than to induce the belief that the bonds would not be enforced against general creditors. In addition to that, the statement was untrue in matters that were bound to be known to J. E. Baum, both as an individual, and as secretary and treasurer of the New Paddock-Hawley Company. The amount of the bonds was stated to be \$31,000, when, as claimed in this suit, the amount is \$32,000. No statement was made of accrued and unpaid interest, which at that time amounted to at least \$10,000. The account of the New Paddock-Hawley Company was likewise not mentioned. It was more than \$35,000. Thus he left out of the statement liabilities to the amount of at least \$45,000. If that amount had been added to the liabilities set out in that statement, it is perfectly clear that no one would have extended a dollar's credit to the corporation. J. E. Baum could not have been required to make a statement; but, when he voluntarily undertook to do so, it was incumbent upon him, not only to tell the truth, but to tell the whole truth. The testimony shows that the assets of the bankrupt, exclusive of the property described in the deed of trust, are not sufficient to pay the debts now proved against the estate, among which the claims of plaintiff are not included. The conclusion cannot be avoided that J. E. and D. A. Baum, both as individuals, and as officers of the New Paddock-Hawley Company, knew from the time of the purchase of the assets of the Paddock-Hawley Iron Company that the Fayetteville Wagon Wood & Lumber Company was insolvent. Under date of March 29, 1907, D. A. Baum wrote to Berry the following letter:

"Mar. 29, 1907.

"Mr. J. H. Berry, Fayetteville, Kansas.

"Dear Sir: It appears from information which is just coming to me in the way of letters of inquiry from the holders that the bonds of the Fayetteville Company have all matured for retirement or payment on March 18th; this I did not know anything about. As I understand it, the bond issue amounts to \$32,000, of which \$20,000 have come into our hands through the purchase of the Paddock-Hawley Iron Company's assets; \$6,000 more of these bonds are held by the Lafayette Bank in St. Louis as collateral, and they have not yet accepted settlement of their claim against the Paddock-Hawley Iron Company; when they do the bonds will come to us; \$6,000 more of these bonds are owned by the Commonwealth Trust Company of St. Louis, who are urging upon me very strongly to buy them. You will perhaps have some letters come to you in regard to these bonds, asking for payment of interest and of principal; I think there is only one answer to make in the matter, and that is that the company is not in a position to do either. There is no danger whatever of foreclosure on the part of anybody; both the Commonwealth Trust Company and the Lafayette Bank have recently learned just what these bonds cover, and I think they both appreciate that to enforce a collection would entail a considerable loss to them. I am trying very hard to get the Lafayette Bank matter closed up, and, as soon as I have done that, I hope to be able to buy the bonds which the Commonwealth Trust Company holds.

"Very truly yours,

[Signed] D. A. Baum."

Here is a specific direction not to pay either principal or interest on the bonds and not to fear foreclosure, because the holders of the bonds appreciate "that to enforce collection would entail a considerable loss to them."

Under date of April 10, 1907, D. A. Baum wrote to Berry the following letter:

"Omaha, Neb., Apr. 10th, 1907.

"J. H. Berry, Fayetteville, Ark.

"Dear Sir: Your letter of Apr. 2nd duly received, and all contained therein has been carefully noted. I do not understand the entry of July 1st, 1905, \$1,000 charged to the Colonial Trust Co. The situation, as I understand it, being that the total issues of bonds was \$32,000—\$6,000 of these bonds being owned by the Commonwealth Trust Co. of St. Louis, \$6,000 more of them being owned by the Paddock-Hawley Iron Co. The balance of these bonds, \$20,000, were also owned by the Paddock-Hawley Co., and were up for collateral, along with \$3,000 of the last-named \$6,000 bunch. These bonds were transferred to us, along with the assets of the Paddock-Hawley Iron Company; but in our settlement with the secured creditors, which, as you know, was made by notes, these bonds were left as collateral as follows: With the Edwardville Bank, \$11,000. With the Lafayette Bank, \$6,000. With the T. A. Bannister, \$6,000. None of these collateral holders have any call on you for interest or principal. The Lafayette Bank might get to that position by foreclosure and sell all their security, as they have not accepted our settlement for the old transaction, but still hold the Paddock-Hawley Iron Co. note as originally made, with collateral attached; but before doing anything they would have to sell their collateral out, and foreclosure proceedings would have to be brought by the buyer of these bonds, and I don't know of anybody who would be a likely purchaser, aside from myself. The other people, Commonwealth Trust Co., own the bonds which they have, and can call for their principal and interests, and under the terms of the mortgage, I understand that after six months' delinquency the foreclosure proceedings may be brought; but they understand the situation so well that there is no liability of action in that quarter, in my opinion.

"I am much inclined to think that an advance in prices would be wise at this time. The conditions in the wood stock business were never as they are now. I enclose a letter from J. A. Brown & Co., which adds much to the situation, as these people were perhaps the largest makers of finished stock in the country. You can just as well get 10 or 15 per cent. more for your goods as what you are now getting, so I believe if I were you I would advance the prices all along the line.

"Yours truly,

[Signed] D. A. Baum."

This discloses a knowledge on the writer's part that foreclosure proceedings could be brought "after six months' delinquency." In fact, the deed of trust provided that the failure to pay any interest coupon or matured bond for 90 days rendered the entire indebtedness due and payable at the election of the legal holder or holders of any one or more of the bonds outstanding. Objection was made by plaintiff to the introduction of the statement made by J. E. Baum on two grounds: (1) That the plaintiff could not be bound by it in any way. (2) That the creditors who testified that they extended credit on the strength of it were not subscribers to R. G. Dun & Co., and therefore not legally entitled to see it.

[8] With regard to the first objection, the testimony shows conclusively that the affairs of the plaintiff were wholly controlled and directed by J. E. and D. A. Baum; that the only place of business it had was the office of these men, and they habitually spoke of the property of the plaintiff as their own. Having confided all of its business to J. E. and D. A. Baum, and having left to them the matter of the enforcement of the payment of these bonds, and having postponed their collection, when ample authority and sufficient cause

existed to enforce collection, it cannot be heard to disclaim responsibility for their acts in connection with the bonds and the management of the business of the Fayetteville Wagon Wood & Lumber Company.

[9] With regard to the second objection, it is sufficient to say that a man who puts in circulation a written statement intended to deceive cannot escape liability, on the ground that the individual who complains of the deception had not paid for the privilege of reading the statement.

The testimony fully sustains the defenses of laches and estoppel. A decree will be entered dismissing the bill, but saving to the plaintiff the privilege of intervening for any balance that may remain of the proceeds of the sale of the property described in the deed of trust after the payment of all of the creditors and the expenses of the bankruptcy proceedings.

YOUNGLOVE v. PULLMAN CO. et al.

(District Court, N. D. New York. September 19, 1913.)

1. DAMAGES (§ 130*)—EXCESSIVENESS—PERSONAL INJURIES.

Plaintiff, a young lady troubled with defective vision but with no other physical infirmity, attempted to alight at a station from a Pullman car, expecting that the usual movable stool had been placed on the platform to break the distance between the bottom step and the platform. This, however, had been omitted by the porter, and as she stepped down she fell between the lower step and the platform and was thrown forward on her face and sustained bruises and a severe sprain of the ankle. *Held*, that a verdict awarding her \$2,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 130.*]

2. CARRIERS (§ 416*)—INJURIES TO PASSENGER—ALIGHTING FROM TRAIN—MOVABLE STOOL—FAILURE TO PROVIDE—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a passenger while alighting from a Pullman car by a fall alleged to have been due to the porter's omission to place the usual movable stool to break the distance between the lower step of the car and the platform, causing plaintiff to fall, whether the porter's omission constituted actionable negligence *held* for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1590-1600; Dec. Dig. § 416.*]

3. CARRIERS (§ 416*)—INJURIES TO PASSENGERS—ALIGHTING FROM CAR—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a passenger troubled with defective vision but being able to see and move about, had been accustomed to travel and use Pullman cars and prior to the occasion in question had always been assisted by the porter to alight, who had always placed a movable stool between the lower step of the car and the platform. On the occasion in question, when she arrived at her destination, the porter took her umbrella and preceded her out of the car and down the steps to the platform, on reaching which he stepped to one side. Plaintiff descended the steps without looking, supposing that the stool had been placed in position as usual. This, however, had been omitted, and as she stepped off she went down between the lower step and the platform and was thrown forward on her face and injured. *Held*, that her failure to look to see whether the stool had been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

put in position did not constitute contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1590-1600; Dec. Dig. § 416.*]

4. CARRIERS (§ 303*)—PASSENGERS—ALIGHTING FROM CAR—DUTY TO ASSIST.

While a railroad company, in the absence of something to show that a passenger about to alight requires assistance, is under no obligation to render assistance, yet, if its agents and employes voluntarily assume to render assistance, it must do so with due and ordinary care and is liable if such assistance is withdrawn and the passenger is injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. § 303.*]

5. CARRIERS (§ 303*)—TRANSPORTATION OF PASSENGERS—DUTY TO USE CARE—EXTENT.

The duty of a carrier to use due care for the safety of its passengers obtains not only while the passenger is being carried on the train but so long as the relation of carrier and passenger exists and acts are being performed reasonably and fairly attributable to that relation, including the act of the passenger in alighting from the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. § 303.*]

At Law. Action by Frances L. Younglove against the Pullman Company and the Boston & Maine Railroad Company. On defendants' motion to set aside the verdict in favor of plaintiff for \$2,500 against both defendants, awarded for injuries received by plaintiff while alighting from a parlor car at a station. Denied.

John Scanlon, of Cohoes, N. Y., for plaintiff.

Jarvis P. O'Brien, of Troy, N. Y., and Visscher, Whalen & Austin, of Albany, N. Y., for defendants.

RAY, District Judge. The defendants operate railroad trains running into the depot at Troy, N. Y., made up of both ordinary passenger cars and Pullman parlor cars.

[1] On the 13th day of July, 1910, the plaintiff was a passenger on one of these trains, riding in the Pullman parlor car, which came into the depot shortly before sundown. She had paid both the regular fare and the extra fare for riding in such Pullman car. She had frequently been a passenger on such trains, riding in the Pullman car. The porter in charge of this car on the day in question had been on the car on at least one of these trips when the plaintiff was a passenger. On the other occasions another porter was in charge. Miss Younglove is somewhat troubled with defective vision and wears glasses but can see and move about. She has no other physical infirmity. Miss Younglove had been accustomed to request and receive assistance from the porter in alighting but did not make any request on the day in question, although when the train stopped the porter took her umbrella and preceded her out of the car and down the steps to the platform. Miss Younglove was the only passenger in this car. No words passed between the plaintiff and porter. On reaching the platform the porter stepped to one side and stood by the side of the car holding the umbrella. The plaintiff descended

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the steps, and, as the usual movable step or stool had not been placed on the platform to aid in alighting, the foot and limb of Miss Younglove as her body moved forward, swung backward, she claims, and went down between the lower step and the concrete platform and she was thrown forward on her face, striking on the platform, and she sustained some bruises and a severe sprain of the ankle. The damages awarded are not excessive.

[2] The evidence was sufficient to show and justify the jury in finding that it was quite usual for the defendant companies to place a movable step or box for passengers alighting from the Pullman cars on or very near the edge of the platform to break the distance between the lower step of the car and such platform and thus make the descent more easy and safe. Miss Younglove testified, and she was not contradicted, that such a step, stool, or box had always been provided when she alighted, and that she had been a frequent traveler on the road. When at the station platform, the distance from the ground, tracks, to the lower step of the car is $29\frac{1}{2}$ inches, from the lower step to the level of the concrete platform is $13\frac{1}{4}$ inches, and from the edge of the lower step to the edge of the concrete platform $17\frac{1}{2}$ inches. That is, it is 6 inches from the edge of the concrete platform out to a line perpendicular to the edge of the lower step. The risers of the steps to the car itself are each 6 inches high. The result is that a person alighting from one of these cars at this Troy station stepped down 6 inches from step to step, four steps, and then to reach the platform (if no movable step, box or stool was provided) had to step outwardly more than 6 inches and downwardly some $13\frac{1}{2}$ inches to reach the platform. The movable steps usually placed, and with Miss Younglove always placed, were 14 inches long and 10 wide and 9 inches in height, thus breaking this distance from the lower step of the car to the platform, or dividing it and making the steps from the platform of the car to the platform of the station substantially uniform.

It requires no argument to show that the descent from the car to the platform of the station would be more or less difficult and dangerous without such movable step or block. If, then, the defendant companies had recognized this difficulty and this danger and had provided this movable step or stool and usually used it for the ease and safety of passengers when alighting, and had always provided and placed it for Miss Younglove or when she and others with her alighted at this station, it was fairly a question for the jury whether or not the defendants were guilty of negligence in withdrawing it or failing to use it on the occasion in question. The court charged:

"Now, gentlemen, in the first place, you are to find, and it is a question for you to determine, for you to say, whether or not the defendants here were guilty of negligence on this occasion in question. You are to determine, first, whether this contention to which I have referred is true, correct. Have the defendants by a custom, their usual course of business in placing this stool, this temporary movable stool for passengers to alight, have they recognized the necessity for it and that this was a difficult and dangerous place to alight without it, and that it needed it and was required for the safety of passengers? Was that true? If so, and then if they had followed it up by placing

that stool usually, so that the plaintiff had learned to rely upon it and she had the right to rely upon it, why then, of course, it would be negligence on the part of the railroad company to suddenly take it away without warning or notice and without any indication to the plaintiff or travelers accustomed to it that it was gone. I said it would be negligence. What I mean is it would be evidence of negligence, from which you might find negligence on the part of the railroad company. I do not say it would be negligence as matter of law. It would be for you to say. It would justify you in finding negligence."

Miss Younglove, the plaintiff, testified that when this train stopped at the Troy station she arose and followed the porter out and down the steps of the car and made the usual step she would have made assuming the temporary or movable step to be in place; that she was looking at the porter, expecting him to assist her, and did not look to see or observe whether the temporary or movable step was in place or not. In short, the substance of her statement was that she assumed from what had gone before and what had been universally, so far as she was concerned, done on other occasions, and from what the porter did on this occasion as he preceded her with her umbrella, that he had placed this movable or temporary step or stool in its usual place, and that it was there, and that the porter was there to assist her as had been done before, and that her eyes were on the porter, and that she made the step assuming the temporary stepping block or stool to be in place.

[3] The defendants contend that this action on her part constituted contributory negligence, as matter of law, and that the court should have directed a verdict for the defendants. The plaintiff contends that such action on her part was not, under the then existing circumstances and in view of the action of the porter and of what had uniformly been done at this station on all former occasions, necessarily contributory negligence, and that the question was a fair one for the jury and properly submitted, and that, the jury having found a verdict in her favor, it should not be disturbed. On this question of negligence the court, amongst other things, charged as follows:

"Now as I said, or started to say, of course the defendants contend: First, that they were not negligent at all, not guilty of any negligence; that the placing of this stool was a mere matter of convenience, put there by the porter to aid people in getting on and off; that there was no duty imposed upon them; and they ask the court to charge that its absence was not negligence or that the duty of putting it there was not imposed upon them by law. I will say to you, gentlemen, the placing of a stool there, or a movable step, is not a duty imposed by any statute, so far as I am aware, or by law, but the railroad company was bound to do those things reasonably necessary to make the entrance to the trains and the egress from them reasonably safe, to use all reasonable, well-known appliances that would aid to make that ingress and egress from those cars reasonably safe so far as they could and so far as such appliances were known. That would be a duty imposed, and it is for you to say, gentlemen, whether this was such a difficult and dangerous place as to make it the duty of the railroad company to supply some means, or those means which they had at hand, and whether they had recognized it and so were guilty of negligence in not putting something there, supplying something, either the stool which they had at hand or something else, to make egress from this car reasonably safe, and so discharge their duty."

And on the question of contributory negligence the court, amongst other things, charged as follows:

"If, however, the defendants here have satisfied you, by a fair preponderance of evidence, that this plaintiff was guilty of contributory negligence, even if the defendants were negligent, if she was guilty of contributory negligence (negligence which contributed to the injury in any degree), then of course this plaintiff cannot recover. The defendants contend here that even if you say it was their duty to place the stool, and even if you find they were negligent in not placing the stool, still they say that you should find that this plaintiff was guilty of contributory negligence in that she did not look to see that the stool was not placed, and that she was negligent in not discovering that it was not placed, not looking to see, paying attention to it, and the defendants contend that if she had looked, if she had paid attention, if she had looked down before stepping, she would have seen that the stool was not there and that she wouldn't have stepped upon the assumption that it was there; that she could either have called for it and have had it placed there or called for assistance, or she could have alighted in such a manner, by jumping or otherwise, as to have avoided all danger. Therefore these defendants contend that the plaintiff was guilty of contributory negligence (negligence which contributed to this injury). In other words, that it was her own fault in part and that but for her own fault this accident would not have occurred. Now, gentlemen, as I say, you are to consider, as bearing upon that, the condition of the woman, what had gone before, the custom of the porter, as you find it to be, the different directions in which it was the duty of the woman perhaps to look, the things that she had to see to, what had gone before. Was she negligent in failing to think and to look and to observe that the stool (the stepping stool) was not there? Was she negligent in acting without paying particular attention and looking to that? If she was, if you so find that it was a duty imposed upon her, in view of all the circumstances going before and accompanying that transaction, if you find that that omission contributed to this injury, was contributory negligence on her part, then, of course, gentlemen, she could not recover."

I think the real question in the case is: Was Miss Younglove, as matter of law, guilty of contributory negligence in failing to look and ascertain that the temporary stepping block had not been placed? Was she, under the circumstances and in view of what had always been done, justified in assuming the stepping block had been placed and in failing to observe it had not been placed? I think it was a question for the jury, under all the facts shown and the circumstances of the case. The porter preceded her as he always had done. He took her umbrella showing a purpose to assist her as the porter always had done. It was evidently his duty to place the stepping block provided for the purpose, as the porter on all and many occasions when plaintiff was a passenger had done, and it seems to me the plaintiff had the right, in the absence of anything indicating he had not performed the duty, to assume that he had performed that duty on this occasion. She was looking to the porter for assistance; her eyes were on him; and can it be said as matter of law, she was negligent in not thinking that he might not have placed the stepping block and in failing to look to ascertain whether or not it was in its place as it always had been? The risers of these car steps were 6 inches (that is, it was 6 inches from step to step), and the space of some 16 inches from the last step downward and outward to the platform divided by the temporary stepping block, generally used by the defendant and always used when the plaintiff was a passenger and placed by the servant

of the defendants, who was there to wait on and assist passengers generally, made the exit of passengers much more secure and safe than it otherwise would have been. A passenger on alighting from a car is of course bound to exercise his senses, and Miss Younglove was exercising hers. As it turned out, she was not exercising them to the best advantage. Was it negligence on her part, in view of what defendants always had done when she was a passenger, to expect that a stepping block would be in place and assume that same was in place and act accordingly? Was it, as matter of law, negligence on her part, in view of what the porter had done on prior occasions, to place her eyes on him so as to receive his assistance instead of looking to see if the temporary stepping block had been put in position?

[4] It is true, undoubtedly, that a railroad company, in the absence of something showing that a passenger about to alight from a car requires assistance, is under no obligation to render assistance. But if the railroad company, acting by its agents and employes, voluntarily assumes to render assistance, it must act with due and ordinary care and is liable if such assistance is withdrawn and the passenger sustains injury. *Hanlon v. Central Railroad Co. of New Jersey*, 187 N. Y. 73, 79 N. E. 846, 10 L. R. A. (N. S.) 411, 116 Am. St. Rep. 591, 10 Ann. Cas. 366.

[5] The obligation and duty of a railroad company to use due care for the safety of its passengers obtains not only while the passenger is being carried on the train but while and so long as he or she sustains the relation of passenger and is performing acts reasonably and fairly attributable to that relation, such as leaving the train for refreshment, for the sending of telegrams, for the taking of exercise, and the like. *Texas & Pacific Railway Co. v. Stewart et al.*, 228 U. S. 357, 33 Sup. Ct. 548, 57 L. Ed. 373, affirming 183 Fed. 575, 105 C. C. A. 646. Here the plaintiff, Miss Younglove, had not ceased to be a passenger. She was performing an act not only fairly attributable to that relation but one absolutely necessary to be performed. She was injured while performing that act. For the purposes of this case, we may assume that the defendant corporations primarily were under no obligation to furnish a temporary stepping block for passengers in alighting from trains. But the evidence shows that it was quite usual and customary for the defendants to use this stepping block for the convenience and safety of its passengers in alighting and, without request, had always done so for others and for this plaintiff when on this train and who for a long time had been a frequent passenger on this train. The jury found that, by and in so furnishing and using it, the defendants had recognized it to be difficult and somewhat dangerous to alight from these Pullman cars without it. They had undertaken by this means to aid not only the plaintiff but others in alighting from these cars at this station. The plaintiff had justly and properly learned to expect and rely upon it, not through her own acts and conduct, but by reason of the acts and conduct of the defendant corporations. On the occasion in question, and without warning or notice of any kind, this aid was with-

drawn or not furnished. The plaintiff had come, and justly so, to expect its presence and rely on its presence as much as though it had been a permanent part of the car or platform. Was she bound, as matter of law, to look and see if the companies had done what they always had done voluntarily before for her safety and what she had the right to assume they had done on this occasion? I think not.

In the *Hanlon Case*, *supra*, 187 N. Y. 73, 79 N. E. 846, 10 L. R. A. (N. S.) 411, 116 Am. St. Rep. 591, 10 Ann. Cas. 366, the conductor assumed to assist the plaintiff in alighting from the train and negligently withdrew that support, whereby the plaintiff fell and was injured. There, of course, the proffered assistance was immediate and a part of that particular transaction of alighting from the train, but it was assistance volunteered and on which the passenger had the right to rely. The court held that, while the railroad company under the circumstances was under no obligation to supply the aid of its servant to assist the plaintiff in alighting, the conductor having volunteered his aid, the company was liable for his negligence, "since the passenger had the right to rely upon the conductor's careful performance of his undertaking."

In the case now before this court the defendants themselves had provided this temporary stepping block for use in assisting passengers to alight from these cars and had frequently used it with passengers and always when this plaintiff was a passenger, not for her specially, but for all the passengers on that car, and had thus built up confidence in its presence on all occasions. The jury was therefore justified in finding that the defendants were negligent in withdrawing it on this occasion without notice. The jury was justified in finding that this was a somewhat difficult and dangerous place in which to alight from car to platform, and that defendants had recognized it as such and made it safe by providing and using this temporary stepping block or stool.

In *Texas & Pacific Railway Co. v. Stewart et al.*, *supra*, 228 U. S. 357, 33 Sup. Ct. 548, 57 L. Ed. 875, Mrs. Mayer entered the car standing on tracks at or near the station in the nighttime as a passenger. There was no other person in the car, and the tracks and door and steps of the car were insufficiently lighted. After being in the car some little time, Mrs. Mayer became apprehensive that she was or might be on the wrong car or train. She said:

"I became fearful that I was on the wrong coach, as no one else entered the same, and I left it to find out as to whether it was the right car or not. * * * I went to the door and saw that it was all in darkness, and I wanted to go and I held onto the door frame to try to reach the steps of the car with my feet, and in reaching for them I went on too far and slipped and fell to the ground."

Here is a case where there was in fact no necessity for leaving the car; one where Mrs. Mayer knew the insufficient lighting and was groping in the dark. The court held that the question of her contributory negligence was properly left to the jury, and that its finding should not be disturbed. The general rule is that when the facts are not in dispute, *and where but one reasonable inference can be drawn from*

them, a question of law for the court is presented; but when a question of fact is presented, or where fair, intelligent minds may draw different conclusions and inferences from the conceded facts, a question of fact for the jury is presented as to the existence or nonexistence of contributory negligence.

In *Chicago, etc., R. Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 131, there was a notice in the car that passengers on leaving by the forward end should turn to the *right*, and if it had been obeyed the passenger would have landed on the platform, but if not obeyed, and he turned to the left, the turn led him to and necessitated his passing across the track. The passenger had not read the notice, turned in the wrong direction, went on the track, and was struck by an engine. Held, the question of contributory negligence was for the jury.

In *Warner v. Baltimore, etc., R. Co.*, 168 U. S. 339, 345, 18 Sup. Ct. 68, 42 L. Ed. 491, passengers who were to take trains on the east track had to pass the west tracks. On this west track a train was momentarily expected to arrive. A person who was to take a car on the east track saw the train on that track stop and he started across the west track and was struck by the train. Held, that he had the right to expect that it was safe to do so from the stopping of the train he was to take.

In *Chunn v. City & Suburban R. Co.*, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219, cars ran in opposite directions on different tracks, and there was a clear space of some 3 feet and 6 inches only between the cars when they passed each other at the point in question. Here some planks had been laid and passengers were accustomed to stand there and take the cars and the doors were opened by the defendant for that purpose. It did not appear who laid the planks. The plaintiff stood in this narrow space to take a car on one track and was struck by a rapidly moving car on the other. Standing there the plaintiff could see in both directions a full quarter of a mile. Held, that the question of contributory negligence was for the jury. Had she looked she would have seen the approaching car; and had she observed she would have seen that she was too close to the track on which the car which struck her was running. The court said:

"If upon these facts reasonable men might fairly reach the conclusion that the plaintiff, while herself in the exercise of due care, was injured by the negligence of the defendant, the case should have been submitted to the jury. *Warner v. Balt. & O. R. Co.*, 168 U. S. 339 [18 Sup. Ct. 68, 42 L. Ed. 491]."

If Miss Younglove had looked to see if the stepping block was in position, she undoubtedly would have observed its absence. She did not and acted on the assumption that it was in position as it always had been when she was a passenger. It did not occur to her to look, as she had no reason to apprehend its absence. As in the *Chunn* Case the plaintiff had no reason to apprehend a careless act on the part of the railroad, a deviation from its custom. I do not think an *absolute duty* rested on her to apprehend the possible absence of the stepping block and to have its possible absence in mind and act accordingly. Its absence was not her fault, and she had no cause or reason to sus-

pect its absence. On the other hand, from what had been the universal custom of the porter of this car, when plaintiff was a passenger, and from the fact that he took her umbrella and preceded her from the car to the platform, she was not negligent, as matter of law, in assuming that he would assist her to alight in the usual way and that he would place the stepping block as had always been done. It was not a negligent act, as matter of law, for the plaintiff to look to the porter for his assistance which had always been rendered before instead of looking to see if he had performed the usual duty of placing the stepping block. If on former occasions the stepping block had been placed at the request of the plaintiff or some passenger, the case would be different, but the evidence is that it was a voluntary act on the part of the porter who, we may assume, was acting on the authority of his masters, the defendants. Let us assume, in the light of some of the cases, that a railroad company would be under no obligation to provide a bridge to cover a space of, say, 20 inches in a horizontal line from its car step to the platform; the step being on a line with the top of the platform. Let us assume that no recovery could be had should a passenger step into such open space, fall, and receive serious injuries. Let us further assume that a railroad company having such spaces between platform and car steps should for years provide a bridge from steps to platform for the ease and convenience and safety of passengers in alighting from the cars, and that this custom should become well known so that travelers on the road well knew of this provision for their ease, convenience, and safety. Suppose that without notice or warning this bridge should be dispensed with and a person, a frequent passenger on the road and accustomed to use the bridge, should assume its presence, his attention being diverted to porter or some object or person on the platform, and step out, assuming the bridge to be in place, and fall and receive serious injuries. Would or would not a jury be justified in finding negligence on the part of the railroad company, and would not the jury be justified in finding absence of contributory negligence on the part of the person so injured? It seems to me the answer is plain and that there can be but one answer.

The motion to set aside the verdict and for a new trial must be denied.

HENRY v. HENKEL, U. S. Marshal.

(District Court, S. D. New York. May 26, 1913.)

HABEAS CORPUS (§ 15*)—CONGRESSIONAL INQUIRY—PROBABLE CAUSE—REFUSAL TO TESTIFY.

That a witness before a committee of the House of Representatives, which was acting under a resolution authorizing inquiry, as a basis for remedial legislation, into the subject of the relations of national banks in various directions, refused to give the names of officers of national banks, who, as he testified, were members of a certain syndicate, constitutes "probable cause" (the sole inquiry in habeas corpus proceedings) for the warrant for his commission to the custody of the marshal to await a warrant for his removal to the District of Columbia, where he had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been indicted under Rev. St. § 102 (U. S. Comp. St. 1901, p. 55), making it an offense for a witness before any committee of Congress to refuse to answer any question "pertinent to the question under inquiry"; the subject being one Congress could investigate, and the question not encroaching on the domain of inquisitorial power, and invading no constitutional rights of the witness.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 15; Dec. Dig. § 15.*]

Habeas corpus proceeding by George C. Henry against William Henkel, United States Marshal for the Southern District of New York. Writ quashed, and petitioner remanded to custody.

John C. Spooner, Paul D. Cravath, John D. Lindsay, and Stuart McNamara, all of New York City, for petitioner.

Henry A. Wise, U. S. Atty., and John E. Walker, Asst. U. S. Atty., for respondent.

MAYER, District Judge. On February 10, 1913, petitioner was indicted by the grand jury of the Supreme Court for the District of Columbia, charged with an offense under section 102 of the Revised Statutes (U. S. Comp. St. 1901, p. 55), in that on January 7, 1913, while a witness before a committee of the House of Representatives, acting under a resolution duly passed by the House, he refused to answer certain questions propounded to him on behalf of the committee, which questions were pertinent to the matter under inquiry by the said committee.

The usual proceedings for removal to the District of Columbia under section 1014 of the Revised Statutes (U. S. Comp. St. 1901, p. 716) were instituted, and the United States commissioner found probable cause, and committed the petitioner to the custody of the marshal to await a warrant of removal. Thereupon a writ of habeas corpus was issued to inquire into the legality of petitioner's detention.

In the proceedings before the commissioner, petitioner demanded an examination, and after the denial of a motion for the dismissal of the complaint the government introduced in evidence the indictment and bench warrant, and, petitioner's identity being conceded, the government rested. Petitioner then moved again for the dismissal of the complaint, and after the denial of that motion counsel for petitioner introduced in evidence a transcript of petitioner's entire testimony before the House subcommittee, and the majority and minority reports of that subcommittee. No question of fact is involved, and the sole inquiry is as to whether there existed "probable cause" to justify the issuance of the warrant.

On April 25, 1913, the House of Representatives adopted House Resolution No. 504, which is set forth at length in the indictment and need not be here repeated. That resolution authorized an inquiry into many subjects, "as a basis for remedial and other legislative purposes." One of the subjects was the relations of national banks in various directions, and in that connection inquiry was made in regard to transactions in which officers of such banks engaged, as affecting, among other things, the actions of banks in regard to loans, the listing of se-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

curities on the New York Stock Exchange, the distribution of securities, and the participation in syndicates or underwritings of officers of national banks.

It is unnecessary to consider whether Congress had power to inquire into certain of the subjects referred to in the resolution, for it is apparent that Congress had full authority to inquire into the matters set forth in paragraph "second" of the resolution, in so far as they related to national banks.

In the course of this inquiry, the petitioner was questioned, and testified at considerable length, concerning a corporation called California Petroleum Corporation (hereinafter referred to as California Company). The details of this inquiry are too lengthy to be recited in this memorandum, and it will suffice to state that there came a time in the course of the inquiry when petitioner was asked the names of national banks and officers of national banks who participated in the syndicate operations (described in the testimony) of the California Company. It appeared that there were four partners in this syndicate, and the petitioner declined to state the name of the fourth partner in the syndicate. From the indictment, as well as the testimony of the petitioner, it seems that he had stated that no national bank had participated in the syndicate, so that there were really but two questions which he refused to answer.

Section 102 of the Revised Statutes reads as follows:

"Sec. 102. Every person who, having been summoned as a witness by the authority of either house of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either house of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months."

It is unnecessary to consider certain questions raised as to the extent to which the court may go in a proceeding of this character, for there can be no doubt that the court may examine all the evidence before the commissioner, with a view to determining whether "probable cause" existed, and if, in this particular case, either of the refusals of petitioner to answer was in respect of a question "pertinent to the question under inquiry," then the technique of procedure becomes unimportant.

The petitioner urges that no offense is charged, because the subcommittee was without authority, under the Constitution, upon an inquiry purely in aid of legislation, to compel any testimony concerning the California Petroleum Syndicate, and in the interesting brief submitted on his behalf many decisions are collated and discussed. I think, however, that the question under consideration is not as far-reaching as the petitioner contends.

Congress had power to ascertain whether a national bank participated directly or indirectly in the organization of California Company, or the listing of its securities, or the participation in any underwriting or syndicate relating to such securities. Surely such an inquiry would not be an exercise of the visitatorial powers which Con-

gress has vested in courts of justice and in the Comptroller of the Currency.

An examination of the National Banking Act will show that Congress has affirmatively permitted and affirmatively prohibited certain kinds of transactions, and these provisions are presumably based upon appropriate information and the result of judgment and experience. With many changes in industrial conditions and in methods of business, and with the increasing and complex problems affecting the national banking system, Congress could inform itself of the course of conduct of officers of national banks as affecting the banks, to determine whether such course should be thereafter continued, modified, or prohibited.

How far Congress could pursue its inquiry need not at this time be academically considered. We are concerned only with a particular question asked of the petitioner which he refused to answer. Certainly the committee could receive such testimony as the petitioner was willing to give. He had already testified without objection that there were 15 national bank officers who were members of the Syndicate, and also that it was customary to offer syndicate participation to national bank officers, and sometimes to national banks themselves.

In asking the petitioner the names of these national bank officers, the committee did not at that point ask a question which can be construed as encroaching upon the domain of visitorial power. The committee in that question made no inquiry as to the details of any transactions about the national banks, but solely about the officers.

Petitioner contends that, if Congress deemed this practice an evil, it already had the information needed to frame legislation in respect thereof, and that the further knowledge of the identity of the particular officers could not help. Whether the committee could have made further inquiry through such officers as to collateral loans or other affairs of the banks of which they were officers presents a question which need not be decided, because such a line of inquiry is not here to be passed upon. The sole question was the identity of these national bank officers.

The fact that the committee had already heard testimony to the effect that such officers engaged in participation did not preclude the committee from obtaining cumulative information upon that point. The committee may have considered it desirable to make this inquiry in numerous instances, with a view of ascertaining whether such participations were engaged in frequently and throughout the country, or only by the same set of officers of the same national banks, or whether such engagements were only occasional. As a result of such an inquiry, Congress may have drawn conclusions upon which to base legislation.

In point of fact, the committee did recommend that officers and directors of national banks should be prohibited from participating in syndicates or promotions or underwritings of securities in which their banks may become interested as underwriters or owners or lenders; but, even though the committee made this recommendation upon the testimony before it, it may very well have determined to cite this

(and other instances) in support of its conclusions and recommendations.

The official conduct of national bank officers is regulated by statute. A national bank springs into existence solely as a creature of statute, and while not attempting to define the extent or the limits of a congressional inquiry, it certainly cannot be said that this particular question invaded the constitutional rights of this petitioner. Whether the petitioner could have been compelled to answer the question as to who was the fourth member of the Syndicate presents a proposition quite different from that just discussed, and in that regard no opinion need now be expressed.

Finally, it seems to me that the controversy is really within a narrow compass, so far as this proceeding is concerned, and as one of the questions seems to have been pertinent, probable cause existed, and the commissioner should be sustained.

The writ will be quashed, the petitioner remanded to the custody of the marshal, and a warrant of removal will issue.

Ex parte MARCIL.

(District Court, W. D. Washington, S. D. September 19, 1913.)

No. 1,416.

PARDON (§ 14*)—PAROLE—GOOD TIME—"LEGAL CUSTODY"—"CONTROL."

Act Cong. June 21, 1902, c. 1140, 32 Stat. 397 (U. S. Comp. St. Supp. 1911, p. 1701), provides that each prisoner confined, in execution of a sentence, in any United States penitentiary, whose record justifies it, shall be entitled to a deduction for good time, commencing from the first day of his arrival at the penitentiary. Act June 25, 1910, c. 387, 36 Stat. 819 (U. S. Comp. St. Supp. 1911, p. 1702), declares that every prisoner confined for a term of more than one year, whose record shows an observance of the prison rules, and who has served one-third of his term, may be released on parole. Section 3 declares that the parole shall be granted on such terms as the board of parole shall prescribe, the prisoner to remain, while on parole, in the legal custody, and under the control of the warden of the prison from which he was paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is provided. The act also provides for the retaking of a paroled prisoner who has violated his parole, at any time within the term or terms of his sentence, and for a hearing before the board, which may revoke the order and terminate the parole, and, if revoked, the prisoner shall serve the remainder of the sentence imposed; the time the prisoner was on parole not being taken into account to diminish the time of his sentence. *Held*, that "legal custody" and "control" did not contemplate actual custody or confinement of a paroled prisoner, and that such a prisoner was not subject to prison rules providing for a forfeiture of good time allowance by a breach of such rules, so that on his return for breach of his parole he was not subject to a forfeiture of his good time earned, in determining the date of the expiration of his sentence.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 28-31; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1549-1552; vol. 8, p. 7617.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Application by J. A. Marcil for writ of habeas corpus. Granted, and petitioner discharged.

J. A. Marcil, pro se.

The United States Attorney, for respondent.

CUSHMAN, District Judge. This cause is for decision, after evidence taken, upon the petition of J. A. Marcil, a McNeil Island United States prisoner, for a writ of habeas corpus, and the return of the warden of the penitentiary thereto.

The return of the warden shows that, on May 3, 1909, the petitioner was sentenced to be confined in the penitentiary for a term of five years, which sentence commenced May 13, 1909; that petitioner was released on parole August 12, 1911, in accordance with the act of Congress of June 25, 1910; that, after being so released on parole for 230 days, petitioner was returned to confinement in the penitentiary May 29, 1912, on account of a violation of his parole, and for a failure to faithfully observe the rules governing him as a convict on parole; that, at the time petitioner was released on parole from the penitentiary, he had earned 216 days good time allowance, as provided in the act of June 21, 1902.

The return of the warden alleges that, by petitioner's act in violating the parole, the good time earned at the time of his parole was forfeited and canceled. The petitioner contends that the violation of the parole did not deprive him of this 216 days good time, and that he is now entitled to his freedom. The act of June 21, 1902, provides:

"Be it enacted," etc., "that each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary, * * * whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison, or jail. * * *"

The act of June 25, 1910, provides:

"Be it enacted," etc., "that every prisoner who has been or may hereafter be convicted of any offense against the United States, and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, whose record of conduct shows he has observed the rules of such institution, and who has served one-third of the total of the term or terms for which he was sentenced, may be released on parole as hereinafter provided."

Section 2 provides for a board of parole, to consist of the superintendent of prisons of the Department of Justice, the warden and physician of each United States penitentiary, "which shall establish rules and regulations for its procedure subject to the approval of the Attorney General." Section 3 provides grounds upon which the board of parole may parole a prisoner. The parole is granted—

"upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be

provided for by act of Congress; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board. * * *

"Sec. 4. That if the warden of the prison or penitentiary from which said prisoner was paroled or said board of parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner. * * *

"Sec. 6. That at the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence imposed, and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced. * * *

"Sec. 10. That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress."

Under section 4 of the act of March 3, 1891 (26 Stat. 839, c. 529 [U. S. Comp. St. 1901, p. 3725]), the Attorney General, in June, 1911, promulgated rules for the government and discipline of prisoners in the United States McNeil Island penitentiary. There are 95 rules. Rules 86, 93, and 95 provide:

"86. The good time law is printed in full elsewhere in this book. For violations of any of these rules and regulations you may lose part or all of your good time. A record of all violations is kept in the warden's office, and a copy of this record is sent to the Attorney General to be considered with every application for pardon or commutation of sentence."

"93. Under the provisions of the good time law, lost good time can only be restored by the Attorney General upon the recommendation of the warden."

"95. You must not try to escape. The officers and employes have very strict orders to prevent escapes, and if you make the attempt you may get badly hurt and, at the same time, lose your good time."

On September 1, 1910, the Attorney General approved the rules adopted by the board of parole for this prison. These rules, in part, are for the governing of prisoners on parole. There is nothing in them touching the good time allowance made for prisoners confined in the prison institution itself. The only penalty provided in them for the violation of parole is the revocation of the parole, the arrest and return of the prisoner to the institution itself, to serve the remainder of his term.

It is contended for respondent that the breaking of petitioner's parole, in violation of the rules of the parole board for his good conduct, deprived him of his earned good time allowance, provided by the act of June 25, 1910, because by the parole statute (section 3), during his parole, the convict is "in the legal custody and under the control of the warden"; that, therefore, the breaking of the rules of parole, also breaks the prison rules, and effects a forfeiture of the good time allowance thereby.

"Legal custody" and "control"—as used in this act—do not contemplate actual custody or confinement, for the act provides that the paroled prisoner—

"shall be allowed to go on parole outside of said prison and in the discretion of the board, to return to his home."

And, again:

"The transportation furnished shall be to the place to which the paroled prisoner has elected to go, with the approval of the board of parole."

The qualified liberty contemplated by the parole law is in no sense that of the prison. The rules of the prison and those for paroled convicts are not made by the same officers. They are not made for the same purpose. While the prison rules contemplate the welfare of the prisoners and safety of society, they are largely, if not mainly, for the purpose of safeguarding those in charge of the prison; the prisoners from one another and to insure facility in restraining and detaining them. The rules for confined prisoners are minute and exacting. Those for paroled convicts are liberal and general.

The act provides a good time allowance, or reduction of sentence, for the prisoner "confined" "whose record of conduct shows that he has faithfully observed all the rules." The rules referred to are the rules of the prison for confined prisoners, not those for paroled convicts. The language is susceptible of no other meaning. When this act was passed, there was no parole law. It was not necessary to be specific. Therefore the language used was "all the rules," because there were no other rules than the prison rules for confined prisoners, and, when the parole law paraphrased and almost quoted this statute entire, the expression used became "the rules of such institution." Obviously the change was made to differentiate the rules for good conduct of detained prisoners—entitling them to good time allowance—from those of paroled prisoners.

The obedience to prison rule hastens the prisoner's freedom. Disobedience to parole forfeits freedom already given. The only effect of broken parole is provided by section 6 of the act:

"The said prisoner shall serve the remainder of the sentence originally imposed."

That is, the part of the sentence remaining when he was paroled, at which time, in the case before the court, it had been shortened 216 days by his good conduct. That the parole law was not intended to affect the good time act is further shown by section 10 of the parole law:

"* * * Nothing herein contained shall * * * in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress."

Rules 86 and 95, of the prison rules above set out, disclose what is promised the prisoner for good conduct, and the warning therein is that, for a "violation of *these* rules and regulations"—that is, the rules and regulations for confined prisoners—good time will be lost.

The writ is granted for petitioner's discharge.

In re BRYKCZYNSKI.

(District Court, E. D. Wisconsin. September 27, 1913.)

ALIENS (§ 65*)—NATURALIZATION—DECLARATIONS OF INTENTION—SERVICE IN NAVY.

Act July 26, 1894, c. 165, 28 Stat. 124 (U. S. Comp. St. 1901, p. 1332), provides that an alien 21 years of age, who has enlisted or may enlist in the United States navy or marine corps, and has served or may serve five consecutive years in the navy or one enlistment in the marine corps, and has been or may be honorably discharged, shall be admitted to become a citizen on his petition, without previous declaration of intention. When such act was passed, Rev. St. § 1418 (U. S. Comp. St. 1901, p. 1007), required enlistments in the navy to be for not exceeding five years, and section 1608 declared that enlistments in the marine corps should be for not less than five years. By Act March 3, 1899, c. 413, § 16, 30 Stat. 1008 (U. S. Comp. St. 1901, p. 1007), the term of enlistment in the navy was changed to four years, and by Act March 3, 1901, c. 852, 31 Stat. 1132 (U. S. Comp. St. 1901, p. 1095) enlistment in the marine corps was reduced to four years, during all of which time honorable discharges were granted pursuant to Rev. St. § 1426 (U. S. Comp. St. 1901, p. 1010), to all who had fulfilled the three-year enlistment in the navy. *Held*, that the modification of the enlistment period should be regarded as effecting a corresponding modification in the requirements of the Naturalization Act, and hence proof of an alien's service of a four-year term of enlistment in the navy, his honorable discharge, and his immediate re-enlistment for a further term of four years, the proof showing five continuous years of service, was sufficient to dispense with a declaration of intention in proceedings for his naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 129; Dec. Dig. § 65.*]

Application of Stanley Kasper Brykczynski for a certificate of naturalization. Granted.

The petitioner was born in Berlin, Germany, March 8, 1888, emigrated to the United States, and, since April 29, 1889, has been a resident of Wisconsin. He entered the United States navy May 20, 1908, upon a four-year term of enlistment. This service he completed, was honorably discharged, and immediately re-enlisted for a further four years, and now is, and ever since his first enlistment has been, continuously in the service. He has filed, and the court has heard, his petition for naturalization. In lieu of a declaration of intention, he offers to support such petition by competent proof of his honorable discharge from, and his five years consecutive service in, the navy.

Merton A. Sturges, Chief Naturalization Examiner, of Chicago, Ill., for the United States.

GEIGER, District Judge (after stating the facts as above). Petitioner's qualifications with respect to character and intelligence are fully conceded; and the only question submitted by the government is whether, upon the facts, his case comes within the act of July 26, 1894, which provides:

"An alien of the age of twenty-one years and upward who has enlisted or may enlist in the United States navy or marine corps, and has served or may hereafter serve five consecutive years in the United States navy or one enlistment in the United States marine corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

become such; and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States navy or marine corps."

Is it necessary under this section that the applicant show five consecutive years of service, and also an honorable discharge certificate which covers such five consecutive years? A review of the legislation governing enlistments and honorable discharges from the navy and marine corps will aid us in answering this question. In 1894, when the above act was passed, enlistments in the United States navy were prescribed to be "for a period *not exceeding* five years." Section 1418, R. S. (U. S. Comp. St. 1901, p. 1007). At that same time enlistments in the marine corps were prescribed to be for a period *not less* than five years. Section 1608, R. S. The former was changed by the act of March 3, 1899 (30 Stat. 100, c. 413, § 16 [U. S. Comp. St. 1901, p. 1007]), which prescribed that "hereafter the term of enlistment of all enlisted men of the navy shall be for four years." The latter was changed by the act of March 3, 1901 (31 Stat. 1132, c. 852 [U. S. Comp. St. 1901, p. 1095]), providing that "hereafter the enlistments into the marine corps shall be for a period of *not less* than four years." During all this time honorable discharges were granted to those who had fulfilled the three-year enlistment in the navy. Section 1426, R. S. (U. S. Comp. St. 1901, p. 1010).

Thus it will be seen that, when the Naturalization Act was passed, the statutes fixed a *maximum* term of enlistment in the navy and a *minimum* term of enlistment in the marine corps, each at five years—thus making it possible at that time to produce the evidence with respect to those who were in the naval service, in the form of a certificate of honorable discharge covering a full five-year term of enlistment; or it was possible at that time to offer proof of a shorter term of enlistment covered by an honorable discharge and proof of continued service under a further enlistment. With respect to those who had served in the marine corps, the question could not arise, because the naturalization statute calls for specific proof of *one enlistment* (which at that time could not be less than five years) and an honorable discharge. Now, while it may have been the intention of Congress to require proof of five consecutive years of service and a certificate of honorable discharge covering such whole period, the change in the enlistment term in the navy from that of a maximum of five years to a term of four years and no less, brings with it, as it seems to me, a corresponding modification in the requirements of the naturalization statute, unless we are ready to hold that its objects have been practically frustrated by the amendment. In other words, if a strict construction should now be adopted or adhered to, the result would be that one who had enlisted in the navy for a four-year term could not obtain the benefits of the Naturalization Act, because his certificate of honorable discharge could not cover a period of five consecutive years. The most he could expect to do was to serve two full enlistments, or eight years, and then offer, either the one certificate covering the eight years, or the two certificates covering four years each, to meet the statutory call for proof.

On the other hand, the amendment fixing the minimum enlistment in the marine corps at four years imposes upon aliens who have served therein and who seek naturalization conditions less rigorous than those existing when the act of 1894 was passed. There is no reason for adopting a construction which, in view of the amendments to the enlistment acts, will work such discrimination; and with respect to aliens who have served or are serving in the navy, proof of an honorable discharge after serving one enlistment of four years, with proof of re-enlistment and continued honorable service for the full five-year period, satisfies the statute. As indicated, when the act was passed, situations like the one before us could arise, because enlistments for terms of five years or less were possible. But the abolition of the five-year enlistment really compels the construction now given to the act.

The petitioner is entitled to be admitted, and an order may be entered accordingly.

SMITH v. LLOYD et al.

SULLIVAN v. SAME.

(District Court, D. Massachusetts. October 4, 1913.)

Nos. 473, 475.

COURTS (§ 335*)—JURISDICTION OF FEDERAL COURT—EQUITY CASES—EFFECT OF STATE STATUTES.

Rev. Laws Mass. c. 159, § 3, cls. 7, 8, which provide that certain state courts shall have jurisdiction in equity of suits by creditors to reach and apply in payment of a debt any property or interest of a debtor which cannot be reached by attachment or execution in an action at law, is a statute enlarging the equitable jurisdiction of the state courts, rather than one enlarging equitable rights, and does not apply to a federal court which is without jurisdiction to entertain on removal such a suit by simple contract creditors.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 905; Dec. Dig. § 335.*]

In Equity. Suits by Daniel L. Smith against J. B. Lloyd and others, and by Mary I. Sullivan against the same. On motion to remand to state court. Motions granted.

Daniel B. Ruggles, of Boston, Mass., for complainant in No. 473. Brandeis, Dunbar & Nutter and Fay B. Kendall, all of Boston, Mass., for defendants in No. 473.

Hudson & Nichols, of Boston, Mass., for complainant in No. 475.

Brandeis, Dunbar & Nutter, of Boston, Mass., for defendants in No. 475.

DODGE, Circuit Judge. Both these suits were brought in the Massachusetts superior court for Suffolk county. Both are bills to reach and apply property alleged to be in the hands of certain of the defendants in trust for the benefit of the defendant Lloyd and which can-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not be attached in a suit at law, in payment of alleged claims by the plaintiffs against Lloyd. Neither plaintiff has recovered any judgment upon his claims. Rev. Laws Mass. c. 159, § 3, cls. 7 and 8, authorize or permit such suits in equity in the Massachusetts courts; but they are not within the equity jurisdiction of the federal courts independently of the Massachusetts statute cited.

The plaintiffs are Massachusetts citizens, and so are all the defendants except Lloyd. Lloyd is described in the bills and the subpoenas thereon issued as also a citizen of Massachusetts. The cases are here upon petitions by him to remove them, wherein he denies that he is a citizen of Massachusetts and alleges that he is a citizen of Illinois. The plaintiffs who move to remand the cases take issue with him upon these allegations. The defendants have also filed motions in this court to dismiss the suits for want of jurisdiction. Assuming Lloyd to be a citizen of Illinois, and not of Massachusetts, although the issue made upon this point has not been determined, the question arises whether or not this court has such jurisdiction as enables it to retain the cases.

The same question, in substance, was before this court in 1906. *Mathews Slate Co. v. Mathews et al.*, 148 Fed. 490. Judge Lowell there held the Massachusetts statute above cited to be a statute enlarging the equitable jurisdiction of the Massachusetts courts rather than one enlarging equitable rights. It followed that this court was without jurisdiction to hear and determine such a case as described in the statute and must remand it to the state court, which had jurisdiction. In the reasoning of the court I concur, and it seems to me applicable to the present question in every essential respect. The defendants say that a different result is now required in view of the recent decision by the Massachusetts Supreme Court in *Stockbridge v. Mixer*, 102 N. E. 646, June 18, 1913. The law of Massachusetts is settled by that decision to be that in all suits in equity under the above statute the defendant has a right to trial by jury. If one possible objection to the jurisdiction here is thus overcome (see *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804), the principal objection remains, i. e., that a state statute cannot enlarge the federal equity jurisdiction unless it has enlarged equitable rights. It clearly appears from Judge Lowell's opinion that his decision was made upon the assumption that by the law of Massachusetts the defendant's right to jury trial in such cases would be secured.

The defendants' motion in each case to dismiss cannot be granted unless the cases have been properly removed here. The motions to remand are allowed.

ARIZONA & N. M. RY. CO. v. CLARK.

(Circuit Court of Appeals, Ninth Circuit. September 8, 1913. Rehearing Denied October 29, 1913.)

No. 2,259.

1. TRIAL (§ 420*)—DIRECTED VERDICT—DENIAL—WAIVER OF ERROR.

Error, if any, in a denial of defendant's motion to direct a verdict at the close of plaintiff's evidence is waived by the defendant's introduction of testimony in his own behalf, and failing to renew the motion at the close of all the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. § 420.*]

2. MASTER AND SERVANT (§ 264*)—EVIDENCE—NEGLIGENCE OF PLAINTIFF—PRIOR MISCONDUCT.

Where, in an action for injuries to a railroad engineer, there was no claim that he did not promptly obey signals given him at the time of the accident, evidence as to prior instances within two years, when he had been negligent in the operation of his engine in failing to obey signals, was immaterial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

3. MASTER AND SERVANT (§ 274*)—INJURIES TO SERVANT—EVIDENCE—REPUTATION FOR PRUDENCE OR RECKLESSNESS.

In an action for injuries to a railroad engineer, evidence of his general reputation for prudence or recklessness in the operation of his engine was inadmissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

4. APPEAL AND ERROR (§ 683*)—RECORD—BILL OF EXCEPTIONS—RULINGS ON EVIDENCE.

The court's refusal to admit a deposition in evidence cannot be reviewed, where the deposition, while printed in the transcript, was not included in the bill of exceptions, or in any way made a part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765, 1766, 3450-3455; Dec. Dig. § 683.*]

5. WITNESSES (§ 209*)—PHYSICIAN—PRIVILEGE.

Where plaintiff, a railroad engineer, after having been injured, was taken to a hospital, where the physician in attendance informed him that they had no eye specialist, and advised plaintiff to have an eye specialist examine his eye, and plaintiff permitted a specialist, obtained by the hospital physician, to examine him in order that he might obtain information as to the extent of his injury—supposing that the specialist was acting with the hospital physician, and not knowing that he was making the examination in the interest of the defendant—the specialist was disqualified to testify over plaintiff's objection, under the Arizona statute providing that a physician cannot be examined without the consent of his patient as to any communication made by the patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of the patient, unless the patient has himself voluntarily testified with reference to such communications.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 771; Dec. Dig. § 209.*]

6. APPEAL AND ERROR (§ 272*)—OBJECTIONS AT TRIAL—INSTRUCTIONS—EXCEPTIONS—TIME.

Error, if any, in the giving or refusal of instructions cannot be considered on appeal, where no exceptions were taken thereto while the jury

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 207 F.—52

was at the bar, though the record recited that before the jury retired the court granted permission to defendant to embody in its bill of exceptions, if it should tender one, its objections to the court's instructions more at length and in detail, and that, after the jury, having been instructed, had retired, certain exceptions were taken by counsel for the respective parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272.*]

7. INTEREST (§ 39*)—TIME—INJURIES—DATE OF JUDGMENT.

In an action for personal injuries, it is proper for the court to allow interest on the verdict from the date of the judgment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 83-89; Dec. Dig. § 39.*]

8. APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVE VERDICT.

The amount of damages awarded to plaintiff in an action for injuries is not open for review on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

9. MASTER AND SERVANT (§ 87½, New, vol. 16 Key-No. Series)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—APPLICATION.

1. Workmen's Compensation Act, Ariz. June 8, 1912 (Laws 1912 [Sp. Sess.] c. 14), was inapplicable to an action for injuries to a servant which occurred prior to the passage of the act.

In Error to the District Court of the United State for the District of Arizona; Richard E. Sloan, Judge.

Action by Thomas P. Clark against the Arizona & New Mexico Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. C. McFarland, of Clifton, Ariz., for plaintiff in error.

L. Kearney, of Clifton, Ariz., and W. M. Seabury, of Phoenix, Ariz., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The complaint in this action, which is for damages for personal injuries alleged to have been received by the plaintiff below, defendant in error here, through the alleged negligence of the defendant to the action, was twice amended; the sufficiency of that upon which the case was tried being questioned by two demurrers, one general, and the other special, and by two motions, in support of each of which are cited in the brief here filed for the plaintiff in error a large number of authorities. It is readily conceded that the complaint might well have been more concise, logical, and clear; but we are of the opinion that its manifest defects are not fatal.

In addition to the jurisdictional facts, it alleges, in effect, that at the times in question the defendant to the action was the owner of and engaged in operating a railroad from Clifton, Ariz., to Hachita, N. M. (then territories, but since become states), carrying both passengers and freight for hire over its road between the points mentioned; that at Clifton it owned and maintained as a part of its road a large number of tracks, turnouts, and switches, for the storage of cars, and for the making up of trains, which tracks and switches extended from

the company's depot in Clifton southerly about a quarter of a mile to where the company's bridge crosses the San Francisco river; that about 800 feet north of the bridge one of the company's switches left its main track and extended a distance of about one-half mile to the smelter of the Shannon Copper Company, the grade of which switch is so steep that the engine upon which the plaintiff was engineer could haul only four of the company's cars at any one trip; that the company's main line from the bridge to the smelter switch is downgrade to such an extent that cars placed thereon, without brakes set, or without being well chocked, would not remain still, but would run to and past the switch; that at the time of the accident in question, to wit, March 15, 1911, the company had in its yards at Clifton 12 freight cars, brought from without the then territory of Arizona over its road, which were loaded with coke and merchandise and consigned to the Shannon Copper Company; that the plaintiff was then engaged as engineer of the company's switch engine used by it in moving such interstate commerce; that in moving the 12 freight cars mentioned the company furnished the plaintiff with a crew of helpers consisting of a fireman, the yardmaster, the foreman, and two brakemen, and that, when the plaintiff and the said crew began the removal of the 12 cars, eight of them were brought down the main track to a point about 450 feet north of the bridge and 200 feet south of the smelter switch, where four of the cars were uncoupled and left on the main track, and four of them were coupled to the switch engine; that, when the four cars were uncoupled and left at the point about 200 feet south of the switch, it became and was the duty of the three helpers left in charge of them to set the brakes thereon and securely chock and fasten them, so that they would not run down the track to the point where the plaintiff was engaged in hauling the other four of the cars onto the switch, which duties the said helpers wholly failed to perform, on account of which negligence the four cars so left standing began to move and run down the track towards the switch, which the plaintiff was entering with his engine and the four cars attached thereto, when the said foreman and one of the brakemen carelessly and wrongfully signalled the plaintiff to stop his engine, which he did within eight seconds, resulting in the tender of the engine cab in which the plaintiff was at the time sitting being struck with great force by the four cars that had been left on the main track, resulting in the loss of one of the plaintiff's eyes and other serious bodily injuries to him. The complaint also alleged that the company's roadbed was defective and unsafe; that the brakes on the said cars and their coupling apparatus were out of repair and unsafe; that there were not enough brakemen furnished by the company to manage the cars, of all of which the company was well aware, and that the cars were negligently and carelessly managed and operated; and that the negligence alleged was the direct and proximate cause of the plaintiff's injury.

In its answer the defendant put in issue all the allegations in respect to its negligence, and alleged that the plaintiff's injuries were caused by his own negligence and want of care, and also set up that the in-

juries received by him were the result wholly of the ordinary risks of his employment, which risks were known to him or would have been known to him by the use of ordinary care.

[1] At the trial, upon the conclusion of the plaintiff's evidence, the defendant moved the court for a directed verdict in its favor, the denial of which motion constitutes one of the assignments of error. A conclusive answer to the point is that the defendant proceeded to introduce testimony in its own behalf upon the issues in the case, and did not renew the motion upon the conclusion of all of the evidence. *Sigafus v. Porter*, 179 U. S. 121, 21 Sup. Ct. 34, 45 L. Ed. 113; *Columbia, etc., v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686; *Grand Trunk Railway v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *American Smelting Co. v. Karapa*, 173 Fed. 607, 97 C. C. A. 517, and cases there cited.

The ruling of the trial court refusing to permit the defendant to introduce the testimony of two witnesses—Kelly and Kline—is also assigned as error.

[2] In respect to Kelly, the record shows that the defendant asked the witness whether the plaintiff was a careful or negligent man in the operation of his engine in switching cars, and whether he knew of any instances prior to the accident and within the space of two years where he was negligent in the operation of his engine in respect to obeying signals, and offered to show by the witness that the plaintiff for two years previous to the accident in question "was habitually careless and negligent in obeying signals given him while operating his engine in switching cars in the yards of the defendant"; and of the witness Kline the defendant asked the question, "Do you know his (plaintiff's) general reputation as to being a safe and conservative engineer, or as to his reputation of being a reckless engineer in the operation of his engine?" objections to all of which the court sustained, to which rulings the defendant excepted.

We think the rulings right. So far as concerns the signals, the evidence showed that the plaintiff strictly obeyed the signals given him in the instance in question by stopping his engine within eight seconds after receiving it, resulting in the injuries complained of, and we find nothing in the evidence to the contrary. Whether he failed to obey some other signal at some other time was manifestly immaterial.

[3] In 29 Cyc. 619, it is said:

"By the weight of authority evidence of plaintiff's habits and usual conduct as to a particular act, or of his character for prudence or recklessness, is not admissible on the question of contributory negligence"—citing numerous cases.

See, also, *Id.* 610.

In 21 Am. & Eng. Encyc. of Law (2d Ed.) 518, it is said:

"It is a general rule that in an action for negligence evidence is not admissible of other independent and disconnected acts of negligence as going to show negligence in the case at bar. It is fundamental, indeed, that evidence of any alleged negligent act or omission which could not by any possibility have contributed to the plaintiff's injuries should not be received. But where, though an act or omission may in a sense be collateral, yet from it an in-

ference of fact may be drawn bearing upon the particular act or omission alleged to be negligent, and from which the injuries resulted, evidence thereof is not incompetent. And so where the injuries complained of resulted from the combined or concurrent effect of the acts of several parties, evidence of the negligent act of each, performed independently of the others, is admissible."

See, also, *Missouri, K. & T. Railway Co. v. Johnson*, 92 Tex. 380, 48 S. W. 568; 6 Thompson on Negligence, § 7792.

[4] The refusal of the court below to admit in evidence the deposition of the plaintiff's physician—Dr. Dietrich—is assigned as error. That deposition, while printed in the transcript, is not included in the bill of exceptions, or in any way made a part of the record of the case, and is not, therefore, for our consideration. In *Russell v. Ely*, 2 Black, 575, 580 (17 L. Ed. 258), the Supreme Court said:

"What purports to be the entire deposition of Baker is sent up by the clerk of the District Court, and is printed in the record before us, and if properly before us might sustain the exception; but this deposition is not incorporated in the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless incumbrance of the transcript, and an expense to the litigating parties."

That case was cited with approval by the same court in *United States v. Copper Queen Mining Co.*, 185 U. S. 495, 498; 22 Sup. Ct. 761, 46 L. Ed. 1008. See, also, *Alaska Commercial Co. v. Dinkelspiel*, 126 Fed. 164, 61 C. C. A. 108; *Boatmen's Bank v. Trower Bros. Co.*, 181 Fed. 809, 104 C. C. A. 314; *Star Co. v. Madden*, 188 Fed. 910, 110 C. C. A. 652.

[5] The defendant company also sought to introduce the testimony of Dr. Stark, an oculist, who was called to examine the plaintiff's eyes, and upon objections of counsel for the latter the court excluded his testimony upon the ground that such examination and the attending communications between the physician and patient were privileged, to which ruling the defendant excepted, and here assigns it as error.

A statute of Arizona provides:

"A physician or surgeon cannot be examined without the consent of his patient as to any communication made by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by personal examination of such patient; Provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

Such statutes are designed to protect the patient, and should be liberally construed to that end. *Underhill on Crim. Evid.* (2d Ed.) § 179, p. 341; 23 Am. & Eng. Encyc. of Law (2d Ed.) pp. 83, 84, 85, and numerous cases there cited.

It is contended on behalf of the plaintiff in error that "Dr. Stark was employed and paid by the defendant company for the purpose of being advised of the condition of the patient's eye at the date of examination"; and such appears from the evidence to have been the fact. But the trial court found that the plaintiff did not know the real purpose of the calling in of Dr. Stark, but believed that the latter's services were engaged for his, plaintiff's benefit, and as his physician in connection with Dr. Dietrich. The record contains a

large amount of testimony on that point which is more or less conflicting—there being some inconsistency in the testimony of the plaintiff himself, as will be seen from this excerpt:

"Q. Tell us what the hospital was where you were examined. A. They call it the A. C. Hospital.

"Q. Is that, or is it not, the hospital in which injured employes of the defendant are examined? A. Yes, sir.

"Q. Did you know that to be the fact at the time of your examination? A. Yes, sir.

"Q. Who was it that requested you to be examined, if any one, by Dr. Stark? A. I think it was Dr. Dietrich.

"Q. You think Dr. Dietrich suggested it? A. Yes, sir; he told me when he would be there.

"Q. Was anything said to you with reference to the purpose for which that examination was requested or required? A. To examine my eye.

"Q. Dr. Dietrich was then in attendance upon you as your physician? A. I was still under his charge.

"Q. Now, did you think this examination by Dr. Stark was to be made for the benefit of the company or for your benefit? A. I don't know.

"Q. You don't know for whose benefit it was to be made? A. For my benefit, I suppose.

"Q. Is that what you understood? A. Yes.

"Q. Did you, or did you not, believe that Dr. Stark was in consultation with Dr. Dietrich, your attending physician? A. Yes, sir.

"Mr. Kibbey: You are leading him right along.

"The Court: I think the communication is privileged—I will sustain the objection.

"By Mr. Kibbey: Q. You say Dr. Dietrich was there? A. He might have been in and out.

"Q. As a matter of fact, he wasn't in town, was he? A. Yes, sir; I think so.

"Q. You had a conversation with Dr. Stark, didn't you? A. Yes, sir.

"Q. In the course of that conversation, did you state to Dr. Stark that you found on the third day after the injury that you had lost the vision of your eye?

"Mr. Seabury: We object to the question.

"The Court: I sustain the objection.

"By Mr. Kibbey: Q. Didn't you state to Dr. Stark that you had not had any injury to your head—received any injury to your head in that accident?

"Mr. Seabury: We make the same objection.

"The Court: Same ruling.

"By Mr. Kibbey: Q. Had you and the company had any talk prior to that time with reference to your condition—your ability to go to work, or anything of that kind?

"Mr. Seabury: We object.

"The Court: Is this a general examination—isn't it as to this matter of the competency of this doctor?

"Mr. Kibbey: I am trying to get to the matter of the competency of this doctor.

"Mr. Seabury: The question is, Did you have any talk with the company? I don't see what—

"The Court: You may answer.

"The Witness: No, sir.

"By Mr. Kibbey: Q. You had not had any talk with any of them up to that time? A. No, sir.

"Q. Didn't you know that the company desired for its own information to have an independent doctor make an examination of your eye? A. I told Dr. Dietrich about it, and he made the appointment with the doctor, I suppose.

"Q. Didn't Dr. Dietrich tell you the company wanted an examination made for their information as to your condition, and didn't you so understand it?

"Mr. Kearney: We object to that as a privileged communication.

"The Court: I overrule the objection.

"The Witness: I told Dr. Dietrich about it, and he tried to examine it himself, and then he made the date with Dr. Stark a few days afterwards.

"Q. Didn't you understand it was for the information of the company to find out what the condition of your eye was? A. I supposed that was the object—very likely.

"Q. You understood when the examination was made that it was for the purpose of getting information for the company? A. Yes.

"Mr. Kibbey: Now, we think it is competent.

"The Court: That answer is contradictory to the other.

"Mr. Seabury: Absolutely, your honor.

"Mr. Kibbey: Yes, it is.

"Mr. Seabury: However, we also claim that his direct examination shows much more facts and circumstances in connection with the matter than the mere answer to that one question, and I think from the witness' testimony, both under cross and direct examination, that it is perfectly clear that he thought Dr. Dietrich called Dr. Stark as a consulting physician.

"Mr. Kibbey: I think it is quite obvious to the contrary.

"Mr. Seabury: We differ in regard to the inferences to be drawn from the evidence. I don't see how the witness can really know—

"The Court: I will put a question.

"To the witness: Q. What did you understand was the object of this examination of your eye? A. To know whether it was injured or not.

"Q. What difference did it make whether it was injured or not, in your judgment? A. It would make a whole lot.

"Q. In what way? A. From good sight to blindness—I wanted that information.

"Q. Who wanted it? A. I did.

"Q. You wanted it? A. I wanted to know the condition of it. When I reported to Dr. Dietrich, he said they had no oculist, and that they would get one, and then I left the thing to Dr. Dietrich, and when they made the appointment I appeared there.

"Mr. Seabury: We think that makes it too clear, your honor.

"The Court: I think so."

The real purpose, as practically conceded by counsel for the plaintiff in error, of Dr. Stark's examination of the plaintiff being to obtain information to be used against any claim on his part for damages, good faith required that the plaintiff should have been frankly told that Dr. Stark came as the representative of the company, and not left to infer that he came as his own physician, as he very well might from the statement of Dr. Dietrich, according to the plaintiff's testimony, that he needed an oculist to consult with. *Munz v. Salt Lake Railway Co.*, 25 Utah, 220, 70 Pac. 852; 1 *Elliott on Evidence*, § 634, p. 741; *Underhill on Crim. Evid.* (2d Ed.) § 179. See, also, *Union Pacific R. R. Co. v. Thomas*, 152 Fed. 365; 81 C. C. A. 491, and cases there cited.

We therefore think the court below was right in excluding the testimony of the witness in question.

[6] There are various assignments of error in respect to giving and refusal to give certain instructions to the jury which we are precluded from considering for the reason that exceptions thereto were not seasonably taken. The record shows that, after the jury had been instructed and retired in charge of the bailiffs, certain exceptions were taken by counsel for the respective parties, and the record shows that:

"Before the jury retired to consider of their verdict that the court granted permission to the defendant to embody in its bill of exceptions, if it should

tender one, its objections to the instructions of the court to the jury more at length and in detail."

That none of such exceptions can be here considered was distinctly decided by this court in the case of *Western Union Tel. Co. v. Baker*, 85 Fed. 690, 29 C. C. A. 392, and has been so held by many other federal courts. See the numerous cases cited in that last mentioned, and in *Star Co. v. Madden*, 188 Fed. 910, 110 C. C. A. 652, where is set out the rule laid down by the Supreme Court in *Phelps v. Mayer*, 15 How. 161, 14 L. Ed. 643, as follows:

"It has been repeatedly decided by this court that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminster II, which provides for the proceeding by exception, requires, in explicit terms, that this should be done, and if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken. Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice."

[7] There remains to consider only the objections to the amount of the judgment. The plaintiff in error contends that the judgment of the court below is erroneous in that by it the plaintiff is allowed interest on the amount of the verdict from the date of the judgment, and cites in support of the point the decision of the Court of Appeals of the Fifth Circuit in the case of *White et al. v. United States*, 202 Fed. 501, which decision does not at all support the contention. That was an action for damages for the cutting and conversion of timber from the lands of the government, and in which the jury by its verdict allowed interest from the date of the conversion to the date of the trial of the case—a period of 13 years. The Court of Appeals, in disposing of the case, said:

"The oral charge of the court is set out in the bill of exceptions in its entirety, and contains no reference to the question of interest. Interest in actions of tort in the federal courts is not allowable as a matter of right; but its allowance, as part of plaintiff's damages, is discretionary with the jury. *Eddy v. Lafayette*, 163 U. S. 458-467, 16 Sup. Ct. 1082, 41 L. Ed. 225.

"The jury were not instructed by the court below that they possessed any such discretion, and probably included interest in their verdict upon the idea that the plaintiff was entitled to it as a matter of right, and not of discretion.

"It is true the plaintiffs in error do not assign error because of this omission of the court; but a plain error may be noticed by us, and in the absence of any assignment. In view of the long and unexplained delay on the part of the government in instituting the suit, we feel that a proper exercise of discretion by the jury would have denied the plaintiff interest."

The case of *Eddy v. Lafayette*, 163 U. S., there cited, is, however, authority for the approval of the judgment of the court below in the present case in allowing interest from the date of the judgment. See pages 461-467 of 163 U. S., 16 Sup. Ct. 1082, 41 L. Ed. 225.

[8] Under the well-established rule prevailing in the federal courts, the question of the amount of damages awarded the plaintiff is not for our consideration. *Texas & Pacific Railway Co. v. Behymer*,

189 U. S. 469, 23 Sup. Ct. 622, 47 L. Ed. 905; *Western Gas Construction Co. v. Danner*, 97 Fed. 883, 890, 38 C. C. A. 528.

[9] The statute of Arizona entitled "An act securing compensation for injuries to workmen and their dependents received while engaged in dangerous and hazardous service, and providing remedies therefor," approved June 8, 1912 (Session Laws of Arizona 1912, p. 23 [Sp. Sess.]), and relied upon by counsel for the plaintiff in error, having been passed long subsequent to plaintiff's injuries, has no application to the case.

It results from what has been said that the judgment of the court below must be, and it is accordingly, affirmed.

WALKER et al. v. GILES et al.

(District Court, N. D. New York. September 6, 1913.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ICE CREAM DIPPER.

The Olmstead patent, No. 819,373, for an ice cream dipper, *held* valid as against the claim of prior invention by another, and not so limited by the proceedings in the Patent Office, or by the language of claim 1, which calls for a peripheral flange on the toothed scraper hub, normally preventing such hub from falling out when the dipper is inverted, that infringement is avoided by the device of the Nielsen patent, No. 833,620, in which such flange is merely transferred to the gear rack, which is the co-operating element; the principle and mode of operation and the result accomplished remaining the same.

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—AMENDMENT OF ANSWER—LACHES.

An amendment to the answer in an infringement suit to plead the defense of champerty will not be allowed on final hearing, where the evidence on which such defense is based was known to defendant two years or more before.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

In Equity. Suit by Edwin Walker, John W. Dorman, Edward J. Dorman, and Mary L. Rexford against Henry Giles and Catherine Nielsen, copartners trading as Giles & Nielsen Nickel Works. On final hearing. Decree for complainants.

James H. Griffin, of New York City, and Frank C. Curtis, of Troy, N. Y., for complainants.

Fred Gerlach, of Chicago, Ill. (Lester W. Bloch, of Albany, N. Y., of counsel), for defendants.

RAY, District Judge. [1] The patent in suit alleged to be infringed was issued to Albert P. Olmstead, assignor to Lazelle A. Michael, trustee, May 1, 1906, on application filed December 30, 1905, for "ice cream dipper." The claim alleged to be infringed reads as follows:

"1. A dipper for plastic material, comprising in combination a handle and bowl provided with a hub bearing at the inner end of, and open to, the bowl;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a toothed scraper hub rotatively mounted in said hub bearing, and insertable and removable through the bowl, said hub having a peripheral flange overhanging on the inner side the teeth thereon; a scraper fixed upon said hub; and a hand lever mounted upon the handle and having a gear rack engageable with the teeth on the hub on the outer side of said overhanging flange."

It is a dipper for any kind of plastic material, but especially ice cream, and has in combination (1) a handle and bowl; (2) the bowl as a mere bowl is flaring and of greatest diameter at the top, and is provided with a hub bearing at the inner or lower end of the bowl, and open to the bowl; (3) a toothed scraper hub, with a scraper fixed on such scraper hub, and which hub is rotatively mounted in such hub bearing and insertable and removable through the bowl—that is, you pick it out at will or drop it out by releasing the gear rack; (4) this toothed hub has a peripheral flange which overhangs, on the inner side, the teeth on the hub; (5) a hand lever mounted on the handle, and which hand lever has (6) a gear rack engageable with the teeth on the hub on the outer side of such overhanging flange.

The bowl holds the ice cream or other substance. The hub bearing open to the bowl simply carries the scraper hub. The scraper hub, which is made to revolve, carrying with it the scraper next the inner surface of the bowl, is toothed to engage with the teeth of the gear rack, operated by the lever attached to the handle, and by pressing on which lever the rack, and consequently the hub, and hence the scraper, are made to revolve. A spring attached to the lever causes a resumption of the parts to their normal situation after being pressed by finger or thumb to remove the ice cream; that is, cut it out from the bowl. This scraper hub would be constantly falling out when the dipper is in use, but for some *means* to keep it in position. This means is the peripheral flange, which is a part of the hub, and overhangs on the inner side the teeth on the hub. Its function is to prevent the scraper hub, and consequently the scraper, from falling out until released for cleansing purposes.

The defendants' structure is a substantial duplication, with mere changes of form, or the substitution of well-known equivalents, until we come to this scraper hub and gear rack, which engages with the teeth on the hub. Defendant has no flange on the hub, but does have one on the gear rack, which, projecting above the teeth on the gear rack, also projects itself above the teeth on the hub when the parts are in normal position, and so effectually prevents the toothed scraper hub from falling out when the dipper is being used; that is, the flange is transferred from *hub* to the gear rack a mere transposition of the flange from one element of the device to another—a mere change of location, without a change of mode of operation, or principle of operation, or results. No element is added and no element is left out. The one device works as well as the other and accomplishes the same result, both working on the same principle and in obedience to the same laws.

This is a clear case of infringement, if complainants' patent is valid, that is, if Olmstead was the first inventor of this patented device, unless the complainants are estopped by the action of the Patent Office

and acceptance of its action to claim that their patent covers this changed construction, that is, are limited to the precise construction claimed, to wit, a peripheral flange *on the hub itself* to perform the function mentioned. The language of the claim is:

"Said hub having a peripheral flange overhanging on the inner side the teeth thereon."

If the flange, whose function it is to prevent the scraper hub from falling out, *must be attached to and form a part of such hub*, defendants do not infringe, as it cannot be claimed that defendants have any *such flange performing any such function*, or an equivalent, attached to and forming a part of the scraper hub of their ice cream disher. If, however, the mere transfer of this flange, which is a part of the element "toothed scraper hub" in complainants' patent and the claim thereof in issue, and also of the same element in defendants' device, to the adjoining and co-operating element found in both structures or devices, viz., "gear rack engageable with the teeth on the hub," this gear rack being thereby made to perform the added function or work of carrying or supporting the flange, is a mere change of location of the part of an element without changing the mode of operation or the result, and complainants are not *estopped* to claim that the claim in issue (claim 1 of the patent in suit) covers such a structure or device, then there is infringement. Here is no leaving out of an element, and no change of the mere form of an element, so as to make one element in one structure perform the functions of two elements in the other structure.

If Olmstead was the first to employ the gear rack as the means for holding in its place the hub or pinion and attached scraper in such a way as to permit the ready removal thereof through the bowl on releasing such gear rack from its engagement therewith, then he was in a sense and to an extent a pioneer, for the great value and utility of the device must be conceded. The dangers to human life lurking in vessels which have contained and are to contain ice cream for consumption are everywhere recognized, and hence the necessity for appliances of this character which can be easily and readily disengaged or separated into parts for cleansing. If Olmstead held this position in this art, he is entitled to quite a broad range of equivalents, unless he has restrictions in the language of his claim either self-imposed or imposed by the action of the Patent Office and his acceptance of a narrow and limited claim in this regard.

Patent Office Restrictions.

Claim 2 of the original application for the Olmstead patent, which on the issue of the patent became claim 1 thereof, the claim now in issue, originally read as follows:

"A dipper for plastic material, comprising in combination a handle and bowl provided with a hub bearing at the inner end of the bowl; a toothed scraper hub rotatively mounted in said hub bearing, said hub having a peripheral flange overhanging the teeth thereon; a scraper fixed upon said hub; and a hand lever mounted upon the handle and having a gear rack engageable with the teeth on the hub beneath said overhanging flange."

There was also a claim 4, and these were rejected in this language and for this reason:

"In claims 2 and 4 the *utility* of the flange is not made apparent as the matter is stated, and the claims are accordingly rejected."

This action was taken February 10, 1906, and February 20, 1906, the claimant proposed the following amendments, viz.:

"Claim 2, line 3, immediately after 'of' insert '*and open to.*' Same claim, line 4, immediately after 'hub bearing' insert '*and insertable and removable through the bowl.*' Same claim, line 5, immediately after 'overhanging' insert 'on the inner side.' Same claim, line 7, erase 'beneath' and substitute 'on the outer side of.'"

These amendments were allowed, and, March 20, 1906, Olmstead was notified that the claim was allowed. No suggestion was made that the claim was too broad, and nothing was cited against the claim, and there was no suggestion that patentable invention was not disclosed. It is readily seen that these amendments brought out clearly and made perfectly plain the "utility of the flange." The objection made by the Patent Office and the amendments made to meet such objection in no way suggest that the claimant is to be confined strictly to a structure where the "peripheral flange" is actually attached to and made to form a part of the "toothed scraper hub," and thus open the door to easy infringement by merely changing the *location* of the flange, or its equivalent, whose sole function is to prevent the said hub from falling out when the dipper is turned bottom side up to release the contents of the bowl, or in handling. The action of the Patent Office and these amendments in no way restrict or limit the claim as originally made and filed.

The original application had this claim, claim 1, of the original application, viz.:

"1. A dipper for plastic material, comprising in combination a handle and bowl provided with a hub bearing at the inner end of the bowl, said bearing being formed with a lateral opening; a toothed scraper hub rotatively mounted in said hub bearing; a scraper fixed upon said hub; and a hand lever mounted upon the handle and having a gear rack engageable with said toothed hub through the lateral opening in said bearing."

It was rejected on Bolland, No. 714,440, November 25, 1902, and canceled. It will be noted that this claim made no reference whatever to a flange or any device for preventing the "toothed scraper hub" from falling out. That claim and its rejection and cancellation has no bearing whatever on this controversy.

Alleged Prior Use, etc.

As stated, Olmstead filed his application December 30, 1905, and his patent was issued May 1, 1906. February 26, 1906, Rasmus Nielsen filed an application for a patent for "ice cream spoon," No. 833,620, which was granted October 16, 1906. The alleged infringing device or spoon is made in very close imitation of and substantially according to the claims, one or more of them, of this Nielsen patent, which was issued to Catherine Nielsen and Henry S. Giles, assignees. That patent which for brevity may be referred to as the Nielsen patent,

has nine claims, all of which may be valid claims for improvements in this art and still infringe the Olmstead patent in suit. Claims 1, 2, 3, 4, 6, and 7 of this Nielsen patent read as follows:

"1. In an ice cream spoon, the combination with a handle and a bowl of a finger operating in the bowl and formed with an extension, a finger-operating handle, means on a finger-operating handle co-operating with the finger extension for holding the finger in operative position, and adjustable means for permitting of the disengagement of the former means for the removal of the finger.

"2. In an ice cream spoon, the combination with a handle and a bowl of fingers in the bowl and having a gear wheel thereon, a finger-operating handle formed with teeth and a flange, said teeth engaging the gear and the flange holding the fingers in position in the bowl, means for limiting the movement of the operating handle in one direction, means for limiting the movement of said handle in the opposite direction, said latter means being adjustable to permit separation of the fingers from the bowl.

"3. In an ice cream spoon, the combination, with a handle and a bowl, of fingers in the bowl, a gear on the fingers, a finger-operating handle having teeth and a flange, said teeth engaging the gear, and the flange retaining the fingers in position by engaging with the gear.

"4. In an ice cream spoon, the combination, with a handle and a bowl, of fingers in the bowl, a finger-operating handle, means between the finger-operating handle and fingers for holding the fingers in position, and removable means for permitting movement of the finger-operating handle for disengagement of the fingers from the bowl. * * *

"6. In an ice cream spoon, the combination, with a main handle and a bowl, of fingers operating in the bowl, a gear operating in conjunction with the fingers, a finger-operating handle pivotally mounted on the main handle, teeth on the finger-operating handle, said teeth engaging with the gear, a lug adjacent the teeth to limit the movement of the finger-operating handle in one direction, a flange between the end of the finger-operating handle and the fingers to hold the fingers in operative position, a spring on the finger-operating handle for normally positioning the lug to limit the movement of said finger-operating handle, and an adjustable element in the path of movement of the finger-operating handle to limit its movement in the opposite direction, said element when adjusted permitting removal of the fingers from the bowl.

"7. In an ice cream spoon, the combination, with a handle and a bowl, of fingers in the bowl, a finger-operating handle, means between the finger-operating handle and spoon for transmitting rotary motion to the fingers, means for retaining the fingers and finger-operating handle in operative relation, and a set screw which limits the movement of the finger-operating handle in one direction, said set-screw adapted to be adjusted to permit disengagement of the fingers from the bowl and the finger-operating handle."

It is self-evident from a reading of these claims that Nielsen has transferred the *flange*, which holds from falling out of the spoon what he calls "fingers" and what Olmstead calls "scraper," and also holds the gear on the fingers, that is, the "toothed scraper hub," to his "finger-operating handle having teeth" at the end where it engages the fingers or their gear, and he locates this flange just above the teeth of the handle, and, as the cogs or teeth of his gear carrying the fingers are below or above (depending on whether the spoon is held mouth up or mouth down) this flange fixed to the end of the handle, or more properly the end of the lever attached to the handle, such gear carrying the fingers cannot fall out.

In Olmstead, with a flange on the scraper hub itself, such hub carrying the fingers, or scraper, cannot get by the teeth of the gear rack

connected to the hand lever mounted on the handle until the teeth of the hub are disengaged from the teeth of the hand lever mounted on the handle.

May 17, 1906, this Nielsen application was, it seems, examined and its allowance recommended without any reference to the prior art, or to the Olmstead application then pending, and John Imirie, Nielsen's attorney, was notified of such fact. On the same day, May 17, 1906, said Nielsen was also notified that:

"Your application for patent for an improvement in ice cream spoons, serial No. 303,071, allowed May 17, 1906, has been withdrawn from the issue files of this office. The reason therefor will be communicated to you by the examiner. Until a new notice of allowance is sent you, the final fee will not be required.

"Very respectfully,

F. I. Allen, Com. of Patents."

May 19, 1906, two days later, the examiner, Stauffer, requested the Commissioner that the case be withdrawn from issue "for the purpose of citing a *recently patented reference*." This was *approved* by the Assistant Commissioner the same day and the case withdrawn. May 22, 1906, Nielsen, through his attorney, residing at Washington, D. C., was notified:

"This application has been withdrawn from issue for the purpose of citing the following recently issued patent against claim 4, upon which said claim is rejected: Olmstead No. 819,373, May 1, 1906 (107—48).

"Chas. C. Stauffer, Examiner."

The *very next day*, May 23, 1906, evidently knowing what was coming, Rasmus Nielsen, at Troy, N. Y., made the following affidavit:—

"State of New York, County of Rensselaer:

"Rasmus Nielsen, being first duly sworn, deposes and says that he is the applicant of the above-entitled application for patent, and that prior to December 15, 1905, he made the invention described in the above-entitled application in the United States of America. The form of his invention as made prior to December 15, 1905, is shown in the spoon marked 'Exhibit A' herewith. Deponent further says that he does not know, and does not believe, that the subject-matter of the above-entitled application for patent has been in public use or on sale in this country, or patented or described in any printed publication in this or any foreign country, for more than two years prior to this application. Deponent further says that he has never abandoned the invention shown in the application, and disclosed by exhibit marked 'A.'

"Rasmus Nielsen.

"Sworn to and subscribed before me this 23 day of May, 1906.

"[Notarial Seal.]

Charles Corliss."

This was filed June 1, 1906, with the following communication:

"Hon. Commissioner of Patents—Sir: In the above-entitled application applicant files herewith an affidavit and exhibit of his invention showing the completion of the same prior to December 15, 1905. The spoon filed as an exhibit is placed on record with the expressed understanding that it be returned.

"Respectfully,

Rasmus Nielsen,

"By John Imirie, Attorney.

"June 1, 1906."

New claims 8 and 9 were added the same day, and the following communication filed:

"Hon. Commissioner of Patents—Sir: Please amend the above case as follows: Add the following claims: * * * The Olmstead reference having

been overcome by the affidavit filed herewith, it is respectfully requested that the application be passed to issue.

"Respectfully submitted,

Rasmus Nielsen,
"By Jno. Imirie, Attorney.

"June 1, 1906."

June 8, 1906, the examiner called for information as to what was meant by "reinforcing band," whereupon June 11, 1906, the new or added claim 9 was amended, and June 14, 1906, the application was allowed, and the final fee having been paid September 27, 1906, the patent was issued October 16, 1906.

In view of these proceedings, and of this ex parte affidavit of Nielsen, *on which* the Nielsen patent was allowed and issued in the very face of the patent issued to Olmstead May 1, 1906, these Patent Office proceedings are of no value whatever, unless it be to raise the presumption that the Patent Office officials were of opinion that, in view of the patent to Olmstead, claim 4 at least of Nielsen's application, the broad claim, was not patentable. This, of course, is the natural conclusion. However, under the rules of the Patent Office, if a patent is granted to A. for an alleged invention, and B. also applies for a patent for the same thing after A. has filed his application, on B.'s application being held up, all he (B.) has to do is to make and file an ex parte affidavit that he made the invention at a date anterior to the date of the filing of A.'s application, and thereupon B. also has his patent, which usually is worded differently, of course. This, in substance, is what was done here, and, instead of there being an interference declared and fought out in the Patent Office, the controversy must be settled in the courts. As the claims of the one do not read literally on the claims of the other, perhaps no interference could have been declared. However, in this case, the presumption, which usually obtains in the case of two patents being issued to two different persons for what seems to be the same invention, that the Patent Office found a patentable difference, is lacking. The evidence shows that the Patent Office officials thought there was no patentable difference, but allowed the Nielsen patent to issue on the ex parte affidavit of Nielsen to the effect that he was the first inventor and had not abandoned his invention.

It has been many times said and held that that which infringes, if later, anticipates, if earlier. If the Nielsen spoon in question here was invented by Nielsen in the sense of the patent law prior to the time Olmstead made his invention, and such invention was not hidden and abandoned by Nielsen, it is quite clear that he does not infringe Olmstead. In fact, defendants do not deny infringement, assuming the validity of the Olmstead claim in issue, but allege and claim to have established prior knowledge and use by one Harry S. Geer, and that he disclosed the invention to Olmstead, and also prior knowledge or use by the said Rasmus Nielsen.

The defendants produce and put in evidence a disher, marked "Exhibit A, Rasmus Nielsen Application for Patent No. 303,071, Filed Feb. 26/06, Ice Cream Spoons," and which is also marked "Defendants' Exhibit, Nielsen Exhibit A." It is claimed that this is the spoon

referred to by Nielsen in his affidavit filed in the Patent Office and quoted above, and it is *now claimed* that Nielsen *made it* prior to December 15, 1905. If so, why did he not so state in his affidavit of May 23, 1906? Why did he say in that affidavit simply:

"That prior to December 15, 1905, he made the invention described in the above-entitled application [Olmstead's] in the United States of America. *The form of his invention* as made prior to December 15, 1905, is shown in the spoon marked 'Exhibit A,' herewith."

It is plain from all the evidence in the case that the spoon, "Exhibit A" above referred to, was made some time in the spring of 1906, to be filed in the Patent Office with the affidavit when the proper time should come, and was not made or in existence prior to December 15, 1905. Several facts indicate this; but clearly, if this Exhibit A had been made prior to December 15, 1905, Nielsen's affidavit *would have stated that fact*.

There is another dipper of the same general construction as to this flange, "Defendants' Exhibit, Nielsen Disher No. 1," which Rasmus Nielsen claims *to have made* in January or February, 1905, and he claims to have conceived it in January, 1905. He says he put it together, and "after my spoon was made" went to Henry C. Miller, in Waterford, N. Y., and showed it to Miller at Gates' factory, etc. He also presents "Defendants' Exhibit, Nielsen Disher No. 2," which he claims to have made thereafter; but this has no scrapers, or hub, or lever, or gear rack of any description. He claims these were taken out, and in part, at least, used in the construction of "Nielsen Exhibit A."

In his affidavit referred to, Nielsen did not state *when* he conceived his invention, and he now puts the date back of or prior to the time when it is shown *he knew* that Olmstead was making an ice cream disher on his own account, and, I think, *knew* that Olmstead had completed his invention. It is also clear that in the fall of 1905, Nielsen knew what Olmstead's invention was. If both were working on the same thing, or idea—that is, the production of a dipper of this form, cone-shaped, workable with one hand, and so arranged that the scrapers and toothed parts used to revolve them, thereby separating the contents of the bowl from the bowl itself, could be allowed to drop out easily by merely withdrawing the teeth on the lever, connected with the handle, from engagement with the teeth on the hub, and so arranged that such parts would *not* drop out until such withdrawal was made—the one who first perfected the invention and filed his application for a patent is entitled to the patent.

There are many facts which shake belief in Nielsen's statements, particularly as to dates. He is flatly contradicted in some important matters which go to his credibility. The excuse given for allowing Exhibit A to remain for months after its conception without action to secure a patent, without filing an application, is not satisfactory. Nielsen says that "Nielsen Exhibit A" is the one he made in August, 1905.

"Q. 50. After completing this Nielsen Disher 'A,' did you take any steps toward the manufacture of cone spoons? A. Yes, sir. Q. 51. State what you

next did in that respect. A. I inquired from different parties in regard to *what purposes they could be made for*, and what proportion (material, probably?) they could make them from. Q. 52. Please examine the letter I now hand you, and state whether you can identify it. A. Yes, sir; I called on that party and asked some questions in regard to making bowls. Q. 53. What kind of bowls? A. These were tin *cone* bowls. Q. 54. Please refer to this letter and state what you recall as having been done in connection with the manufacture of cone-shaped bowls and the time when it was done. A. It was about the latter part of October or November (1905) I called on John W. Wallace & Co., New York, asked if they would be in shape to build certain *cone* bowl that I required, which they state that they would take the matter up and confer with me later. This is the letter they sent me."

The letter was placed in evidence and was from John W. Wallace & Co. In attempted corroboration the cash book of Giles & Nielsen was produced to show the expenses of the trip, and then Nielsen testified:

"Q. Why did you go to the Wallace Company to see about *cone-shaped* bowls for dishers? A. As I was recommended to Wallace & Co. by a friend of mine, H. W. Fields. Q. 62. Did you understand that the Wallace Company was then engaged in making *cone-shaped bowls*? A. I was informed by Mr. Fields that Wallace & Co. was one of the largest concerns in the country manufacturing *cone dishers*."

He then produced and there was put in evidence "Defendants' Exhibit Tin Disher" as one of those then being made by Wallace & Co.

Edward C. Williams was in the employ of John W. Wallace & Co. in both 1905 and 1906. That firm was then engaged in the manufacture of ice cream cans and supplies and other sheet metal goods, including ice cream dishers, the "Wallace reparable disher," and was equipped for making them. That disher was manufactured under United States letters patent No. 803,906, granted November 7, 1905. That is a *cone-shaped* disher. Mr. Williams remembers the visit of this representative of Giles & Nielsen (Nielsen or Giles), and states that what that person wanted at that time was the *spoon bowls* of the "clipper dishing spoon" which are not cone-shaped, but a half round, and that for this half-round spoon he asked prices, and that he (Williams) wrote the letter of November 6, 1905, and that such letter refers by "spoon bowls" to these half-round spoons, and *not* to cone spoons which Wallace & Co. was making and fully equipped for making. He says "disher cups" refer to the cone-shaped dishers, and that the later letter, Defendants' Exhibit "Wallace Co. Letter of February 14, 1906," refers to the cone-shaped dishers. He says the difference was well known and recognized in the trade. In short, Mr. Williams testifies that in November, 1905, there was no reason why the firm could not have made prices on the cone-shaped dishers, but that there was reason why they could not make quotations on the "half-round" or the spoon-shaped bowl which Nielsen then wanted.

There is no reason for questioning the accuracy and reliability of this disinterested testimony of Mr. Williams, and it demonstrates that Nielsen was seriously in error, if not willfully so, in claiming that in the fall of 1905 he was trying to engage in making this cone-shaped disher, which he claims to have invented in January, 1905, and it is strong and persuasive evidence, in connection with other facts, that

he did not make his cone-shaped dipper "A," and No. 1, and No. 2, referred to, until early in 1906, later than the date of invention fixed by Olmstead, and later than the filing of Olmstead's application. In the fall of 1905, Nielsen was working on the half-round disher and asking prices.

Alleged Priority of Geer.

It is not necessary to take much time on this defense. There is no substantial evidence that Geer ever invented or had a conception of this device of Olmstead. He employed Olmstead to do some little mechanical work for him in connection with a dipper. He gave Olmstead \$5 at one time and \$3 at another. This work, which Olmstead, a mechanic, could do, and which Geer, a traveling agent, could not do, put the idea of an improved dipper into the brain of Olmstead, and except as to his family he worked secretly to accomplish this, and finally succeeded, and pursuant to an understanding with Geer sent his work to one Conant, offering, if Conant would furnish the money necessary to obtain a patent, to share the ownership or gains. This offer was declined. It is true that Geer wanted to get up a cone-shaped disher with removable scraper, and he so informed Olmstead; but he did not tell him how it could be done, and the work they did together failed to accomplish such result—that is, Geer's idea, whatever it was, resulted in failure. I do not see that Olmstead did anything underhanded, as he says, "I thought, if I completed it all right, I would do the right thing, take him in, and if I completed one he did that the pattern maker had, I would look for the same from him," and that he never refused to go on with the dipper Geer was having him work at. Olmstead also testifies, and I think truthfully:

"And as I told you before, he (Geer) said, if I could produce a good dipper, I think Mr. Conant would furnish the money, and Mr. Geer and I and all would have a hand in the matter."

This explains the sending of the completed work of Olmstead to Mr. Conant. It was only after Conant refused to furnish the money that Mr. Dorman was taken in by Olmstead, as he agreed to furnish the money.

It is claimed by the defendants that "Defendants' Exhibit, Geer Dish," which has the cone dish or receptacle, embodies the idea or invention of Geer, and that it has the toothed scraper hub (with scrapers attached), with an overhanging flange, and that this hub is mounted in the hub bearing of the bowl and operated by a hand lever, mounted on the handle, having a gear rack engageable with the teeth on the hub. In this structure of the "Geer disher" we have the cone dish or receptacle so formed at its apex as to furnish a bearing for the scraper and hub connected therewith, and this cone dish is mounted on the end of one-half the handle, which is divided into two parts hollowed out or recessed their whole length to receive the lever, spring, scraper hub, and gear rack. The scraper hub is just below the opening in the apex of the cone-shaped receptacle (as we hold the device with the mouth up), and there is a corresponding opening in the upper half of the handle, and is mounted in the other half of the handle furnished

with a bearing for the purpose. This scraper hub has a flange which prevents it from falling out through the cone-shaped receptacle when its teeth are engaged with the teeth of the gear rack on the end of the handle. This gear rack is formed of teeth on the side of a prolongation of the jointed lever, and works longitudinally with the handle, and not transversely thereto, as in the devices of Olmstead and Nielsen. The two halves of the handle are screwed together by screws holding all the parts in position. It is not difficult to assemble or disassemble; but it is heavy and somewhat cumbersome, and would be comparatively expensive.

In this structure, as it now exists, we have neither the structure of the Nielsen patent in question here, nor the structure of the Olmstead patent as a whole; but we do have the toothed scraper hub in part mounted in a bearing in the bowl, and which hub is provided with a flange overhanging the teeth thereon on the (so-called) inner side; and we do have a hand lever mounted on, or rather *in*, the handle, which lever has a gear rack (not of the same form as the others), engageable with the teeth on the hub on the *other* side of said flange. If Geer actually devised this structure, this toothed scraper hub with its flange and this gear rack, and had the idea of co-operation and engagement, and disclosed it to Olmstead, then Olmstead got his ideas (so far as the patentable conception is concerned) from Geer, and Geer was the inventor of all that is patentable in either Olmstead or Nielsen. But Mr. Olmstead, corroborated by several witnesses, denies that Geer had any such hub, etc., or combination, and denies that the structure was in any such form as now found when he worked on it, or when he turned over such parts as this had to Geer.

There was nothing new in toothed scraper hubs with hub bearings, with scrapers adjustably fixed thereon and connected with cone-shaped bowls, and engageable with and operated by a gear rack on the end of a hand lever mounted on the handle of the device; the toothed scraper hub being connected with the scraper, which had a bearing in the bowl, and which scraper was capable of being disconnected from its hub and was removable through the bowl, all the parts capable of being readily assembled and disassembled for cleansing purposes, or any other.

January 16, 1900, one Bach applied for a patent for "ice cream mold and dipper," which was granted April 9, 1901, No. 671,788. Bach has a cone-shaped dipper proper with an opening at the apex. The cone itself on its inner side forms a bearing for the rotatively mounted scraper thereon. This scraper is prolonged through the opening in the cone-shaped dish, and has, mounted thereon outside the apex of the receptacle, a toothed scraper hub, which hub is held in position by a nut. The handle proper is connected with this cone-shaped bowl at its apex. By removing the nut this toothed scraper hub is readily removed—in fact, will fall off—and then the scraper is removed through the bowl. The nut and bowl form bearings for this toothed scraper hub. To revolve the scraper a lever is attached to the handle of the disher or spoon by a screw on which the lever (forming a part of the handle) is pivoted. This lever has a gear rack engageable with

the teeth on this scraper hub. A spring is inserted between the handle proper and the lever, and by grasping in one hand the lever and handle and pressing them together the scraper is made to revolve. The nut on the prolongation of the scraper acts as a flange to prevent the hub from coming off and the scraper from falling out. Remove it, and scraper, toothed hub, and cone-shaped bowl are disassembled.

This structure, however, is not one where the scraper and scraper hub are integral, and which, on account of the flare of the scraper, must be removed, if removed at all, through the bowl. By enlarging the opening in the apex of the cone-shaped dish, this scraper hub would readily come out through the bowl; but it was means to prevent this when the disher was in use that was desired. The flange on the scraper hub occurred to some one, perhaps to both Geer and Olmstead, and it is sure that the idea of the reverse of this, or the flange on the end of the lever in connection with the gear rack occurred to some one. Adopt the flange on the hub, and the idea of the reverse construction would readily occur to any one. Given the one construction and there was no invention in producing the other. The lever carrying the gear rack was fixed to the handle and the handle was fixed to the bowl. It was only necessary to find some mechanical "contrivance" or structure which would retain the gear rack in place. I think it was Olmstead who first devised or invented means for doing this in such a combination. I have no doubt that Geer *desired* such means, but cannot find that he had any settled or well-considered idea of means, or that he devised such means. Undoubtedly he secured the services of Olmstead, hoping that he could and would find the means, and undoubtedly Olmstead did devise such means and for same he obtained his patent. He made the invention before Nielsen made his, if Nielsen made any, and the language of Olmstead's claim is not so narrow that a plainly equivalent construction does not infringe. If Nielsen is entitled to a patent at all, it must be on the ground that he was the first inventor of "the means" referred to.

It cannot be that valid patents can issue and be sustained for mere changes in form of construction or location of parts, or a portion of a part, without change in mode or principle of operation or result; for the mere transfer of a part of one element in a combination to another co-operating element by its side, the mode and principle of operation and result remaining precisely the same. I am not impressed with the argument or contention that Olmstead's invention is for one *species* of dipper, and Nielsen's for another species of the same genus as Olmstead's, and that each is patentable. In substance, aside from mere form, Olmstead and Nielsen are the same; the mode of operation, laws governing, and results obtained are the same—precisely the same. In both a projecting flange prevents the *scraper hub*, to which is attached the scraper, from falling out through the bowl of the dipper. In Olmstead this flange is on the hub, and hence the hub itself is obstructed in its outward movement when its flange meets the teeth on the engaged gear rack. In Nielsen the outward movement of the scraper hub is obstructed when its teeth meet the flange on the en-

gaged gear rack. In both cases the flange is the obstruction to the escape of the toothed hub. It is a matter of location merely.

This question of the limitation of claims by the language employed has been considered in hundreds of cases. It is not always easy to find a case in exact point. In *Wagner T. Co. v. Wycoff S. & B.*, 151 Fed. 585, 81 C. C. A. 129 (2d Circuit), the court said:

"Infringement is not avoided by changes in a patented machine which are nonessential, as by changing the positions of parts, or transferring a function from one part to another, without affecting the principle or mode of operation."

In *Benbow-Brammer Mfg. Co. v. Straus et al.* (C. C. A. 2d Circuit) 166 Fed. 114, 92 C. C. A. 98, affirming (C. C.) 158 Fed. 627, the claim called for sleeve on the *operating* shaft moving up and down to produce a certain result. The infringing device had no such sleeve, but the up and down movement was secured on the same principle and by equivalent means placed on the *driving* shaft and consisting of a grooved hub, which on this shaft accomplished the same result as the sleeve on the operating shaft. The changes there were a much further departure from the language of the claims than the change made here.

Alleged Champerty.

[2] Defendants on the final hearing presented a motion for leave to amend the answer and plead this defense of champerty. This cannot be permitted on the final hearing and after such delay. So soon as evidence was drawn out which tended to show champerty, if there be any such evidence, and this was done in October, 1910, if at all, it was incumbent on the defendants to move promptly and ask an amendment. To now delay the decision of the case and produce evidence on such an issue would be unfair and delay action. The motion should be denied on the ground of laches, if for no other reason. The motion to amend is therefore denied.

There will be a decree for the complainants, with costs.

STILLWELL v. McPHERSON, Highway Com'r.

(District Court, N. D. New York. August 23, 1913.)

1. PATENTS (§ 36*)—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

While commercial success is some evidence of utility and perhaps of invention which may turn the scale in doubtful cases, it does not of itself prove invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. § 36.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CORRUGATED METAL CULVERT.

The Watson patent, No. 559,642, for a corrugated sheet metal culvert, in view of the prior art, is void for lack of patentable invention. Also *held* not infringed conceding validity, construed and limited as it must be in view of such prior art.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by McClellan Stillwell, doing business under the firm name of the Economy Culvert Company, against Frank McPherson, Highway Commissioner of the Town of Ithaca, Tompkins County, N. Y. On final hearing. Decree for defendant.

See, also, 172 Fed. 151.

Wallace R. Lane, George Mankle, and Clarence J. Loftus, all of Chicago, Ill., for complainant.

Risley & Love, of Utica, N. Y., and Bond & Miller, of Canton, Ohio, for defendant.

RAY, District Judge. The single claim of United States letters patent No. 559,642, issued May 5, 1896, on application filed February 19, 1896, to James H. Watson, of Crawfordsville, Ind., reads as follows:

"A culvert constructed of sheet metal and comprising connected cylindrical sections provided with circumferential corrugations, extending to the extremities of the sections, each section terminating at one end in a flared and at the other end in a contracted portion of a corrugation, whereby the contracted extremity of one section is adapted to fit into the flared extremity of the adjoining section to interlock the terminal corrugations, and means, as bolts, engaging the overlapping extremities of the corrugations for securing the sections together, substantially as specified."

Resolved into specific elements, we have: (1) A culvert constructed of *sheet metal*, and comprising (2) *connected* cylindrical sections of sheet metal provided with *circumferential corrugations* which extend to the extremities of the sections, (3) each section *terminating* at one end *in a flared* and at the other end in a *contracted portion* of a corrugation (4) whereby the *contracted* extremity of one section is adapted to fit into the flared extremity of the adjoining section to interlock the terminal corrugations, and (5) *means*, as bolts, engaging the overlapping extremities of the corrugations for (6) securing the sections together. Leaving out the descriptive and explanatory parts of this claim and we have cylindrical sections of uniformly circumferentially corrugated sheet metal, the end of the one section enlarged or flared and that of the adjoining one contracted so as to fit into the flared end of its neighbor, and then means, as bolts or rivets, inserted at the joined ends to hold the two sections together. As the claim says "means," the two sections of corrugated pipe may be wired together. That is, in fact, we have two elements only: (1) The specified sections as to material and form; and (2) the "means," bolts, rivets, or wires for holding the two sections together. It requires two sections at least to come within the claim. Any one may use circumferentially corrugated sheet metal made into a cylinder for a culvert or any other purpose. There is no invention in such a structure; nothing new or novel. But when you desire to build a long culvert and it is impracticable to transport or even manufacture sheet iron of the required length, or when you desire ease or convenience of transportation, then, in either case, it is necessary to have joints (that is, one section capable of being united to another); and, to have a reasonably tight joint and to prevent the separation of the one section from the next, it was deemed wise to have the end of the one fit *into* the end of the other without diminishing the capacity at that point,

which is done by preserving the enlargement of the corrugation at the end of the one section and leaving off about one-half from the end of the next section, and the result is, where the one end of the one is inserted in the end of the other, they fit together, engage, and the continuity and uniformity of the corrugations is preserved or maintained, and by making suitable apertures, where these ends fit together, and inserting rivets or bolts, the two are held together under all the ordinary strains to which a culvert is subjected. No claim can be made by Watson of the discovery of the fact that corrugated sheet iron or corrugated sheet iron pipe is stronger than the ordinary flat or smooth sheet iron or sheet iron pipe of the same thickness, as that was well known.

Watson's declared purpose was to provide a substitute "to take the place of vitrified tile now in common use for these purposes," viz., culverts and well curbing. The superiority of this, or of any sheet metal pipe, in a culvert is: (1) Less weight, ease of transportation, and reduction of the cost of such transportation; discarding of cement at the joints; reduction of loss by breakage; reduction of the cost of preparing the bed for the culvert and, by using corrugated pipe, lessened liability to displacement by heavy storms, rains, and washouts, and increased strength in the ability to sustain a greater weight, such as a loaded wagon.

Prior Art.

Culverts of wood, metal, brick, stone, and concrete for conveying water under roadways, canals, etc., are very old. In 1871 M. G. Freeman, of Illinois, took out United States letters patent No. 114,662, for "improvement in iron culverts." It was of iron made in sections with grooves bolted together, and says the patent:

"The sections *A A* may be made of any size or weight and any form desired, either plain or smooth, or ribbed on one side, as shown in the drawing; or they may be ribbed on both sides, the bulge on one side against and opposite the depression on the other, said ribs giving greater strength."

This, as shown in Fig. 2 of that patent, made a corrugated tube forming ribs for giving greater strength. And says the patent:

"When used for sewers the iron can be made very thin and at less cost than either brick or stone, and as durable as either."

It cannot be doubted that Freeman knew that his iron pipe in sections was less liable to breakage than vitrified tile pipe and could be transported in shorter sections and then bolted together. The manufacture and use of cylindrical corrugated metallic tubes for steam boilers and other uses was old in 1887, when Samson Fox took out United States letters patent No. 365,466, for "mode of making corrugated tubing," and in which he claimed:

"The invention herein described of forming substantially cylindrical corrugated metallic tubes," etc.

And in his specifications he stated:

"I am aware that it is *not new* to form a circumferentially corrugated cylindrical tube or flue in which a flat sheet is corrugated; the edges are then brought together and riveted or otherwise attached."

It was well known in 1887, and when Fox took this patent, that such corrugations added strength to the tube. He says:

"My invention consists in the formation of substantially cylindrical tubes or flues, specially applicable to steam boilers, though not exclusively so, in which, by the same thickness of the metal, a greater and more uniform strength against crushing or destructive strain is obtained than when the same thickness of metal is formed into a true cylinder. My invention consists in taking a sheet of steel to be formed into the tube, rolling it into a substantially cylindrical form with overlapping edges, welding the edges together in a uniform manner, and then by a suitable corrugating-machine corrugating the cylinder circumferentially into a series of uniform corrugations."

Fig. 3 plainly shows the corrugations but he did not deal with the subject of attaching one section to another. But anterior to this, and in 1872, James S. Pierson, of New York, had taken out United States letters patent No. 124,624, for "improvement in water and sewer pipes," in which he claimed:

"A pipe composed of an annularly-corrugated metal body, *A*, a lining, *B*, of hydraulic cement, and an outer coating, *C*, of asphalt or other water-proof material, for protecting the metal body against corrosion, substantially as specified."

These were for use aboveground and underground and the corrugations were to give added strength. He says:

"The corrugations are annularly arranged and, in addition to imparting strength and relieving the rivets which secure the seam of strain, serve to hold the lining of hydraulic cement to its place. A pipe thus made is at once cheap, light, and capable of sustaining a very heavy pressure."

The cement lining when used was to protect against gases and keep the water pure, not to add strength. He dealt with the joining of one section to another, and says:

"The one end of the pipe is left bare of cement on its interior to the depth of one of the body's corrugations, or thereabout, for the purpose of receiving within such female socket, or exposed portion of the body, the flush or cemented end of an adjacent pipe section," etc.

He inserted the end of one into the end of the other and united these with cement, not bolts or rivets.

In the patent to Hugh W. Harry, No. 400,566, dated April 2, 1889, for tank, we have (quoting therefrom):

"The sides of the tank are composed of galvanized iron formed in plates, which are curved and corrugated in the direction of their curvature, and are arranged with their ends and side edges overlapping, and with their vertical joints arranged in the breakjoint manner, as shown. These plates *D* have their ends secured together by rivets *E*, so the two plates, when properly secured together, will form a complete circle, and the series of circles thus formed are secured together vertically, one above the other, until the tank has been built to the desired height. The lower edge of the bottom circular section thus provided is secured to the circular edge of the bottom of the tank by nails or tacks or other like fastenings, as shown at *a*; said nails or fastenings penetrating into the wooden bottom, so as to aid in securing the latter in place. The extreme lower edge of the bottom section of the tank is then bent under the ends or edges of the boards *A* constituting the main wooden bottom, which is thereby braced and strengthened, as shown. After the several sections have been riveted together I apply solder to all the joints, so as to make the tank water tight. It will be seen at once that I have pro-

vided a very simple tank, which can be built at a slight cost. Being constructed of corrugated metal, it possesses great strength and durability, and, being made in sections in the manner described, it can be built to any desired height, so as to have any desired capacity. The joints are all water tight, so as to prevent leakage, and the ends and edges of the sections all overlap, so as to effectually resist the strain applied thereto. The bottom is especially constructed to support the weight of the water and is prevented from becoming water soaked by the metallic plate on the upper side thereof."

The corrugated cylindrical tank may be constructed of any height, or, on its side, of any length, and the "corrugated metal culvert" of the patent in suit is a substantial duplication of that structure. Turn one of those tanks of suitable diameter for a culvert on its side, remove the bottom of course, and use it as a culvert and we have complete anticipation of the structure of the Watson patent. It is immaterial whether the cylindrical sections of corrugated metal fitting into each other, as shown here, so as to form continuity and uniformity of corrugations and double metal at the joints, caused by the overlapping, are riveted or bolted, either furnish the necessary means for uniting section to section.

In the prior art we have a variety of expedients for attaching sections of pipe, stove pipe, sewer pipe, water pipe, etc. See Allen patent, No. 186,290, of January, 1877; Dennis patent, No. 246,092, of August, 1881; and patent to Camp, No. 246,597, of September, 1881, where we find the following:

"The nature and object of my improvement are to provide a novel joint for connecting sections of metallic pipe that are to be afterward coated and lined, which, while making a close and tight joint, strengthens the united coated and lined pipe against peripheral pressure externally and internally and prevents the joints of the sections being withdrawn or spreading longitudinally or otherwise. * * * The sections of the pipe are first made in straight tubular form, and the ends intended to be joined are slipped flat one over the other, as shown in detail, Fig. 5. They are then connected with a few rivets, and the joined pipe is then carried to a beading machine of peculiar construction. (This machine is not herein described in detail, as it is embodied in another specification drawn up preparatory to making application for letters patent therefor; it being obvious that none of the ordinary beading machines can be used for beading my improved pipe, in consequence of the projecting rivets *a* and flanges *a'* and *a*².) The overlapping joints are then pressed out, forming a bead, *A*. This bead does not take up all of the overlapping metal but leaves beyond the relief-beaded portion flat flanges *a'* *a*²; the flange *a'* on section *B* surrounding and lying flat externally upon section *C*; the other flange, *a*², surrounding and lying flat internally against the inner face of section *B*, and so on with each succeeding section. My improved joint requires only a very small number of rivets. The pipe is then lined and coated with asphaltum, cement, or any similar composition. Fig. 2 is a sectional view of such finished pipe, wherein *f* is the metal pipe, and *b c* represent respectively the lining and coating. Besides the advantage of my improvement as a device for joining sectional sheet metal pipe, the beaded rims, with their internal and external flanges, form strengthening ribs of overlapping metal that reinforce the pipe and protect it from circumferential pressure either externally or internally."

In the Dennis patent the sections of pipes are transported before being joined. In Allen a bead is formed on one section near the end and a flare or outward bead is formed on the other, and when the one is inserted in the other up to the bead a tight joint is formed. Add rivets or bolts and we have the structure of the Watson patent.

In view of this prior art I do not see how it can be held that the Watson patent discloses patentable invention. It was not new with Watson to use such pipes of metal or iron in culverts or to carry water and sewage underground as we have seen.

Commercial Success, etc.

[1] It appears from the evidence that, after traveling a hard road and overcoming doubts as to utility and durability, this culvert pipe has met with considerable commercial success. Persistent effort and judicious and extensive advertising will give commercial success to many things, some meritorious and some not, but not all improvement in any line is invention; and while commercial success is some evidence of utility, and it may be of invention and has turned the scale in doubtful cases, it does not of itself prove invention. *McClain v. Ortmyer*, 141 U. S. 419, 428, 12 Sup. Ct. 76, 35 L. Ed. 800; *Lovell Mfg. Co. v. Cary et al.*, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 224, 13 Sup. Ct. 850, 37 L. Ed. 707.

I do not doubt and can well see that especially in localities where there is soft ground for considerable depths, making it difficult and expensive to get a suitable and permanent foundation for a brick, a concrete, or stone culvert, or where brick and stone are not easily found, or are expensive, this metal pipe would find a ready and an extensive sale. It was not invention to conceive the idea that such pipe would constitute an efficient and suitable culvert, and, if so, Watson was far behind in making the discovery. Doubtless users and would-be users at first doubted the strength of such pipe and its ability to sustain heavy loads passing above it. But it was not invention to discover its strength, and, if it were, others, as we have seen, had long before discovered the greatly increased strength given sheet iron pipe by adding these corrugations.

It is evident at a glance when we look at Fig. 2 of the drawings of this Watson patent in suit that the mode of uniting one section to the other is within the sphere and skill of the ordinary mechanic and does not involve mental conception amounting to invention. In the state of the art no exercise of the inventive faculties was involved. Having in view the prior art, as the Allen patent, No. 186,290, of 1877, and we observe that by cutting our corrugation in the center we have an enlarged portion, or the one half of a corrugation forming a flaring end of one section of the pipe. Cut the end of the adjoining section to be inserted in the valley between corrugations and you have a portion or end of your second section (the one to be inserted) which readily enters or fits snugly into the flaring end of the other section until the center of its corrugation reaches the elevated edge of the other section. The end of the one is inserted in the end of the other; the continuity of corrugations is preserved; you have a tight joint and at this point a double wall or thickness. Add rivets or bolts and the thing is done. It is not necessary to cut the sections or the metal sheets of which made. In making the sections the one may be made to terminate at the point of greatest diameter, while the end of

the section to be inserted is made to terminate at the point of least diameter.

In my judgment the time has not come, as much as we may desire to encourage the arts and sciences and protect the true inventor who has done so much for the growth and advancement of our country, when every demonstration of "Yankee ingenuity" or mere ingenuity of "any race or color" is entitled to be ranked and dignified as "invention." If sections of wood and metal pipe had never been united and riveted together before, the open end of the one section a little enlarged and the end of the other a trifle diminished to the end that the one should receive the other, we might properly say to the one who thought out how such union could be made:

"You are an inventor; your conception ranks as invention."

But here such structures and unions were common and well known as were rivets and bolts for holding things in place. What was done here by Watson was the obvious thing to do. Iron and steel structures and sheet metal are everywhere taking the place of wood and of brick and mortar even. Hollow iron pipes have been used to carry water for more than a century both aboveground and underground. So of lead pipes. Was it invention to bend and rivet corrugated steel or sheet metal into a circular form and use it for this purpose? Or was it invention to connect one section of such pipe with another when formed in the manner described and bolt or rivet them together to prevent their pulling apart on strain or pressure? I think not. And clearly there was no invention in the selection of sheet iron or steel for culverts or conduits for water under ground or under roadways. While the alleged popularity of this Watson culvert may be due to its greater usefulness, small cost, ease of transportation, and the readiness with which it may be put in place for use, or to the fact that it came on the market when and in localities where a substitute for a vitrified pipe or for brick or stone culverts was greatly desired and even required, such popularity and demand certainly, in view of the prior art, is not due to any patentable feature in its construction.

The primitive and old-fashioned mode of conveying water under roadways, where stone was not abundant or the soil was soft to considerable depths, was to find a hollow log in the woods, clean out the rotted portion from the interior, place it in position, and cover with dirt. If two or more sections were required, the end of one section was uniformly chamfered off so as to lessen its diameter and the end of the next section was rimmed out with ax, adz, or chisel, and then the chamfered end of the one section was inserted in the rimmed-out end of the next and a few nails held them together, or what made them more secure were a few hardwood pegs inserted in auger holes bored at the proper places. Such culverts in the old sections of our country have been supplanted largely by others, as hollow logs are scarce; there being but little timbered territory comparatively. So far as I am informed, no patent was granted for this efficient construction of which the Watson patent is but a substantial duplication; corrugated sheet metal having been substituted for wood.

Where stone was plentiful a trench was dug, stone walls erected on each side thereof and maybe flat stone were laid in the bottom, and these walls supported sills on which were placed flat stone, or plank, or hewn timber, and sometimes poles. For conveying water under roadways, plank nailed together to form an opening were used also. The old-fashioned so-called "pump logs" to convey water and extending sometimes for miles in hard ground and soft ground and through swamps and under, in, and across creeks and rivulets were in common use and in some sections of the country are to-day. Who has not seen two 2x4's nailed together bored through from end to end; the end of one section chamfered off to diminish its size and the end of the next section rimmed out so the end of the one could be inserted in the end of the other and then nails, bolts, or pins inserted to prevent their separation? Or who has not seen the small logs cut from the forest and bored through and then chamfered and rimmed respectively and united in the same way? Was it invention to select and substitute corrugated iron tubes united in the same old way? The witnesses for the complainant contend that there is no analogy whatever between sheet metal pipes, smooth or corrugated, commonly known as stove pipes made in sections and united as indicated and used to conduct or convey smoke and gases above ground, and sheet metal pipes of the same size and weight and united in the same way, but used as a culvert to convey water underground. They contend that the pipe *made to be used* as a stove pipe would always be a stove pipe and the one *made to be used* as a culvert would always be a culvert regardless of the use to which put. In other words, the *intention* of the maker would determine what it was when put in service, regardless of the use to which put. The witness said that, if made to be used as a stove pipe and used as a culvert, it would be "a stove pipe out of place," not a culvert. In short, the contention is that one who should conceive the idea that a bayonet would make a good weed digger would be entitled to a patent if it proved a popular success, and that it would be no answer to say that bayonets for use on a gun in the armies and used in fighting battles have been in common use for over 200 years. Is this a case where the transposition of a steel pike from army to farm, a far more peaceful and useful sphere of action, for use as an agricultural implement would entitle the one who conceived the idea to a patent? The first soldier whose common sense told him to use his bayonet as a spade to dig a hole and throw up a breastwork, in short dig a small rifle pit, had a conception and his idea became immensely popular and was taken up and made of practical use by many thousands when in the presence of or apprehension of the appearance of the enemy, but was he entitled to a patent because of its utility and popularity and extensive use in the army for that purpose in the absence of spades? True, the bayonet remained a bayonet, but the soldier was not entitled to a patent because he called it his spade and used it as such. Making and connecting sections of steel or iron smoke pipe is in the same art with making and connecting sections of steel or iron water or sewer pipe. Both should be "liquid tight,"

strong and durable, and the sections should be securely fastened together, forming nonleakable joints. Especially is this true in the case of smokepipes, stove or furnace, as many householders and insurance companies have found to their cost. The Allen patent, No. 186,290, of January, 1877, is a good illustration of the prior art in uniting two cylindrical sections of pipe together so as to form a strong and a nonleakable joint and at the same time not contract the aperture for the smoke and gases. Wherein and how much does it differ from the pipe of the Watson patent? True, Allen did not rivet or bolt his sections together, as he did not regard it necessary, but any one not a mechanic can see that rivets or bolts could be easily added and that they would give greater security against separation. Allen says:

"The object of my invention is to overcome the labor and difficulty of joining together joints of stovepipe. The figure represents the joints *A* and *B* of pipe, which are of the usual length, size, and material; but instead of the ends being left straight, these have one end, *A*, left straight, and a beaded crease or rim, 3, turned about two inches from the end, and about one-fourth of an inch high, and the other end of joint, 4, the edge is beaded or turned out, forming a flaring mouth to cover about one-half of the bead or rim 3; and when the joints *A* and *B* are pressed together the bead 4 on joint *A* forces itself partly over bead or rim 3 on joint *B*, which forms a strong joint, and prevents the smoke from oozing out. Besides, the joints are quickly fitted together, as the two sharp edges do not come in contact, as they do in other kinds of pipe. Besides, my pipe is made of the same material as other pipe, and the same amount, and requires no extra skill, time, or tools to make it, and hence can be made for the same money, and is much better in every way."

Allen's beaded crease or rim 3 corresponds with the corrugation in Watson where the small end is to be inserted, and the beaded or turned out edge of the end of the other section forming a flaring mouth corresponds with the flaring mouth of Watson's patent formed by the ending of the corrugation at its greatest diameter. Attention is also directed to the Morrison patent, No. 99,459, issued February 1, 1870, "improvement in stovepipe joints." Morrison corrugated each end of his sections and then slipped or sprung the one within the other. He says:

"It will be noticed that the contact is over the whole swell of the bead. Furthermore, the bracing and stiffening form of the bead effectually prevents warping of the ends of the rings, which ordinarily occurs by the application of heat on sheet metal, and which, in the present instance, would destroy the circle of the joint, and therefore prevent the easy turning of the parts when it is desired to change the adjustment. This form of the seam or joint is far superior to that in which a single flange of one part rests in an overlapping sharp-edged bead of the other, in which case any warping of the seam or irregularity in the thin flange would interfere with the turning of the parts."

It is evident from this, for he (Morrison) describes it, that the Watson mode of connecting two sections of pipe was old. True, he makes no mention of bolts or rivets but does provide other "means" for firmly holding the sections together. Morrison also contemplated the use of his invention in culvert or other water pipes, for he says:

"This is particularly applicable in water pipes or for other uses where strong pipe is required."

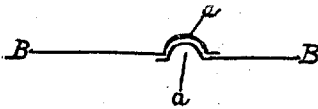
Indeed, it is obvious that a sheet metal pipe which is to carry smoke and flame and accompanying gases will also convey water underground or aboveground, and that when put under roadways it is only necessary to see to it that the pipe is strong enough to sustain the weight and pressure, both direct and longitudinal. The longitudinal pressure on a pipe under a roadway, if deeply covered, is negligible but considerable if exposed to direct blows from the passing vehicles. No one has the hardihood to contend that these culvert sections of corrugated sheet iron are to be loosely laid in the ditch crossing the roadway and directly driven on and over. So exposed they would soon be battered out of shape, cut through, and destroyed. They are to be laid in the soil which is to be firmly packed about and on them. Under ordinary conditions they are more durable than wood, although a hollow log culvert of hemlock or pine, if kept constantly wet and not exposed to direct blows or battering, will last a century. It is, of course, desirable to substitute these iron culverts in many places as they can be made of any size desired. In time rust will destroy them. But it was not patentable invention to know what has been known and taught for a century, at least, that iron can be wrought into almost any shape and that under ordinary changeable weather conditions it is, inch for inch, stronger and more durable than wood. Brick and stone culverts, laid in cement and on a firm and enduring foundation, are far better and more durable, and this is undoubtedly true of concrete if properly mixed of first-class materials; but such culverts are, of course, more expensive. Or, as said by Freeman in his patent No. 114,662, issued May 9, 1871, for "improvement in iron culverts":

"* * * The sections *A A* may be made of *any* size or weight and in any form desired, either plain or smooth, or ribbed (in effect corrugated) on one side as shown in the drawing, or they may be ribbed on both sides (in effect corrugated), the bulge on one side against and opposite the depression on the other; said ribs giving greater strength. * * * When used for sewers the iron can be made very thin and at a less cost than either brick or stone, and as durable as either."

But all this is of little weight in this case as Watson was far in the rear, some 25 years, in discovering the increased strength of corrugated metal and the availability of sheet iron as a conveyor of water or for use as a culvert. Used on buildings (see Austin patent, No. 290,659, of 1883) it was only necessary to increase the size and utilize it as a culvert, using heavier metal. He is presumed to have known the prior art fully, and on this assumption his conception was, if anything, that the corrugations could be availed of to make the uniting of sections easy. But he cannot be credited with this even, for Morrison, in 1870, said:

"The seams or joints between the parts (sections), to allow the free reverse adjustment of the same, are formed as follows: The oblique ends of the arms of the elbow, and also the rings or sections (of pipe), are run through a machine which produces a wide horizontal bead, or *corrugation a*, all around. The end of one ring is then slipped or sprung into the next, and so on; the bead (corrugation) of the one part striking and resting closely within that of the other part, as clearly shown in Fig. 3."

Fig. 3 is shown thus:



B B are the sections, and *a a* are the corrugations or beads. And I may say in passing that this mode of uniting the sections, rivets added, is the one now adopted by defendant in practice, thereby forming a better and more permanent union and a better and stronger joint.

Infringement.

If there is any invention in the Watson patent, it lies in his mode of joining the sections. His claim is quite specific, and he says of his circumferential corrugations:

"Provided with circumferential corrugations extending to the extremities of the sections."

And then:

"Each section terminating *at one end* in a contracted portion of a corrugation."

And the purpose is stated thus:

"Whereby the *contracted extremity* of one section is adapted to fit into the *flared extremity* of the adjoining section to interlock the terminal corrugations."

This language may have been used to evade Morrison. Watson is limited not only by the prior art but by this specific language. He is not a pioneer in this art as we have seen and is limited to *just what he claimed* with a reasonable but limited range of equivalents. But complainant is not entitled to a construction of this Watson claim, which makes the defendant an infringer, for the reason he uses the attaching or interlocking means of the prior art. The defendant has a combination, every element of which was present in the prior art, and they are used in the old way or manner if not for the same purposes. The defendant does not join his sections in the manner described and claimed in the Watson patent, but on the other hand uses the Morrison method with a slight variation which he had the right to do without infringing Watson, even if it could be held that the Watson patent is valid, which I cannot do. Defendant has no contracted extremity at either end of either of his sections adapted to fit into the flared extremity of the adjoining section. In defendant's culvert the sections are joined by the overlapping of the whole of the terminal corrugation, a complete corrugation; one whole or complete corrugation at the end of one section being inserted within the complete or whole corrugation of the next or adjoining section. In a crowded art, where there is little room for improvement, we sometimes do find improvements which are new and useful and disclose conception of quite a high order and which, with new means or a new and novel arrangement and adaptation of old and well-known means, disclose invention or what we sometimes term "potentable invention," but this is not one of those cases. All there is of this Watson patent, in view of the prior art, is the application of corrugated sheet metal pipe of

suitable sizes and lengths to use as culverts for conveying water under roadways, etc.; and, while the idea may have been new and novel with Watson it was neither new nor novel in the art. Certain decrees entered by consent of parties and adjudging the validity of the patent are before me. "Consent decrees" do not usually enlighten the court. These are not accompanied by any opinion of the court granting them, and it is well known that alleged infringers, who are mere users, are sometimes sued, who *buy* their peace by *consenting* to a decree for an injunction without costs and are happy to be rid of the annoyance. It is also said nothing was cited against this Watson claim in the Patent Office. This shows a want of care and research there but not patentable invention. This is not the case of "a happy thought" patentable, for it was directly suggested by what had preceded it in the art to which it belongs and was in fact fairly and logically deducible from prior constructions and uses.

[2] It is therefore held that this Watson patent in suit, in view of the prior art, is void for want of patentable invention, and that conceding patentability, construed and limited as it must be in view of such prior art, the defendant does not infringe.

There will be a decree dismissing the bill, with costs.

BECKWITH v. MALLEABLE IRON RANGE CO.

(District Court, E. D. Wisconsin. August 7, 1913. Supplemental Opinion, August 27, 1913.)

1. ACCOUNT (§ 20*)—ACCOUNTING BEFORE MASTER—PROCEDURE.

The purpose of equity rule 79 (new rule 63 [198 Fed. xxxvii, 115 C. C. A. xxxvii]), providing that all persons accounting before a master shall bring in their respective accounts in the form of debtor and creditor, and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party as the master shall direct, is to limit the trial before the master to disputed items.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 9, 40, 94, 95, 97-99; Dec. Dig. § 20.*]

2. PATENTS (§ 322*)—ACCOUNTING BY INFRINGER—PROCEDURE BEFORE MASTER.

Under such rule, in an accounting in an infringement suit, the proper practice requires the accounting party at the outset merely to file such account, in debtor and creditor form, as, in the light of the principles and express directions of the decree, will exhibit the matters which are the subject of the accounting, namely, on the one hand the sums chargeable, the manufacture and sales, the amounts received and the like, all in such detail as would be required in an account thereof for any other purpose; and, on the other hand, in detail the items of credit or offset, such as cost of material, manufacturing cost and the like, to the end that the statement as a whole will be an account showing gains and profits and such as will furnish a basis for further proceeding in case the adversary is not satisfied therewith. In advance of the bringing in of such account the master cannot, *ex parte*, call upon the accounting party to embody in such account matters of evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590-595; Dec. Dig. § 322.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by Arthur K. Beckwith against the Malleable Iron Range Company. On motion by defendant to strike certain specifications from master's summons. Motion granted.

See, also, 203 Fed. 45.

The complainant was awarded a decree for infringement, pursuant to which the cause was referred to a master to take an account of the number of infringing devices made, sold, and used by, also the gains, profits, and advantages received by or accruing to, the defendant; also the damages suffered by the infringement. The matter being thus before the master, a summons or subpoena was issued to the defendant requiring it to appear; to render a sworn statement of account, in writing, of the number of infringing devices made, sold, or used, the details of sales, and the gains and profits made thereon; also requiring specification in such account these further items:

"First. The whole number of ranges made by you with reservoirs described in claim 11 of the patent to complainant, No. 787,425, and referred to in said decretal order.

"Second. That you specify, giving the names and addresses of the persons purchasing said infringing reservoirs, also the date of the purchase, the number purchased, and the size and complete description of the range with reservoir attached so purchased.

"Third. That you indicate, for the period of your infringement of said patent, the selling price of each of said ranges and also of each of said reservoirs, together with the other elements of claim 11 of said patent, and the discounts, freights, and rebates or credits of any description allowed to the purchaser and also the net amount of money actually received by you for: (a) The range; (b) the reservoir.

"Fourth. That during the period of your said infringement you indicate and itemize the manufacturer's cost of the range, itemize the cost for labor and cost for material, and also for the same period that you itemize the manufacturer's cost of the reservoirs, the contact plates, and all attachments used in connection therewith, itemizing the cost for material and the cost for labor.

"Fifth. That you indicate the cost and expense (for the period of said infringement) of selling said ranges with infringing reservoirs attached down to the time you ceased to infringe.

"Sixth. That you indicate the entire profits derived by you from each sale of said ranges with said infringing reservoirs attached, as provided in said decree.

"Seventh. That you indicate the entire profits derived from the sale of ranges with reservoirs attached on account of the utilization of the features contained in the letters patent referred to in the decree in this case.

"Eighth. Also specify the gains and savings made by you during the period mentioned in said decree, by the use of said infringing reservoir over the style formerly used by you.

"Ninth. Also specify the price at which you sold your ranges without reservoirs; also your ranges with reservoirs; and also the actual cost to you of said ranges without reservoir and the actual cost to you of said ranges with said reservoir during the infringing period referred to in said decree.

"Tenth. That you have with you in court all the books and vouchers in your possession on which the said data were originally entered, together with all books and vouchers in your possession which show the cost of labor and materials used in making said infringing reservoirs, especially all daybooks, journals, ledger, order books, blotters, and cashbooks used by you during said infringing period."

Upon the return day the defendant moved to quash the master's summons and refused to comply therewith or to furnish the sworn statement required thereby, excepting as to the tenth paragraph respecting the production of the books and papers. The master overruled the motion. An adjournment was taken, and upon the adjourned day defendant produced a sworn statement, and also its books and records. Such statement showed the number of in-

fringing devices sold but did not contain the other information called for by the summons. The master adhered to his ruling, and the matter was thereupon certified to the court for its directions. On March 7, 1912, Judge Sanborn, presiding therein, rendered a decision quashing the master's summons and directing the accounting to proceed. The judge held, in effect, that equity rule No. 79 (new rule No. 63 [198 Fed. xxxvii, 115 C. C. A. xxxviii]) was not applicable to an accounting in a patent infringement suit. Thereupon the complainant made an application to the Circuit Court of Appeals for a writ of mandamus compelling this court to vacate its order quashing the master's summons, and such writ was awarded; the court ruling, in substance, that equity rule No. 79 was applicable to the situation, and that the accounting proceed in accordance with such rule. *Re Beckwith*, 201 Fed. 519, 119 C. C. A. 614; *Re Beckwith* (C. C. A.) 203 Fed. 45.

The mandate having been complied with, and the matter being about to be noticed for further proceeding before the master, the defendant has now made application to strike from the master's summons the requirements contained in all of the items excepting the first, eighth, and tenth.

Harry C. Howard and Fred L. Chappell, both of Kalamazoo, Mich., for complainant.

A. L. Morsell, of Milwaukee, Wis., and Thos. A. Banning, of Chicago, Ill., for defendant.

GEIGER, District Judge (after stating the facts as above). [1] The Court of Appeals, in disposing of the matter which was presented to it, and in ruling that the situation was covered by equity rule No. 63, observed that, the status of an infringer of a patent being recognized as that of a trustee *ex malificio*, the rules respecting the burden of proof as announced in *Westinghouse Co. v. Wagner Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, and *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, are not inconsistent with the applicability of such equity rule, and concludes that "it cannot be open to question that patent accountings are within the general provision of equity respecting the remedies of accounting, and that equity rule No. 79 (new rule No. 63) is both applicable thereto and mandatory in its requirements." *Re Beckwith* (C. C. A.) 203 Fed. 45.

Equity rule No. 63, thus held to be controlling, reads as follows:

"All persons accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition as the master shall direct."

It has been suggested that, intermediate the commencement and termination of the proceedings before the master, the court ought not to give directions respecting the course of the procedure. Ordinarily this is true, but, in view of the history of the case and the importance of the question as one of practice, I have concluded to entertain the application and determine it as seems right and consonant with the remedy of accounting as the same is to be followed under the rule.

What, then, is the correct practice to be pursued before a master under the rule in question, taken in connection with the accompanying

rule No: 62 (198 Fed. xxxvi, 115 C. C. A. xxxvi), relative to the powers of the master? This latter rule reads as follows:

"The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference, and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto, and also to examine on oath, viva voce, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress or otherwise, as here provided, and also to direct the mode in which the matters requiring evidence shall be proved before him, and generally to do all other acts and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties."

It may be observed that rule 63, formerly rule 79, is identical in language with the sixty-first rule of the English chancery practice which was in existence in 1842, when the equity rules which were in force in this country prior to the adoption of the recent new rules were adopted. The English rules, or "new orders," as they were called, were adopted in 1828 and worked many changes in the then English chancery practice, not the least of which was respecting the taking of accounts before masters. It had been the custom to require each and every item in the accounting to be proven under proceedings involving tedious interrogation and examination of items of account, whether admitted or disputed. The change wrought by the new rule is commented upon by Mr. Smith in his work on Chancery Practice, vol. 2, p. 114, referred to by the Supreme Court of the United States in *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105, as "the most authoritative work on English Chancery Practice in use in March, 1842, when our equity rules were adopted." The author says:

"The 61 N. O. (new orders) directs all parties accounting before the master to bring in their accounts in the form of debtor and creditor. This account is prepared as an affidavit; the body of the affidavit containing a verification of the accuracy of the schedules, in which are contained the details of the account. This affidavit is a substitution for an examination, which was the manner of accounting before the new orders. By the alteration, interrogatories and the certificates allowing them are saved, together with the excess of expense of an examination beyond that incurred in preparing an affidavit. If the party does not bring in the account within the time fixed, he is proceeded against in the same manner as a party not putting in his examination.

"When the account is brought in, if any of the parties are dissatisfied with it, they are at liberty to examine the accounting party upon interrogatories, or as the master shall direct. 61 N. O. The manner of exhibiting these interrogatories will be explained in treating on that subject. In disputed accounts, this examination becomes so much of course that I believe it is found, in such cases, that it is cheapest and best to exhibit interrogatories in the first instance.

"The debtor and creditor account when sworn to is left in the master's office, and a warrant on leaving the same is taken out and served on the clerks in court of the opposite parties, who take copies of the same. As the debtor and creditor account, whether exhibited, annexed, or scheduled to the affidavit, is sworn to, the master cannot proceed upon that document, as it would be improper for him to alter or vary it."

It therefore seems that one of the purposes of the new English rule was to eliminate the evils of the former practice and to furnish a definite basis for the proceedings before the master. That is, the rule is framed upon the theory that at the outset the accounting party will, obediently to the decree, bring in a statement of account embodying upon the one side the items with which he is properly chargeable and upon the other the items claimed to be allowed, just as any one, conceding that a relation of debtor and creditor exists between himself and another, will bring in a statement of what he conceives to be items of debit and items of credit. In this way the opportunity is at once afforded of ascertaining the real issues between the parties before the master upon the accounting; it is the means of limiting the trial before the master to *disputed* items. That this is the purpose of the rule is clearly indicated by its language, conferring upon the adversary the right to proceed as therein directed, in case he is *not satisfied* with the account.

Counsel for complainant has called attention to the language of Judge Seaman in the opinion filed upon the mandamus application:

"The purpose 'of requiring the accounting party to bring in his account in the form of debtor and creditor is to compel discovery from him as to the details of the transaction under investigation.' 2 Bates on Fed. Eq. Prac. 759. See, also, 1 Pomeroy, Eq. Jur. 223-239. So ascertainment of the profits attributable to the infringement requires such discovery, not alone of the gross sales, but of all items of cost entering into the production and sale, which are presumptively within the knowledge or means of information possessed by the infringing manufacturer. In reference to these items, it is rightly averred in the defendant's answer that they involve 'many factors and considerations which do not enter into ordinary accountings'; that to ascertain the profits 'many deductions are allowed to the defendant' for various expenses, including 'proportional overhead expenses' entering into the production and sale. Nevertheless they are plainly capable of specification in the form of debits and credits for the purposes of the accounting, and the complications mentioned, together with the fact that the items are within the exclusive knowledge and possession of the defendant, furnish ample ground for such specification in conformity with the equity rule. It cannot reasonably be assumed that these items entering into the cost appear in detail in the ordinary books of account; but, in whatever form the information is preserved or may be obtained by the manufacturer, we believe it to be both the purpose of the rule and in accord with equity to require the defendant, at the outset of the accounting, to make the needful investigation and state the items in detail, having effect, as well, of his admissions of fact and of statements under oath, and thus perform his just part in narrowing the issue upon the accounting to items and matters which are in actual controversy between the parties." Re Beckwith (C. C. A.) 203 Fed. 48.

This language is not in any respect at variance with the contention of the defendant. On the contrary, it points out clearly the analogous situation found in cases of this character and those of ordinary accountings. The purpose of the rule, as stated, "to require the defendant at the outset of the accounting to make the needful investigation and state the items in detail, having effect, as well, of his admissions of fact and of statements under oath," is the same purpose which has been universally recognized in requiring an ordinary trustee, an administrator, or an executor to return under oath an account, giving on the one side the items of property received and on the other

side, in detail, items claimed by him as justly to be allowed as disbursements in the execution of his trust. The purpose is, as stated, to require the accounting party thus to "perform his just part in narrowing the issue upon the accounting to items and matters which are in actual controversy between the parties."

[2] We are thus brought to the question whether, as matter of correct practice, the master should, ex parte, and in advance, require the accounting party to furnish, in detail, evidence such as statements called for in the items of the master's summons in the present case, no matter what may develop upon the actual hearing. In my judgment the proper practice under the rule requires the accounting party in a patent infringing accounting at the outset merely to file such account in debtor and creditor form as, in the light of the principles and express directions of the decree, will exhibit the matters which are the subject of the accounting, namely, on the one hand the sums chargeable, the manufacture and sales, the amounts received, and the like, all in such detail as would be required in an account thereof rendered for any other purpose; and on the other hand, in detail, the items of credit or offset, such as cost of material, manufacturing cost, and the like, to the end that the statement as a whole will be an account showing gains and profits, and such as will furnish a basis for further proceeding in case the adversary is not satisfied therewith. I know of no reason why an accounting party in a patent suit should be called upon, in advance, to make detailed calculations to furnish statements whose effect is or will be evidentiary only.

The account which the rule requires to be brought in is one thing; the evidence in support or in dispute of any item or items thereof is quite another. The bringing of the former is mandatory upon a party; with the latter neither the parties nor the master has any concern until disputed items present issues calling for evidence; and, in advance of the bringing in of the account, the master cannot, ex parte, call upon the accounting party to embody in such account matters of evidence or in fact anything except such items *as under the law*, independently of subpoena or summons, the accounting party is presumed to embody therein obediently to the decree and to the general provisions of rule 63. In other words, the account in debtor and creditor form is the basis or foundation of any *trial* before the master, serving, with exceptions or objections to any items, as a substitute for pleadings. Therefore, until such foundation is laid, rule 62 can have little or no function to discharge. That rule vests in the master large *regulative powers*. But it does not impair in any degree the effect or character of rule 63. That this must be true may be illustrated by noting the provisions of rule 62 giving to the master power to compel production of books "to examine * * * all witnesses * * * to direct the mode in which the *matters requiring evidence* shall be *proved* before him." Can it be that the master may require proof of any kind, or determine the mode of such proof, ex parte and before any question has been presented, before any issue or dispute has been raised, before *necessity* for *proof* of any kind has arisen? In my judgment these questions must be answered negatively; and correct prac-

tice requires compliance with rule 63 respecting the filing of an account, and *exceptions thereto, as a basis* for exercise by the master of most of the particular powers conferred upon him by rule 62.

I am satisfied that, if complainant's view in the present case were tenable, it would lead to this incongruous result: Rule 63 being held applicable, the party prosecuting the accounting has the *right* to insist that the accounting party comply therewith and bring in his account in debtor and creditor form. This, reciprocally, must confer upon the accounting party, not only the right and duty to so bring it in, but also the right to have the prosecuting party *except to or express his dissatisfaction with it*, as a condition of proceeding to "examine the accounting party viva voce, or upon interrogatories as the master shall direct," and as a condition for the exercise by the master of the particular powers conferred upon him by both rules 62 and 63. Therefore, unless the bringing in of the account specified in rule 63 be treated as the *foundation*, the rule is no longer mandatory, and compliance therewith may rest wholly in the discretion of the master, and either party may be deprived of its benefits. It will make possible situations where the accounting party honestly intends to bring in an account which not only *should* but which *may be accepted* by his adversary; and yet he can be obliged, in advance, to submit to examination and, at large expense, to prepare proofs needed only in case of controversy or dissatisfaction. It would seem that the rules are designed to make the proceedings orderly and expeditious, and that this is sought to be accomplished primarily by affording means of limiting the scope of the master's investigations to *contested items*. Therefore neither he nor a party should, in advance, presume that an account, when filed, will be disputed or will give rise to dissatisfaction; but, on the contrary, the necessity of submitting to examination, the necessity of furnishing proofs by the accounting party, must, by the terms of the rule, find its basis in the *filing* of an account, to which exception has been taken. Manifestly, when the party prosecuting the accounting takes exception to items or expresses his dissatisfaction with the account, the master in discharging his functions under the rule ought to afford opportunity to the accounting party to be heard.

The general conclusion is that the practice adopted in the present case is not in accord with rules 62 and 63; that until the accounting party has been afforded opportunity to comply with such rules by bringing in an account tendered as conforming to the requirements of the decree, and to which the prosecuting party has taken exception, there is no warrant, under the rules, for requiring proofs or specification of evidentiary matter; that the defendant's objections to the second, third, fourth, fifth, sixth, seventh, eighth, and ninth specifications contained in the master's summons are well taken. The other specifications are unobjectionable, because they follow, in substance, the language of the decree and embody only what, in any event, would be required by notice or summons to comply with rule 63 by filing an account.

The defendant's motion to strike from the master's summons the specifications noted will be granted; and the matter will be remitted

to the master, with directions to proceed with the accounting by requiring the defendant to file its account, and, if exception be taken, then to proceed conformably with rules 62 and 63.

An order may be entered accordingly.

Supplemental Opinion.

The defendant has presented a draft order to be entered in accordance with the opinion filed on the motion to strike from the master's summons certain specifications; and such draft, together with the objections noted by complainant's counsel, calls my attention to the fact that the defendant's motion asked for a modification of the eighth specification contained in the master's summons, by adding thereto the italicized clause, so that it shall read as follows:

"Eighth. Also specify the gains and savings made by you during the period mentioned in said decree, by the use of said infringing reservoirs covered by said claim 11, over the style formerly used by you, *or any other style free and open to you to make and sell, when made and sold under the same conditions as the infringing reservoirs were made and sold.*"

The conclusion, in the original opinion, that all of the specifications excepting the first and tenth should be stricken from the summons, was reached without considering whether any of the specifications directed to be stricken out called for matters which should or should not properly be embodied in an account. The matter was dealt with as one involving the right of the master under correct and orderly practice to require, ex parte and in advance, the return by the accounting party of evidentiary matters, or the framing of the account by inclusion therein of any *specific* items. Hence, having concluded that the master should not proceed in that way, the eighth specification was directed to be stricken out, and for the same reason the defendant's request for a modification must be denied. If the defendant's view of the law as embodied in this proposed modification is correct, it should and will have opportunity to urge that view after filing an account whose sufficiency with respect to the presence or absence of items covered by the phase involved in such specification may then be tested.

The order may therefore be entered as originally directed, and adding thereto a denial of defendant's motion to modify the eighth specification.

W. F. & JOHN BARNES CO. v. VANDYCK-CHURCHILL CO. et al.

(District Court, S. D. New York. June 11, 1913.)

1. TRADE-MARKS AND TRADE-NAMES (§ 93*) — UNFAIR COMPETITION — SUFFICIENCY OF EVIDENCE.

In a suit to restrain unfair competition in the sale of upright drills, or drill presses, evidence *held* insufficient to show a sale by defendant in such a way as to mislead the purchaser to believe that the drill sold was one manufactured by complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 75*) — UNFAIR COMPETITION — DECEPTION.

In determining whether unfair competition exists, actual deception need not be shown.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. § 75.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 73*)—RIGHT TO USE OF NAME.

Where B., who had been employed for a great many years by a partnership composed of his two brothers, which was engaged in manufacturing upright drills or drill presses, and by a corporation subsequently formed by him and his brothers, which used their name as a part of its corporate name, after retiring from such corporation without any agreement restricting his continuance in business or the use of his name, formed a new company, known as the B. Drill Co., which manufactured a drill designed by him, and which in selling such drill did nothing constituting unfair competition, it could not be enjoined from using the word "B." or the words "B. Drill" as a part of its corporate name, since, in the absence of contract, fraud, or estoppel, a man may use his own name in all legitimate ways, and as the whole or a part of a corporate name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

In Equity. Bill by the W. F. & John Barnes Company against the Vandyck-Churchill Company and others. Bill dismissed.

Offield, Towle, Graves & Offield, of Chicago, Ill. (Charles K. Offield, of Chicago, Ill., of counsel), for complainant.

Luther L. Miller, of Chicago, Ill. (Duncan & Duncan, of New York City, and Lincoln B. Smith, of Chicago, Ill., of counsel), for defendants.

MAYER, District Judge. The complainant is a corporation doing business at Rockford, Ill., and engaged in manufacturing a line of machinery, including foot and hand power machinery, for use by carpenters and cabinet makers, scroll and jig saws, lathes, grinders, upright drilling machinery (sometimes called "drill presses"), and horizontal or radial drills.

The defendant Vandyck-Churchill Company is a corporation doing business in the city of New York, and engaged in selling tools and machinery, and, at the time the bill was filed, was the agent for the sale in that city and contiguous territory of the drill presses manufactured by the Barnes Drill Company, a corporation doing business also at Rockford, Ill.

The controversy is really between the complainant and the Barnes Drill Company. Briefly stated, complainant charges unfair competition, and in its bill prays for an injunction against defendants, restraining them from (1) manufacturing, handling, selling, or advertising in any manner upright drills, not made by complainant, having the word "Barnes" in any manner associated therewith, either alone or in connection or combination with other words; or (2) representing such drills to be "Barnes" or "Barnes drills"; or (3) handling, selling, or causing to be manufactured upright drills made in imitation of the external appearance of the drills made by complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Although the record is not lengthy, the exhibits are many; but the facts upon which the decision must rest are few and simple.

John Barnes, W. F. Barnes, and Benjamin F. Barnes are brothers; John being the eldest, and B. F. the youngest. About 1872 W. F. and John entered into a partnership under the name of W. F. & John Barnes, and manufactured certain classes of machinery and implements, and ultimately some upright drills. B. F., during the partnership, with unimportant intervals of absence, was in the employ of his brothers, and, during most of the time, was the superintendent of the factory.

In 1884 the three brothers joined in incorporating a company under the name of W. F. & J. Barnes Company (afterwards W. F. & John Barnes Company); the greater part of the stock being held by the older brothers. B. F. was the vice president of the company until 1895, and the owner of some stock. His duties were those of a superintendent, and his testimony and that of his brother W. F. is that he helped design some of the articles manufactured by the corporation.

Because of capable business methods and the excellent character of its output, the corporation built up a large business, developing a substantial success in what are known as "standard-type upright drills," although this line was but a part of the general business of the company.

B. F. retired from the W. F. & J. Barnes Company in 1899, without any agreement on his part restricting his continuance in business or the use of his name. He designed a new type of drill, and for its manufacture he organized the B. F. Barnes Company, incorporated under the laws of Illinois in 1899.

In 1907 B. F. retired from this B. F. Barnes Company, selling his stock, and not making any agreement that he would not engage in the manufacture of drills, or that he would not use his own name in such business as he might enter into. Shortly thereafter B. F. Barnes Company adopted another name.

In association with some others, B. F. organized a company in 1907 under the laws of Illinois, incorporated as the Barnes Drill Company, and of this company he is the president and general manager, and the owner of the majority of the stock. He is, in effect, the sole manager of the Barnes Drill Company, and that company is manufacturing a drill designed by B. F., which, for brevity, will be called the "B. F. drill."

It is urged by complainant that the words "Barnes" and "Barnes drill" have acquired a secondary meaning, and that the complainant is the sole owner of these words as applied to upright drills and their manufacture, and, in brief, that no one else may use these words in connection with the sale and exploitation of drills of this general type.

It may be assumed, for the purposes of this case, that the words "Barnes" and "Barnes drill" have acquired the secondary meaning contended for; but, nevertheless, the complainant cannot prevail, because, even with this assumption, it has failed to sustain its charge against the defendants and their principal—on the contrary, the conduct of the Barnes Drill Company has been such as to negative satisfactorily the charge of unfair competition.

It is apparent that the litigants desire a decision squarely on the merits, and therefore no time need be spent upon the technical status of the formal defendants to the action.

[1] The testimony shows a single sale of a B. F. drill to a Mr. Hurd by Mr. Mawby, a salesman of Vandyck-Churchill Company. This latter concern has its salesroom in Liberty street, in the borough of Manhattan, city of New York; and in that street is also the well-known house of Manning, Maxwell & Moore, who are agents for complainant in New York and neighboring territory.

There is no significance in the fact that Vandyck-Churchill Company has its sales office in Liberty street, for that is well known as a machinery street or section, and Vandyck-Churchill Company does a general business, in which the sale of the B. F. drills was merely an incident.

The nature of the article is such that it cannot be supposed that purchasers buy drills without care, examination, or consideration. We are not dealing with some article of merchandise easily the subject of mistake by the buying public, but with an important machine, involving a substantial expenditure, and, while there may be an occasional careless purchaser, it is obvious that the men who purchase such machines are usually expert, and know exactly what they want. The testimony of Mr. Hurd is not convincing, if it is sought to create the impression that he thought he was buying a drill made by complainant. The testimony of Mr. Mawby, the salesman, relates the transaction as it might have been expected to happen. In brief, his testimony was that Mr. Hurd examined various drills, and selected the B. F. drill, because he needed such a drill promptly, and it suited his purposes. Hurd asked Mawby to put his price quotation in writing, and then he (Hurd) would confirm the order after he reached his office. The quotation letter written in accordance with this request was immediately made out and delivered to Hurd while he was still in the salesroom, and this letter and the invoice accompanying the same described the drill as "one 20-inch Barnes Drill Company's drill press back-geared," and there was not the slightest attempt at deception. Even to an inexperienced eye the B. F. drill was markedly different in appearance from the drills of other concerns, including that of W. F. & John Barnes Company, as is graphically set forth in the photographs opposite page 8 of the brief of defendants. On the machine itself are the words "Barnes Drill Co. Inc. 1907. Rockford, Ill."

[2] In determining whether unfair competition exists, it is, of course, well settled that actual deception need not be shown; but when an incident occurs which may be regarded as the most favorable that may be presented on behalf of a complainant, such an incident is serviceable as showing the methods employed, with a view of determining the character of the competition. Quite irrespective of the testimony as to this single transaction, no one could be misled (in the absence of actual misrepresentation) into believing that the B. F. drill was sold as if coming from complainant company.

It seems unnecessary to review the evidence in detail. It may be

that, because of the word "Barnes" appearing in the corporate name of each of these corporations, there has been some confusion in the mail; but that confusion has been slight, and apparently quickly remedied, and the defendant has not, by any trick or unfair dealing, availed of any business which might have been procured by reason of the misdelivery of mail, and, indeed, the Barnes Drill Company has been put to quite as much inconvenience as complainant. It may also happen that the name "Barnes" may help the Barnes Drill Company as an incident in its business; but for such a result, in the absence of unfair competition, the complainant can have no recovery against defendants.

[3] It appears that defendant is marketing only the type of drill which I have called the B. F. drill, and at a price considerably in excess of the standard-type upright drills of complainant. Therefore, upon the record in this case, I conclude that the defendants have not done any acts in any way to constitute unfair competition, and the only theory upon which complainant could recover would be that the Barnes Drill Company was not entitled to use the word "Barnes" or the words "Barnes Drill" as a part of its corporate name.

Counsel for both sides have analyzed with care certain well-known and leading cases on unfair competition; but it seems to me that the case of *Howe Scale Company v. Wyckoff et al.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, is controlling and all the authority that defendants need. The last paragraph of that case states the law as applicable here, when Mr. Chief Justice Fuller says:

"We hold that, in the absence of contract, fraud, or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name. And, in our view, defendant's name and trade-mark were not intended or likely to deceive and there was nothing of substance shown in defendant's conduct in their use constituting unfair competition, or calling for the imposition of restrictions, lest actionable injury might result, as may confessedly be done in a proper case."

In the case at bar, B. F. Barnes is using his surname legitimately in the corporate name of Barnes Drill Company. In his instance, it is not a mere pretense, nor was he some person unfamiliar with the business, whose name was bought or used for purposes of fraud; but he was pursuing the avocation of a lifetime in a corporation of whose stock he was the majority owner, and of whose affairs he was the active manager.

If, at some future time, the Barnes Drill Company puts on the market drills in appearance like those of the complainant, and advertises or otherwise conducts its business in such a way as to create the impression that the Barnes Drill Company is the W. F. & John Barnes Company, or is selling their drills, then a different situation may be presented.

But here the defendant is in even a stronger position than were the defendants in the *Howe Scale Case*, *supra*. The general purchasing public buys typewriters, and might very well be attracted by the name of the maker; but here we have a trade article, bought in most, if not all, instances by skilled men, who usually purchase intelligently

and deliberately. The case does not involve any far-reaching question, but merely a determination of the facts in accordance with familiar principles.

The bill is dismissed, with costs. Settle decree on five days' notice.

PUGET SOUND ELECTRIC RY. v. LEE et al., as Members of the Public Service Commission of Washington.

(District Court, W. D. Washington, N. D. August 25, 1913.)

No. 2,390.

JUDGMENT (§ 828*)—RES JUDICATA—REVIEW OF ORDER OF RAILROAD COMMISSION—WASHINGTON STATUTE.

Laws Wash. 1909, c. 93, creating a public service commission with power to regulate railroad rates, which gives to a railroad company the right to maintain a suit in the superior court to review any order of the Commission, with the further right of appeal to the Supreme Court of the state, is within the provisions of the state Constitution and provides for a full review by judicial tribunals which when exercised renders the matter *res judicata*; and a railroad company, having availed itself of such remedy, cannot thereafter maintain a suit in a federal court to restrain the enforcement of an order which has been sustained by the state courts. In case conditions change after an order has been made so as to render it unjust or unreasonable, the remedy is by a petition for rehearing before the Commission.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

In Equity. Suit by the Puget Sound Electric Railway against George A. Lee, Jesse S. Jones, and Harry E. Wilson, as members of the Public Service Commission of the State of Washington. On motion to dismiss. Motion sustained.

Jas. B. Howe, of Seattle, Wash., and John A. Shackleford, of Tacoma, Wash., for complainant.

W. V. Tanner and Stephen V. Carey, both of Olympia, Wash., and Peters & Powell, of Seattle, Wash., for defendants.

NETERER, District Judge. The complainant owns and operates a railway line between the cities of Seattle and Tacoma. It seeks to enjoin the enforcement of an order of the Public Service Commission of the state of Washington fixing rates for the carriage of passengers, which it claims are confiscatory. Complainant obtained a writ of review from the superior court of the state and an order superseding the enforcement of the orders of the Commission pending the hearing. The superior court affirmed the order of the Commission, and an appeal was prosecuted to the Supreme Court of the state, where the judgment of the superior court was affirmed. The complainant alleges that it thereafter operated its line of railway under the tariff rates as established by the Commission, and that the operation thereof instead of paying 7 per cent. upon the investment, as estimated by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Commission, has paid less than 2 per cent. and is confiscatory of the property of the complainant. The defendants claim on this hearing that the complainant selected its forum in which its rights were adjudicated, and that the decisions of the court of the state is res judicata.

The matter comes on before this court on a motion to dismiss under rule 29 of the rules of practice for the courts of equity of the United States (198 Fed. xxvi, 115 C. C. A. xxvi). The sole question to be determined at this time is whether the decision of the state court is res judicata.

The provisions of the Washington Constitution bearing on the subject are:

Article 2, § 1:

"The legislative powers shall be vested in a senate and house of representatives, which shall be called the Legislature of the state of Washington."

Article 4, § 1:

"The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the Legislature may provide."

Article 12, § 18:

"* * * A railroad and transportation commission may be established, and its powers and duties fully defined by law."

The duties of the above-named branches of government are separate and distinct, one judicial and the other legislative. Each has a distinct function.

Chapter 93 of the Laws of 1909, being the act of the Legislature under which the original order of the Commission was entered, provides in section 3, p. 198:

"Any railroad, * * * affected by the order of the Commission and deeming it to be contrary to law, may institute proceedings in the superior court of the state of Washington, in the county in which the hearing before the Commission upon the complaint had been held, and have such order reviewed and its reasonableness and lawfulness inquired into and determined. * * * If however, said action in review is instituted within said time the said railroad, * * * company shall have the right of appeal or to prosecute by other appropriate proceedings, from the judgment of the superior court to the Supreme Court of the state of Washington, as in other civil cases."

Section 6, p. 202:

"All process herein provided for shall be served as in civil cases; issues shall be made up without delay as nearly as practicable as in civil cases."

Subdivision "b," same section, p. 204:

"The chairman and each of the commissioners * * * shall have power to * * * issue subpoenas for the attendance of witnesses, and the production of papers, way bills, books, accounts, documents and testimony. The superior court of the county in which any proceedings under this act may be instituted, shall have power to compel the attendance of witnesses and the production of papers, way bills, books, accounts, documents and testimony as required by said subpoena * * * and upon failing to obey said order, * * * said witness shall be dealt with as for contempt of court."

Section 12, p. 212:

"Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the Commission and certified to by it; and the court before which such hearing is had, in case it finds such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the Commission in rejecting evidence properly proffered, in which case it shall remand said hearing to the Commission with instructions to receive the evidence so proffered and rejected and make findings of fact on the evidence so proffered and that already received. * * * In case the Supreme Court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make or render proper findings or remand the same to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered, in which case the hearing shall be remanded to the Commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected, and that already received."

The legislative enactment is clearly within the constitutional provisions; and every opportunity for judicial review, with compulsory process for attendance of witnesses and production of documents and right of cross-examination, accorded. The hearing before the court is one of original cognizance, tried, it is true, upon the evidence presented to the Commission; but the method of trial is one clearly within the Legislature to prescribe, so long as no right is withheld. No right was withheld here, for all evidence offered to the Commission was presented to the superior and Supreme Courts. *Puget Sound Elec. Ry. Co. v. Railroad Commission*, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763; *State ex rel. Railroad Commission v. Great Northern Ry. Co.*, 68 Wash. 257, 123 Pac. 8.

The Supreme Court of the United States, in *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863 (Justice Lamar), said in passing upon this same act, in substance: The act provided and the Supreme Court recognized an adequate opportunity to be heard before the Commission, and then provided for a judicial review by authorizing the company to test the validity of the order in the superior court, according to the company the right to cross-examine witnesses produced on the part of the Commission and the privilege of offering evidence on every material matter to the investigation, so that the matter of the lawfulness and reasonableness of the regulation could be determined, and—

"having been given full opportunity to be heard on the issues made by the complaint and answer and as to the reasonableness of the proposed order, and having adopted the statutory method of review, this company cannot complain."

And on page 527 of 224 U. S., on page 539 of 32 Sup. Ct. (56 L. Ed. 863), the court further says:

"Nor would there be any impairment of the right to a judicial review, because additional testimony could not be submitted to the chancellor. The statute enlarges what this court has recognized to be proper practice in equity cases attacking such regulations. There the hearing is *de novo* and there

is no prohibition in equity against offering all competent evidence to prove that the order was unreasonable."

The court then quotes with approval from Cinn., N. O. & Tex. Pac. v. I. C. C., 162 U. S. 184, 196, 16 Sup. Ct. 700, 705 (40 L. Ed. 935), the following:

"We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the Commission, and first adduce it in the Circuit Court. * * * The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as prima facie evidence, that the facts of the case are to be disclosed before the Commission."

In support of the motion to dismiss, the defendants, in addition to Railway Co. v. Fairchild, supra, cite and rely upon Detroit & M. R. Co. v. Michigan Railroad Commission (D. C.) 203 Fed. 864, decided March, 1913. The provisions of the Constitution of Michigan, under consideration by the court, provide:

Article 4, § 1:

"The powers of government are divided into three departments: The legislative, executive and judicial.

Section 2:

"No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this Constitution."

Article 12, § 7:

"The Legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this state. * * *"

The Michigan Railroad Commission Act of 1909 (Pub. Acts 1909, No. 300) § 26, provides:

"Any common carrier * * * being dissatisfied with any order of the Commission * * * may commence an action in the Circuit Court in chancery against the Commission as defendant to vacate and set aside any such order on the ground that the rate or rates * * * are unlawful or unreasonable. * * * Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said Commission, and the Circuit Courts in chancery are hereby given jurisdiction of such suit and empowered to affirm, vacate or set aside the order of the Commission in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law. * * *

"(c) If, upon the trial of said action, evidence shall be introduced by the complainant which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto, the court, before proceeding to render judgment, * * * shall transmit a copy of such evidence to the Commission. * * * Upon receipt of such evidence the Commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, * * * and shall report its action thereon to the said court within ten days from the receipt of such evidence. * * * If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

"(d) Either party * * * may appeal to the Supreme Court, which appeal shall be governed by the statute governing chancery appeals."

Justices Knappen and Denison, Circuit Judges, and Tuttle, District Judge, in reviewing the Michigan Railway Commission Act, in the last-named case, said:

"It follows that the right of the railway company to such a review as any court could give became fixed when the order of the Commission was promulgated; that, to prevent an invasion of its legal right, the railway company could resort to any court of competent jurisdiction; and that, having selected the Wayne Circuit Court in chancery, and having submitted its controversy to that court, and judgment having been rendered against complainant by that court and by the Supreme Court of Michigan, the railway company cannot now try the same controversy over again in this court."

The complainant contends that the case at bar is controlled by the case of *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, which was an action appealed from the courts of Virginia. The Constitution of Virginia, art. 3, provides:

"Except as hereinafter provided, the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."

Article 12, § 156:

"The State Corporation Commission shall be a department of government, * * * shall have power * * * of supervising, * * * and controlling all transportation, * * * prescribe * * * rates, * * * and fix rules and regulations * * * governing such companies."

It is further provided that before fixing any rate the company affected must be given ten days' notice of time and place where the matter will be heard; and, where a general order is designed to be made, notice of time and place of hearing must be published for four weeks. At the hearing objection may be urged. The authority of the Commission to fix rates is paramount. An appeal is provided in like manner as appeals to the Supreme Court of Appeals when taken from an inferior court, but only to the Supreme Court of Appeals, which has power to reverse, correct, or annul, and, when an order of the Commission is reversed, the court shall at the same time substitute therefor each order as in its opinion the Commission should have made at the time of entering the order appealed from without reference to the Commission; and the substitute order shall have the same force and effect as if it had been entered by the Commission at the time the original order was entered. It will thus be seen that the court, instead of exercising judicial powers, acted also as a legislative body. The Supreme Court in that case declined to assume jurisdiction and dismissed an appeal without prejudice upon the ground that an appeal had not been prosecuted from the order of the Commission to the Supreme Court of the state. Justice Holmes said:

"Considerations of comity and convenience have led this court ordinarily to decline to interfere by habeas corpus where the petitioner had open to him a writ of error to a higher court of the state, in cases where there was no merely logical reason for refusing the writ. The question is whether somewhat similar considerations ought not to have some weight here."

An examination of the Constitutions and laws of Virginia, Washington, and Michigan will disclose similar provisions as to Michigan

and Washington. Virginia differs from these two states in that it makes the Supreme Court of the state a part of the Corporation Commission, making its functions legislative, so far as the Commission is concerned, rather than judicial. Washington and Michigan provide for court trials, require reference to the Commission by the court where error is found in rejection of testimony by the Washington court or new evidence received by the Michigan court; and final judgment is entered only when matter is submitted to the court upon all the evidence considered by the Commission. The Virginia Court of Appeals passes upon the matter finally without reference to the Commission, irrespective of error, and as a part of the rate-making body. It appears that a full and fair hearing of the matter here presented was had in the state courts.

It is further contended by the complainant that new matters have arisen since the adjudication by the Washington Supreme Court which would permit it to maintain its action in the federal court. For any changed conditions since the issuance of the order, or a result injuriously affecting the complainant which was not anticipated, provision is made by the laws whereby a remedy is provided before the Public Service Commission. Laws of 1911, c. 117, § 89, p. 600, provide:

"The Commission may, in its discretion, permit the filing of a petition for rehearing at any time."

This is a clause inserted in the law to meet such a contingency. While this does not open to complainant a writ of error to a higher court in the state, it is a remedy provided before the rate-making body having complete jurisdiction. The court cannot presume that the remedy provided is impotent. The language of Justice Holmes aptly applies here. The matters alleged as having arisen since the submission to the Washington court are not sufficient to give this court jurisdiction. We repeat the language of the district court of Michigan. The complainant having selected its forum, having submitted its controversy to the Washington state court, and judgment having been rendered against it by that court and the Supreme Court of Washington, cannot now try the same controversy over again in this court.

The motion to dismiss is sustained.

UNITED STATES v. LENORE.

(District Court, D. North Dakota, October 1, 1913.)

1. COURTS (§ 509*)—FEDERAL COURTS—JURISDICTION—COMITY—"ILLEGALLY PROCURED."

Where a state court of competent jurisdiction overruled an objection to a petition for naturalization that it was not properly signed, in that it was signed by the petitioner's mark only, and thereupon granted the petition, a federal court of concurrent jurisdiction would not take jurisdiction of a suit by the United States to set aside the decree on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
207 F.—55

ground that it was "illegally procured," since the defect, if any, was error only, and not illegality, and could be corrected by appeal or writ of error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1364-1371; Dec. Dig. § 509.*]

2. ALIENS (§ 68*)—CIRCUIT COURT OF APPEALS—JURISDICTION—NATURALIZATION PROCEEDINGS—REVIEW—"CASE."

Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), provides that the Circuit Courts of Appeals shall exercise jurisdiction to review by appeal or writ of error final decisions of the District and Circuit Courts in all cases other than those provided in the preceding sections of the act, unless otherwise provided by law, and the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely on the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states, etc. *Held*, that the word "case," as so used, was intended to include all claims of litigants brought before the courts for determination by the regular established proceedings of law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs, and therefore includes a naturalization proceeding, so that errors occurring therein were reviewable by appeal or writ of error to the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

For other definitions, see Words and Phrases, vol. 1, pp. 985-993; vol. 8, p. 7597.]

In Equity. Suit by the United States against Elizabeth Lenore to cancel a certificate of citizenship alleged to have been illegally procured. Bill dismissed.

Edward Engerud, U. S. Dist. Atty., and M. A. Hildreth, Asst. U. S. Dist. Atty., both of Fargo, N. D.

Clement L. Waldron, of Beach, N. D., for defendant.

AMIDON, District Judge. This is a suit in equity, brought by the United States under section 15 of the act of June 29, 1906 (34 Stat. 596, 601, c. 3592 [U. S. Comp. St. Supp. 1911, p. 537]), to cancel a certificate of citizenship granted to the defendant by the district court of the Tenth judicial district of North Dakota, sitting in the county of Billings. The statute authorizes such a suit whenever the certificate is obtained by fraud or "illegally procured." The bill charges that the petition presented to the state court by the defendant for her naturalization was signed by her mark, and not "in her own handwriting," as required by the statute. This charge was admitted by the answer, and was amply shown by the evidence adduced at the trial of the present suit. It also appeared from the pleadings that at the hearing of defendant's petition for her naturalization the government was represented by counsel, who participated in the examination of witnesses, and specifically objected to the granting of the certificate because the petition was not properly signed. This objection was heard by the court, considered, and overruled.

[1] I am asked to cancel the certificate of citizenship, not upon the ground that it was obtained by fraud, but upon the ground that it was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"illegally procured"; the illegality consisting wholly, as is charged, in the ruling of the state court above mentioned. The extraordinary character of such a decree at once challenges notice. By it one court is called upon to set aside the judgment of another court of co-ordinate jurisdiction because of a difference of opinion as to the interpretation of a statute. It should also be noted that this jurisdiction, if it exists, is not confined to the federal district courts. The bill for cancellation of a certificate of citizenship may be presented in any court "having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit." It results that, if this court may cancel a certificate of citizenship issued by the state court because of a difference of opinion in regard to a matter of law, the state court may be called upon in the next suit to exercise the same power with respect to a certificate of citizenship issued out of this court. Not only that, but courts of different judicial districts and of different states may each set aside the solemn judgments of other courts of the same state or of other states, entered after full hearing, because of a difference of opinion as to the law. As the statute requires these suits to be brought by the United States attorney, it will probably happen, as a general thing, that he will file the bill in the court to which he is officially attached. It will thus become the duty of federal courts to set aside the judgment of state courts of co-ordinate jurisdiction, and send their orders to the clerks of those courts, commanding them to cancel records which they made pursuant to the judgment of the court to which they are attached. Two serious consequences must result from the exercise of this jurisdiction: First, it will produce a babel of conflicting judgments among courts of co-ordinate jurisdiction, and tend directly to destroy respect for the courts, and also to destroy that good will which should always exist among courts of co-ordinate jurisdiction. Second, it will tend to break down that comity which has been the bond of peace between federal and state courts exercising co-ordinate jurisdiction in the same territory. Results so unfortunate can be justified only by imperative and unequivocal language.

A brief history of the causes which led to the passage of the act of 1906 will, in my judgment, show that Congress never intended to confer the jurisdiction which is here invoked.

In 1902 fraudulent and illegal practices in the naturalization of aliens were discovered in the city of St. Louis, Mo. Some of these misdoings are recounted in the opinion in *Dolan v. United States*, 133 Fed. 440, 69 C. C. A. 274. The prosecutions which resulted in the Eastern district of Missouri led to investigations in other cities, and the discovery of many fraudulent and illegal practices in the issuance of certificates of naturalization. In some cases perjury and subornation of perjury were resorted to for the purpose of deceiving the court and obtaining certificates for aliens who had not resided in the country for the requisite time. In other cases foreigners were marched into the court in large companies, and the oath of allegiance administered to the whole company, although many of them were unable either to speak or understand the language that was used. Two persons

made the ordinary witness' oaths for the whole company. Upon this sham and spurious proceeding certificates were issued. In other cases clerks of court issued such certificates without any proceeding in court whatever, and fabricated a judicial record to support the certificates. It was even discovered that some clerks were engaged in a regular brokerage business in certificates of naturalization. This practice went so far that some of these certificates were sold to aliens residing abroad, who had never been in the United States, in order that they might be used for fraudulent purposes, both with respect to foreign countries and this country. The result of these investigations was gathered together in an elaborate report, which was presented to Congress and resulted in the passage of the act of 1906. Congressional Record, vol. 40, part of page 7036; House Documents, vol. 44 (Miscellaneous), 59th Congress, 1st Session. It will be seen that the mischievous practices which the statute was intended to correct fell into two general classes: First, the obtaining of certificates of naturalization through the deception of the court by means of perjury and subornation of perjury. Such practices were fraudulent, and certificates obtained thereby are accurately described as having been "obtained by fraud." This had been familiar law, not only in the case of naturalization certificates, but of patents for public land. Second, false and spurious certificates were obtained without any judicial proceeding whatever, or by a proceeding in court which was itself sham and spurious. Certificates thus obtained are accurately described as having been "illegally procured." Neither the debates in Congress nor the report of the investigation which was laid before Congress contain any suggestion that any other evils were intended to be dealt with, or that the phrase "illegally procured" was intended to set one court to annulling the judgments of another court of co-ordinate jurisdiction because of a difference of opinion in regard to a matter of law. To say that a certificate which is issued pursuant to a full hearing in court is "illegally procured," if any error occurs in the proceeding, would be a wide departure from the language which courts have been accustomed to use in referring to judicial error. "Illegally procured" imports, not an error of court, but willful misconduct on the part of the holder of the certificate or those who have acted in his behalf. The history of the statute shows that its language can be given full effect according to the mischief that was present to the thought of Congress, without upsetting the whole judicial system that has hitherto obtained among courts of co-ordinate jurisdiction. I am, therefore, unable to follow the decisions in *United States v. Meyer* (D. C.) 170 Fed. 983, *United States v. Plaistow* (D. C.) 189 Fed. 1007, and *United States v. Schurr* (D. C.) 163 Fed. 648. I concur in the view expressed in *United States v. Luria* (D. C.) 184 Fed. 643, 646, that "'illegally procured' does not mean that the certificate was issued through error of law." Errors of courts, committed in the honest exercise of their jurisdiction under the naturalization laws, must be corrected the same as in other cases by appeal or writ of error. Such a method of review has been recognized in the Circuit Courts of Appeal of most of the circuits. *United States v. Balsara*, 180 Fed. 694, 103 C. C. A. 660 (2d Circuit); *Bessho*

v. United States, 178 Fed. 245, 101 C. C. A. 605 (4th Circuit); United States v. Poslusny, 179 Fed. 836, 103 C. C. A. 324 (2d Circuit); United States v. Martorana, 171 Fed. 397, 96 C. C. A. 353 (3d Circuit); United States v. Doyle, 179 Fed. 687, 103 C. C. A. 233 (7th Circuit); United States v. Ojala, 182 Fed. 51, 104 C. C. A. 491 (8th Circuit).

[2] In *United States v. Dolla*, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665, it was held by the Circuit Court of Appeals of the Fifth Circuit that the proceeding for the naturalization of an alien did not constitute "a case" so as to permit a review by appeal or writ of error in the Circuit Court of Appeals. This decision has never been cited, and seems to be out of accord with the practice in other circuits. In my judgment it proceeds upon an erroneous interpretation of the statute. The hearing in court by which aliens are naturalized must be an exercise of judicial power. Otherwise Congress could not confer that authority upon federal courts. *Muskraat v. United States*, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246. Again, it has been uniformly held that judicial power can be exercised in the federal courts only when the proceeding takes the form of "a case" or "controversy" within the meaning of those terms as used in the judicial article of the Constitution. Of these terms the word "case" is the more comprehensive. The language of Mr. Justice Field in the case of *In re Pacific Railway Commission* (C. C.) 32 Fed. 241, 255, has been frequently quoted and approved by the Supreme Court, and seems the most accurate statement which has yet been made on the subject:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm v. Georgia*, 2 Dall. 431, 432 [1 L. Ed. 440]; 1 Tuck. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The decision in the Fifth Circuit seems to me to be in conflict with the established doctrine of the Supreme Court. In *Fong Yue Ting v. United States*, 149 U. S. 698, 728, 13 Sup. Ct. 1016, 1028 (37 L. Ed. 905), the question involved was the deportation of a Chinaman from the United States under the law of 1892; the case having many of the administrative features which in some countries attach to the naturalization of aliens. Under the statute, after a Chinaman had been arrested, it was made the duty of the officer to bring him before a United States court, where the question of his right to be in the country was to be summarily heard without pleadings. Of such a proceeding the court says:

"When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power;

for here are all the elements of a civil case—a complainant, a defendant and a judge—actor, reus, et judex.”

Speaking of the extent of the judicial power conferred by the Constitution, Chief Justice Marshall said, in *Osborn v. United States Bank*, 9 Wheat. 738-819 [6 L. Ed. 204]:

“This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them *shall assume such a form that the judicial power is capable of acting on it*. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.”

In *Smith v. Adams*, 130 U. S. 167, 173, 9 Sup. Ct. 566, 568 (32 L. Ed. 895), Mr. Justice Field, speaking for the court, used the following accurate language:

“Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy”

—within the meaning of those terms as used in the federal Constitution. See, also, *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475, 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49, et seq., where the cases are fully reviewed.

The term “case,” in the Court of Appeals Act, clearly has the same significance as in the federal Constitution. Under the statute of 1906 the naturalization of an alien has all the qualities of a case. It proceeds upon petition and notice. The government is entitled to be present, by its counsel, and examine the petitioner and his witnesses, and to produce other witnesses. The Supreme Court in the case of *Johannessen v. United States*, 225 U. S. 227, 237, 32 Sup. Ct. 613, 56 L. Ed. 1066, clearly indicates that the proceeding under this statute has the qualities of a case.

The act of 1906 vests jurisdiction to naturalize aliens in the highest courts of the state and nation exercising original jurisdiction. This authority ought not to be construed as so special and restricted as to deprive those courts of all discretion as to matters of procedure. The statute clearly defines the qualifications which aliens must possess in order to entitle them to citizenship. There are also numerous provisions defining in detail the procedure and pleadings which shall be adopted. These latter parts of the act are simply intended to prevent the admission to citizenship of those who do not possess the qualifications stated in the act. They are matters of procedure, and ought to be treated as other matters of procedure are in those courts. This is especially true when a court of co-ordinate jurisdiction is asked to set aside a decree. If the court entering the decree has jurisdiction its certificate certainly ought not to be canceled for failure to follow strictly all the details of the statute relating to procedure. The case of *United States v. Stoller* (D. C.) 180 Fed. 910, seems to me sound and to contain many sensible observations on this subject.

When a certificate of naturalization is obtained by fraud, or is ille-

gally procured in the sense that it has been issued without authority of law, and is in effect false and spurious, a suit in equity may be maintained for its cancellation. This has been fully established in the federal courts in the case of patents for land obtained under similar circumstances. Such a suit is not intended to correct an error of court, but to defeat the fraud of the litigant. But when a certificate is issued as the result of a judicial hearing in a good-faith attempt to exercise the jurisdiction conferred by the act of Congress, it is not open to attack in another court of co-ordinate jurisdiction simply by reason of alleged errors which may have occurred in the court pursuant to whose judgment the certificate was issued. Errors of that kind can properly be reached only by appeal or writ of error.

The statute authorizes a suit to cancel a certificate only "on the ground of fraud," or "on the ground that such certificate was illegally procured." In my judgment the certificate here involved falls under neither of these classes. The bill must therefore be dismissed, and it is so ordered.

WELLS FARGO & CO. v. MAYOR AND ALDERMEN OF JERSEY CITY.

(District Court, D. New Jersey. September 5, 1913.)

1. STATUTES (§ 208*)—RULES OF CONSTRUCTION.

Absurd or unjust results will never be ascribed to the Legislature, and it will not be presumed to have used inconsistent provisions as to the same subject in the immediate context.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 285; Dec. Dig. § 208.*]

2. COUNTIES (§ 148*)—MUNICIPAL CORPORATIONS (§ 740*)—LIABILITY FOR INJURY BY RIOTERS—CONSTRUCTION OF STATUTE.

Under Revision N. J. 1877, p. 998 (4 Comp. St. N. J. 1910, p. 4380), section 5 of "An act to prevent routs, riots and tumultuous assemblies," which provides that, "whenever any buildings or other real or personal property shall be destroyed or injured, in consequence of any mob or riot, the city in which the same shall occur, or if not in a city, then the county in which such property was situated, shall be liable to an action by or on behalf of the party whose property was thus destroyed or injured, for the damages sustained by reason thereof," the physical situs of the property destroyed or injured, and not the place where the mob originated or operated, fixes the liability of the city or county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 213; Dec. Dig. § 148; * Municipal Corporations, Cent. Dig. §§ 1558, 1559; Dec. Dig. § 740.*]

3. COUNTIES (§ 148*)—MUNICIPAL CORPORATIONS (§ 740*)—LIABILITY FOR INJURY BY RIOTERS—CONSTRUCTION OF STATUTE—"PROPERTY."

Such act imposes a new liability on cities and counties, not recognized at the common law, and falls in the class requiring a strict construction; and under such rule the "property" for injury to which a right of action is given is limited to tangible property, and the liability does not extend to injury to a business.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 213; Dec. Dig. § 148; * Municipal Corporations, Cent. Dig. §§ 1558, 1559; Dec. Dig. § 740.*]

4. PROPERTY (§ 1*)—DEFINITION.

The word "property," literally taken, is nomen generalissimum but is not always so used. As ordinarily used it means the thing possessed,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

but it may include the right to use and enjoy it. The more comprehensive meaning is presumed to have been intended by the use of such a word in a constitution. In statutes the broader or restricted meaning will be given according to the legislative purpose.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

5. PROPERTY (§ 2*)—BUSINESS—SITUS.

Property in its comprehensive sense undoubtedly embraces business, and so considered business undoubtedly has a situs. This situs, however, is not physical, but exists only in legal contemplation, and varies to accommodate the necessities of legislative purposes. Ordinarily, and in the absence of express statutory declaration, or unmistakable implication, fixing it at the place where the tangible property from the use of which it arises has its being, such situs follows the domicile of its owner.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. § 2.*]

6. MUNICIPAL CORPORATIONS (§ 723½*)—INJURY BY RIOTERS—GROUNDS OF LIABILITY.

The taking of one man's property to contribute toward paying the losses sustained by the owner of another property in consequence of mob violence, by imposing liability on the city, finds its justification in the duty of protecting property situate within the city's limits, which the community owes to the owners of such property; but a statute imposing such liability absolutely, without regard to negligence, must be strictly construed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1696; Dec. Dig. § 723½.*]

7. STATUTES (§ 218*)—CONSTRUCTION—CONTEMPORANEOUS CONSTRUCTION BY ACQUIESCENCE.

The general and continued acquiescence of both the legal profession and laymen in the assumption that statutes imposing liability on municipalities for the destruction of property by mob violence did not extend to business losses does not carry the force of judicial or legislative construction, but it is not without weight in the construction of a similar statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 294, 295; Dec. Dig. § 218.*]

8. WORDS AND PHRASES—"BUILDING."

The word "building" imports tangibility, and, while it is ordinarily classed as real property, it may be personal property.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 889-892; vol. 8, p. 7593.]

At Law. Action by Wells Fargo & Co. against the Mayor and Aldermen of Jersey City. Judgment for plaintiff.

Collins & Corbin, of Jersey City, N. J., and Charles W. Stockton and John H. Mooers, both of New York City, for plaintiff.

Warren Dixon, of Jersey City, N. J., for defendant.

RELLSTAB, District Judge. In an action to recover damages for property injured in consequence of mobs and riots, the case was submitted to the jury under special instructions. The jury found, in answer to the questions submitted, that the plaintiff had been damaged \$300 in its tangible property and \$43,000 in its intangible property—

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its business. This business was collecting, transporting, and delivering merchandise, a general intrastate and interstate express business. In conducting that part of its business involved in this suit, the plaintiff used a pier on the Jersey City side of the Hudson river, a terminal of the Erie Railroad, as a receiving and distributing point. At this terminal it received not only the merchandise arriving on the trains but such as was collected in its metropolitan district, embracing the city of New York (excluding Brooklyn) and Jersey City, from which it forwarded on departing trains such as was intended for distant points and distributed that which was intended for delivery within such district. But a small, inconsiderable part of the business thus carried on had its origin or destination in Jersey City. In making such collections and distributions it employed a large number of men (drivers and helpers) and horses and wagons. These horses and wagons were housed in Jersey City, several blocks from such pier, and were taken by the employes in the early morning from the stables to the pier and returned thereto at the conclusion of the day's business. Mob interference with the passage of such wagons, etc., in the streets of Jersey City, from October 26 to November 14, 1910, occasioned the business losses which the jury's verdict fixed at \$43,000. Whether the business losses thus sustained by the plaintiff can be recovered (the question reserved) depends upon the construction of the New Jersey act entitled "An act to prevent routs, riots and tumultuous assemblies." Rev. 1877, p. 978 (4 Comp. Stat. of N. J. p. 4380). The first four sections of this revised act, originally passed in 1797, denounce mobs, provide for their suppression and punishment, and declare the duty and immunity of the peace officers in dealing with them. The remaining sections are taken from the act entitled "An act to provide for compensating parties whose property may be injured or destroyed in consequence of mobs or riots," approved March 11, 1864 (P. L. 1864, p. 237), and concern themselves with the matter of such compensation. Sections 5 and 7, the pertinent sections, read as follows:

"5. That whenever any buildings or other real or personal property shall be destroyed or injured, in consequence of any mob or riot, the city in which the same shall occur, or if not in a city, then the county in which such property was situated, shall be liable to an action, by or in behalf of the party whose property was thus destroyed or injured, for the damages sustained by reason thereof."

"7. No person or corporation shall be entitled to recover in any such action if it shall appear upon the trial thereof that such destruction or injury of property was occasioned, or in any manner aided, sanctioned or permitted by the carelessness or negligence of such person or corporation; nor shall any person or corporation be entitled to recover any damages for any destruction or injury of property as aforesaid, unless such party shall have used all reasonable diligence to prevent such damage, and shall have notified the mayor of such city, or the sheriff of such county, immediately after being apprised of any threat or attempt to destroy or injure his or their property by any mob or riot of the facts brought to his knowledge; and upon the receipt of such notice it shall be the duty of such officer to take all legal means to protect the property attacked or threatened, and the expenses incurred by said officer in the performance of his duty as aforesaid shall be paid by the county collector of the county in which said property is situate, upon the approval of the judge of the court of common pleas of said county."

Generally stated, section 5 provides for compensating the owner of property destroyed or injured by mobs and declares who shall pay it; and section 7 imposes certain duties upon the owner of such property and upon the chief peace officers of the localities who are required to make such compensation. It is to be noted that in carrying out this legislative purpose of compensation the state places the obligation upon cities and counties, relieving itself and lesser political divisions.

[1] The plaintiff contends: First, that the following phrase in section 5, viz., "the city in which the same shall occur," discloses a legislative purpose to make the location of the mob violence, rather than the property destroyed or injured thereby, the deciding factor of the city's liability. This, in my opinion, is erroneous; and though, in the facts of this case, the city's general liability is the same whichever construction be accepted, as the mob violence was confined to such city, a determination of the proper application of this phrase (it being a relative one) will be helpful in ascertaining what kind of property was contemplated by this act. Under the plaintiff's construction, the result would be that if the mob operated from outside the city, and the property injured was within it, neither the city nor the county would be liable, for it is to be noted that the county's liability depends upon the situation of the property (outside the city) and not the place where the mob operated. It is apparent that such a result is foreign to the legislative purpose, which comprehends all property situate within the state. Absurd or unjust results will never be ascribed to the Legislature, and it will not be presumed to have used inconsistent provisions as to the same subject in the immediate context. The courts will be astute to avoid such results. Astuteness in ascertaining the legislative purpose and to harmonize its provisions therewith is not necessary, however, in this case. The legislative purpose in the quoted phrase and in the one immediately following is to limit the liability to cities and counties and to indicate when the city and when the county is to respond in damages. The Legislature having clearly indicated when the county shall be liable (if the property is outside the city), the same basis of liability (location of property) for cities will be taken as the legislative purpose, if the disputed phrase is sufficiently flexible to permit of such interpretation, even if another construction lies within the words used, as it is elementary in the interpretation of statutes that a meaning may be within the words literally yet not within the statute. *Endlich Int. of Stat. § 25.*

[2] The language employed in section 5 concerning the liability of city and county is only seemingly inconsistent, however. A careful reading of the entire section will evince that the basis of liability for both city and county is the same and that such basis is the location of the property injured or destroyed and not the origin of the mob violence. The word "same" in the quoted phrase, a relative term, is not limited in its application to the phrase "in consequence of any mob or riot" immediately preceding it. The phrase relative to mobs, it will be noted, follows two legislative expressions; the first relating to the destruction or injury of property and the other to the cause thereof. This phrase, though immediately preceding the disputed phrase, is not

its antecedent. The subject here is property, and the word "same" harks back to it, and the occurrence referred to in such phrase is the destruction or injury of property by mob violence. Property thus qualified (destroyed or injured by mobs) is the antecedent and such phrase, in view of the other parts of sections 5 and 7, must be read as referring to the location of such property and not to the occurrence of such violence in the city. In *re Kimball*, Fed. Cas. No. 7,768; *Ammons v. Brunswick-Balke, etc., Co.*, 141 Fed. 570, 72 C. C. A. 614. That this is the proper construction to be given to this section is made plain by a reading of section 7.

In section 7 it will be noted that the owner of "the property attacked or threatened" is to give notice to "the mayor of such city or the sheriff of such county" "immediately after being apprised of any threat or attempt to destroy or injure his or their property by any mob or riot." Such city or county means the city or county referred to in section 5. If the mob which threatened or attempted to injure property located in Jersey City, but on the border of the city of Hoboken, had originated in Hoboken (parts of the same county), would the owner of the menaced property have discharged his statutory duty by simply giving notice to the mayor of Hoboken? Would not Jersey City have a perfect defense under this section upon proof that it had no knowledge of the existence of the mob in time to prevent the injury, etc., and that the owner, with knowledge of its existence and of its threats and attempts against his property, failed to give the statutory notice to the mayor of Jersey City?

What mayor is here meant "to take all legal means to protect the property attacked or threatened"? Undoubtedly the mayor of any city where a riot occurs is in duty bound to take available steps to suppress the riot; but, with reference to the peace officer here indicated to be notified by the property owner, is it not manifest that only such mayor is to act whose magistracy embraces the territory where the threatened property is located? What effective legal means could the mayor of any other city take that would protect the particular property threatened? The duty of such other magistrate would be the governmental one to suppress mobs irrespective of their particular destructive purpose; but the duty here enjoined is one to be performed in behalf of particular property; and manifestly only that mayor is intended within whose official territory such property is located. It is in that territory that such property is subject to taxation, and it is from the police authorities having particular charge of that locality that such property is entitled to protection.

Every consideration of these sections impels the interpretation that the physical situs of the property and not the place where the mob originated or operated fixes the liability of the city or county.

[3] Plaintiff's further contention is, as it must be to sustain the reserved finding of the jury, that intangible property of a most general character is comprehended in the phrase "buildings or other real or personal property." This can only be by assuming that the Legislature used the word "property" in its most general and comprehensive sense.

[4] The word "property," literally taken, is *nomen generalissimum*, but it is not always so used. As ordinarily used, it means the thing possessed, but it may include the right to use and enjoy it. The more comprehensive meaning is presumed to have been intended by the use of such a word in a constitution, as, being the organic instrument, it is presumed to have been couched in broader phrases than is the case in a statute, which usually concerns itself with more precise matters. In statutes the broader or restricted meaning will be given according to the legislative purpose. A consideration of the old law, the mischief to be remedied, and the character of the remedy (Lord Coke's rule) will also be helpful in determining whether words are to receive a literal, liberal, or restricted construction. The act in question imposed a new liability on cities and counties, one not recognized at the common law, and falls in the class requiring a strict construction. If the Legislature had intended to use it in its most comprehensive sense, it was singularly guilty of surplusage, for in such sense it was unnecessary to use the additional words "buildings or other real or personal" immediately preceding the word "property." Such additional terms qualify the meaning of property; and, unless they are to be discarded, they furnish strong evidence that "property" was used in a limited sense.

[8] The word "building" imports tangibility; and, while it is ordinarily classed as real property, it may be personal property. The words "or other real or personal property," following immediately such word "buildings," while more comprehensive, even if they are not controlled by the doctrine of "*eiusdem generis*," will be found to be restricted to tangible property when construed in the light of the context, the particular legislative purpose of the enactment, and the effects and consequences resulting if the broader meaning be given to them.

The English statute (1 George II. St. 2, c. 5), the prototype of the statutes in this country, shifting the loss of property sustained through mob violence from the individual to the whole community, used no general terms in designating the property to be compensated. It specified churches, buildings, dwelling houses, stables, and outhouses. Had it concluded with the general phrase "or other property," it is clear that under the cases such words would not have extended beyond subject *eiusdem generis*. While such canon of interpretation, being but an enlargement of the maxim "*noscitur a sociis*," is usually applied to instances where the general words follow several of a limited or restricted character, yet it is applicable where but one of the species is mentioned. *Williams v. Golding*, L. R. 1 C. P. 69. That many species are mentioned affords stronger evidence that the general words were intended to embrace only the same kind or character than when but one is used is undoubted, but the difference is only of degree. In the New Jersey act the word "building" comprehends all the species enumerated in the English statute. All of these are limited to corporeal or tangible property, and the general phrase following in our act, no more than if it had been similarly employed in the English statute, can be taken as comprising intangible or incorporeal property

without doing violence to accepted canons of interpretation. The rule that construes general words and phrases in the light of the company they keep, and which restricts their meaning to those immediately preceding and relating to the same subject, is one frequently employed to divine the legislative use of such words. The following cases, invoking such canon of interpretation, are some in which general terms relating to property were restricted to a sense analogous to the less general: *Regina v. Neath*, 6 Ad. & El., Q. B. 707; *Regina v. Neville*, 8 Ad. & El., Q. B. 452; *East London Water Works Co. v. Mile End*, 17 Ad. & El., Q. B. 511; *People v. N. Y. & Mann. Beach Ry.*, 84 N. Y. 565; *Renick v. Boyd*, 99 Pa. 555, 44 Am. Rep. 124; *Harwood v. Lowell*, 4 Cush. (Mass.) 310; *White v. Ivey*, etc., 34 Ga. 186; *Chidsey v. Canton*, 17 Conn. 475. Under this doctrine only tangible property, real or personal, is within the New Jersey statute. The same result obtains, in my judgment, by the application of other accepted rules for the interpretation of statutes.

The entire phrase, "buildings or other real or personal property," naturally suggests to the mind tangible and not intangible property. Mr. Endlich, in the cited text-book, under the heads of "Ordinary Meaning Preferred," section 78, and "Restriction of General Words to Subject-Matter," section 86, said:

"Ordinary Meaning Preferred.

"* * * As between two meanings of a word, the ordinary and popular meaning is, in general, to be preferred and is most frequently in harmony with the subject-matter and object of the enactment."

"Restriction of General Words to Subject-Matter.

"But it is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter, in reference to which the words are used, finds its most frequent application. However wide in the abstract, they are more or less elastic and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the Legislature intended, they frequently express more, in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. It is therefore a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular. If the intention be particular; that is, they must be understood as used in reference to the subject-matter in the mind of the Legislature and strictly limited to it."

[5] The analysis made of sections 5 and 7, resulting in the conclusion that the location of the property determined whether the city or county was liable, shows that tangible and not intangible property was in the legislative mind. Buildings and other real property have a physical situs, and personal property of a tangible character, though movable, is capable of a like situs. Property in its comprehensive sense undoubtedly embraces business, the result or product of using tangible property. So considered, business undoubtedly has a situs. This situs, however, is not physical. It exists only in legal contemplation and varies to accommodate the necessities of legislative purposes. Ordinarily it follows the domicile of its owner; but legislative needs and purposes oft require that a situs other than the owner's domicile be

given to such property. The cases cited by plaintiff, from which I select *The Slaughter House Cases*, 83 U. S. (16 Wall.) 36, 21 L. Ed. 394, *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, *Southern Pacific Co. v. Ky.*, 222 U. S. 63, 32 Sup. Ct. 13, 56 L. Ed. 96, illustrate this principle. These cases, however, are not helpful in this discussion. That business is property and that it may be taxable is conceded, and that some of that involved in this suit may be reached in this state by appropriate legislation and that the failure of the Legislature to subject business to taxation does not affect the question of its taxability may also be conceded and yet the defendant be immune from the burden here sought to be imposed upon it. The question pressing for solution is not whether such business may not be an appropriate subject of legislation for taxation or whether ethically it is not entitled to as much protection as tangible property but whether the Legislature has actually provided that such intangible property is to be compensated in case it is injured by mob violence. The situs of intangible property being a creature of the law, and the general rule being that it takes the situs of its owner, the business here in question must be held to have its situs in Colorado (the plaintiff being a corporation of that state), unless some statute by express declaration or unmistakable implication fixes it at the place where the tangible property from the use of which it has its being. No statute other than the one under consideration is claimed to give it such a situs, and, as this does not do so expressly, nothing short of an implication so clear and unmistakable as to exclude any other situs can take it out of the general rule.

[6] The enactment in question, as already mentioned, imposes a new obligation upon its political subdivisions. It subjects the property of individuals, taken collectively, to a burden unknown at the common law. Statutes in derogation of the common law must be strictly construed. This canon is well-nigh dogmatic and carries with it the presumption that the statute intended no further alteration in the common law than that which is clearly expressed. End. §§ 127, 341. And statutes which encroach upon the rights of the citizen, whether as regards persons or property, are similarly subject to a strict construction. End. §§ 340-345. The rule also applies to such statutes as authorize the taking of property for public purposes and a fortiori where the act subjects one man's property to seizure for the liability of another. End. § 343. It must be borne in mind that the city's liability under the act in question does not depend upon its negligence. The obligation to pay is absolute though the city did all in its power to suppress rioting and prevent property from being injured. The taking of one man's property to contribute toward paying the losses sustained by the owner of another property in consequence of mob violence finds its justification in the duty of protecting property situate within the city's limits which the community owes to the owners of such property.

In *Chicago v. Sturges*, 222 U. S. 313, 323, 32 Sup. Ct. 92, 93 (56 L. Ed. 215, Ann. Cas. 1913B, 1349), it was said:

"The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of Anglo-Saxon people. Thus 'The Hundred,' a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning possibly in 1285, in the statutes of Winchester (13 Edw. I, c. 1), coming on down to 27 Elizabeth, c. 13, the Riot Act of George I (1 Geo. I, St. 2), and Act of 8 George II, c. 16, we may find a continuous recognition of the principle that a civil subdivision intrusted with the duty of protecting property in its midst and with police power to discharge the function may be made answerable not only for negligence affirmatively shown but absolutely as not having afforded a protection adequate to the obligation."

"Property in its midst" is the expression here used by Mr. Justice Lurton. If the property damaged is not in the community's midst (that is, has not a physical situs in such city) but is of an intangible character consisting of the right to use tangible property in carrying on business such as that in question, and losses are sustained by the deprivation of such right (as are the losses in question), then, assuming that a saddling upon a community of such losses is not an infraction of the constitutional guaranty "of due process of law," it is the essence of accepted canons of interpretation of legislative declarations that such a burden can only be imposed by clear and unequivocal language, leaving no doubt that such was the legislative purpose.

Furthermore, when a passage is susceptible of more than one meaning, it is important to consider the effects and consequences which would result from a given construction. Endlich, § 113. This canon is not to be employed to avoid the clear import of a statute; but where the question is whether a word or phrase is used in its most comprehensive sense, and such sense would produce grave and serious results, such effects and consequences are to be given weighty consideration in arriving at the legislative intention. If the plaintiff's construction should prevail, dire disaster to the municipality might follow in the wake of every mob manifestation, regardless of the want of notice to the city or that it took every possible means to prevent the destruction or injury of property. The facts in the case at bar are sufficiently illustrative of the probable results following a like situation when made applicable to other transportation businesses. The cause of the plaintiff's business losses was due to a mob's endeavor to stop the passage of the plaintiff's horses and wagons to and from its stables. To the mind of the striking employes of another express company doing business in the same territory, a "tie-up" of the entire express business in such localities would be of advantage to them in enforcing the strikers' demands. Acting upon such theory, some of such striking employes, assisted by outsiders who sympathized with them, sought to induce the employes (drivers and helpers) of the plaintiff to abandon their horses and wagons. Not succeeding in this to the extent desired, they used force against such employes as continued in the plaintiff's employ and the "strike breakers" called in by it to help move such wagons; such force being applied indiscriminately to persons and property. With such an object lesson it is not fancy or mere speculation to conceive of a situation in Jersey City, the tide-water terminus of a number of transcontinental railway systems, where the business

of transportation of several, even all, of such railway lines would be seriously affected by mob violence following in the wake of a strike on one of such lines in consequence of an attempt upon the part of the strikers and their sympathizers to "tie up" the entire transportation business carried on in and through such city, resulting in business losses aggregating millions of dollars. Are such losses to fall upon the municipality? Yes, if the plaintiff's construction that all kinds of property are comprehended by such act. No, if the indemnity extends only to tangible property. Can it be that, merely because the statute used the word "property," the Legislature intended to burden its municipalities with all the injurious consequences resulting from the mob's interference with the use of tangible property? A construction fraught with such appalling consequences is not to be adopted unless the legislative intent that such is its purpose is clear and unmistakable.

[7] The New Jersey statute of 1864, as already indicated, has its prototype in Stat. 2, c. 5, 1 Geo. II, and similar statutes are found in a number of the states in this country. It is singular, if the plaintiff's contention is correct, though the reports show a number of successful actions brought to recover damages to property resulting from mob violence, that but one case (*Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605), can be found which holds that losses sustained by intangible property are recoverable under such a statute. It is inconceivable that business losses were not sustained in many of such cases, yet no mention of any claims or allowances for such losses is made in the reports, except in that case. The inference is justified: First, that in such case either no claim was made for such losses or that they were disallowed; and, second, that the legal profession, as well as laymen, in the several states wherein such riots destroyed and injured property from the time of such enactments acquiesced in the construction that business losses were not considered as property in such statutes. While such continued acquiescence does not carry the force of judicial or legislative construction, it is not without sanction on the principle underlying the rule that due weight is to be given to contemporaneous exposition and long professional usage following it. The New Hampshire case, which is claimed to be an authority on this point, held that business is property within such a statute. This case had no judgment under review. By a practice apparently in vogue in that state at that time, the charge of the trial court, though no verdict was reached because of the jury's disagreement, was being tested as to its correctness before a retrial should be had. Among a number of instructions given by the trial judge was one "that, if the plaintiff (the publisher of a local newspaper) was entitled to recover anything, he should recover for the damage resulting from the interruption or destruction of the plaintiff's business and for the injury to the good will of the paper." Considerable attention was given by the appellate court to some of the challenged instructions, but it disposed of this particular one as follows:

"The instructions as to damages should be qualified by adding 'so far as such interruption and injury were the direct and natural results of the attack of the mob.'"

No authority or reason for such ruling was given. Whether a new trial was had and with what results does not appear. Whether in the juridical polity of such state such advisory opinion is a final adjudication of the questions propounded, though by subsequent development such questions were not necessary for decision, I am not advised. Giving the opinion thus rendered the effect of a decision, it is the only one that has been called to my attention, or which I have discovered by such research as, in the limited time permitted, I have been able to make, that holds that intangible property is a subject for indemnity under such a statute. A distinction is readily observable between the "business" before the New Hampshire court and that before me. That in the New Hampshire case, carrying on a local newspaper, as is inferable, was confined in the greater part, if not entirely, within the limits of the city, while very little, if any, of that, the loss of which is involved in the case at bar, could find place within the city. Another, and to my mind weightier, distinction is that the business losses in the New Hampshire case were capable of being due directly and solely to the stoppage of the newspaper publication resulting from the destruction or injury of tangible property there in question, while the losses here considered were due to the failure to collect and distribute merchandise, having its situs not in Jersey City but elsewhere; the losses not being due to any direct attack upon such merchandise but upon the men, horses, and wagons employed to transport it and which happened to have a physical situs in such city. The failure to carry on such business was therefore not due directly but indirectly in consequence of the attacks made upon the tangible property within Jersey City. It will be noted that the appellate court in the New Hampshire case was constrained, in affirming the instructions of the trial court "that a recovery could be had 'for the damages resulting from,' " etc., to add "so far as such interruption and injury were the direct and natural results of the attack of the mob." This addition, in my judgment, is significant and sufficient to create a doubt whether such court would have allowed damages of the character now under consideration as being either the direct or natural results of the mob's attack. But, be that as it may, I am constrained, for the reasons heretofore given, to hold that not the right to use a thing but the thing physically possessed is the property legislatively dealt with in the New Jersey statute, and that the business losses falling within the point reserved are not property within such statute.

Judgment may be entered for the plaintiff only for the sum of \$300, with costs.

In re HENNEBRY.

(District Court, N. D. Iowa, C. D. September 29, 1913.)

No. 967.

1. BANKRUPTCY (§ 408*)—DISCHARGE—OBJECTIONS—GROUNDS—TRANSFER IN FRAUD OF CREDITORS.

Bankr. Act July 1, 1898, c. 541, § 7 (8), 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), requires the bankrupt to schedule only such property as he owns, or in which he has some interest, at the time of making the schedule; and section 70a (4) vests in the trustee the property of the bankrupt conveyed or transferred by him prior to bankruptcy in fraud of creditors. *Held*, that a bankrupt's failure to schedule property alleged to have been transferred by him in fraud of creditors more than four months prior to the filing of the petition did not constitute such a concealment of the property as would bar discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

2. BANKRUPTCY (§ 408*)—DISCHARGE—OBJECTIONS—GROUNDS—FALSE OATH.

Verification of a bankrupt's schedules, from which property transferred more than four months before the filing of the petition is omitted, does not constitute the making of a false oath within the meaning of Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), for which the bankrupt may be denied a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

3. BANKRUPTCY (§ 408*)—DISCHARGE—OBJECTIONS—TRANSFER OF PROPERTY—CONCEALMENT.

Where a bankrupt, having transferred certain property to his wife more than four months prior to filing his petition in bankruptcy, fully disclosed such transfer on his examination at the first meeting of creditors, and made no attempt to evade any question with respect thereto, or to conceal from his creditors or the trustee any of the property alleged to have been so transferred, the fact that he did not list the property in his schedules did not constitute a continuing concealment thereof from his trustee, constituting an offense punishable by imprisonment, as provided by Bankr. Act July 1, 1898, c. 541, § 29b (1) or (2), 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), so as to constitute ground for denial of discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

4. BANKRUPTCY (§ 408*)—DISCHARGE—GROUND—OFFENSE PUNISHABLE BY IMPRISONMENT.

An offense by a bankrupt punishable by imprisonment, as provided by Bankr. Act July 1, 1898, c. 541, § 29b (1) or (2), 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), in order to constitute ground for a denial of the discharge, must be established beyond a reasonable doubt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

In Bankruptcy. In the matter of bankruptcy proceedings of William F. Hennebry. On specifications of objections to the bankrupt's petition for discharge. Overruled. Discharge granted.

Kelleher & O'Connor, of Ft. Dodge, Iowa, for objecting creditor.
Healy, Burnquist & Thomas, of Ft. Dodge, Iowa, for bankrupt.

REED, District Judge. The bankrupt has filed a petition for discharge, to which the Citizens' National Bank of Belle Plaine, Iowa, one of his creditors, in due time filed specifications of objections upon the grounds in substance:

(1) That the bankrupt knowingly and fraudulently made a false oath to his schedules in bankruptcy in (a) that he was in fact the owner of 160 acres of land in the state of Colorado, of the value approximately of \$1,000, which he had deeded to his wife, Ellen Hennebry, without consideration, and with intent to hinder, delay, and defraud his creditors; (b) that he was the owner of an undivided one-sixth interest in 83 $\frac{3}{4}$ acres of land in Du Page county, Ill., which he inherited from his father, and which he also deeded to his wife in March, 1912, while he was insolvent, which transfer was without consideration, and with intent to hinder, delay, and defraud his creditors, and particularly the objecting creditors; (c) that he was in fact the owner of a house and lot in the city of Ft. Dodge, Iowa, the title to which he caused to be conveyed by the former owner thereof in 1910 to his said wife with intent to hinder, delay, and defraud his creditors; that the bankrupt sold said property and caused the deed thereof to be made by his said wife to the purchaser for the sum of \$4,400, \$2,265 of which the bankrupt received, the remainder, \$2,135, being the amount of the incumbrance upon said property, and caused \$765 of said amount to be paid to certain of his creditors as a preference, and the balance, \$1,500, was deposited to the credit of his said wife in the Washington Park National Bank of Chicago, Ill.

(2) That said bankrupt, at the time he signed and made oath to the schedules of his property, was the owner in equity of all of said property hereinbefore mentioned, but did not list the same in his said schedules, and did knowingly and fraudulently make a false oath to his said schedules, for the purpose of concealing his interest in said property from his creditors and from his trustee in bankruptcy.

(3) That said bankrupt also knowingly and fraudulently omitted from his schedules of debts certain creditors to whom he was in fact indebted, and to whom he paid certain sums of money as a preference, and thereby further made a false oath to his said schedules.

(4) That the bankrupt failed to keep books of account, from which his true financial condition might be ascertained.

The petition in bankruptcy (voluntary) was filed October 7, 1912, and the adjudication followed on October 10th. The alleged fraudulent transfers of his property with intent to hinder, delay, and defraud his creditors were all made several years before the filing of said petition in bankruptcy, except the property in Du Page county, Ill., and that was made in March, 1912; and the alleged false oaths to his schedules are based upon the ground that he failed to list in said schedules the property he had so conveyed to his wife in alleged fraud of his creditors, and the omission of certain of his creditors from such schedules.

Section 14 of the Bankruptcy Act, as amended in 1910, provides that:

"The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, * * * and discharge the applicant unless he had (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition * * * destroyed, concealed, or failed to keep books of account or records from which" such "condition might be ascertained; * * * or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay or defraud his creditors. * * *

Section 29 of the Bankruptcy Act provides:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy. * * *

Under section 14 of the Bankruptcy Act the concealment, transfer, or removal by the bankrupt of property with intent to hinder, delay, or defraud his creditors must be within the four months immediately preceding the filing of the petition in bankruptcy to warrant the withholding of the discharge upon that ground.

It is the contention of the objecting creditor that the failure of the bankrupt to list in the schedules the property alleged to have been concealed or transferred by him in fraud of creditors is a continuing concealment of property by him with intent to hinder and delay his creditors, and to conceal it from his trustee, and that the verification by him of such schedules is the making of a false oath in a proceeding in bankruptcy, and punishable by imprisonment under section 29b of the Bankruptcy Act.

[1] The bankrupt is required by section 7 (8) of the Bankruptcy Act to schedule only property that he owns, or in which he has some interest at the time of making the schedule; and by the form of schedule B—4 of property, in remainder or reversion, or held in trust for him, and property conveyed or transferred by him prior thereto in fraud of creditors, is not then his property, nor property in which he has any interest in remainder, reversion, or in trust that could legally be recovered by *him* from the person to whom he had so transferred it; but such property under section 70a (4) of the Bankruptcy Act vests in the trustee, who may recover it from the fraudulent vendee or grantee. If Congress had intended that the transfer of property by the bankrupt in fraud of creditors, or the concealment thereof by him with such intent, at any time prior to the bankruptcy, no matter how remote, would bar a discharge, it surely would not have limited the transfer or concealment for such purpose to a time within the four months immediately preceding the filing of the petition in bankruptcy. To hold that a fraudulent transfer of property made more than four months prior to the filing of the petition in bankruptcy will bar a discharge would be in plain disregard of the act of Congress. In *Pirvitz v. Pithan*, 194 Fed. 403, 114 C. C. A. 365 (Court of Appeals, this Circuit), cited by the objecting creditor, the transfer of the property

there found to be in fraud of creditors, and to defeat the discharge, was within the four months immediately preceding the filing of the petition in bankruptcy.

[2] Nor is the verification by the bankrupt of the schedules from which property so transferred is omitted the making of a false oath within the meaning of the Bankruptcy Act; for, as before stated, *the bankrupt* is not the owner of, has no interest in, and is not entitled in his own name or right to recover, such property. The provision of the Bankruptcy Act that the trustee may recover such property, if in fact it has been so transferred, has the effect of restoring it to the bankrupt estate for the benefit of the creditors, and this seems to be all that is contemplated by Congress as to property so transferred in fraud of creditors.

[3] It is also the contention of the objecting creditor that the failure of the bankrupt to schedule property so alleged to have been transferred in fraud of creditors more than four months before the filing of the petition is a continuing concealment of such property from his trustee, and that by so doing he has committed an offense punishable by imprisonment under section 29b (1) and (2) of the Bankruptcy Act, which will defeat his right to a discharge; also that such offenses, when alleged to defeat a discharge, may be proved by a preponderance of the evidence only, and not beyond a reasonable doubt.

The evidence as to the alleged fraudulent transfer of property by the bankrupt in fraud of creditors is alone that given by him in his examination at the first meeting of creditors. That examination fails to disclose any attempt upon his part to evade any question as to such transfers, or to conceal from his creditors or the trustee any of the property alleged to have been so transferred, and his statements in regard thereto seem to be full and frank. It cannot, therefore, rightly be said that there was any concealment of the property so transferred, other than the fact that it was not listed in his schedules, and the trustee and his creditors were then advised by him of the property so transferred, when and how he acquired the same, the purpose of the transfer, and the consideration he received therefor; so that, if it was in fact a fraudulent transfer, the trustee and creditors were then given full information by him in regard thereto, which would enable the trustee to recover the same if he, at his own instance, or at the instance of the creditors, felt disposed to make the attempt.

The omission of the property from the bankrupt's schedules alleged to have been so transferred may, in connection with other evidence of a fraudulent concealment of such property, be considered in determining whether or not there has been an intentional fraudulent concealment by the bankrupt of property to hinder, delay, and defraud his creditors; but the omission alone from the schedules of such property, especially when transferred more than four months before the bankruptcy, is not, as it seems to me, the offense contemplated by section 29b (1) or (2) of the Bankruptcy Act; but the offenses so denounced are concealments of property within the four months preceding the bankruptcy and false oaths in bankruptcy proceedings, other than mere omissions of such property from the schedules, and contemplate the

concealment of property by some other act or acts upon the part of the bankrupt than merely omitting it from the schedules, and affirmative false statements of some material fact or facts by the bankrupt in a proceeding in bankruptcy, willfully and intentionally made by him, knowing the same to be false.

[4] It is true that it is held by some of the courts of bankruptcy that the offense denounced by section 29b, when alleged to defeat a discharge, is not required to be proved beyond a reasonable doubt. If this be true, then the bankrupt may be denied a discharge by evidence of an alleged offense, which would be insufficient to convict him of that offense, if he was indicted and put upon trial therefor. He might thus be denied a discharge for an alleged offense, and afterwards acquitted thereof. It is not believed that Congress intended this, and in the absence of controlling authority I am unwilling to so hold.

As to the alleged failure of the bankrupt to keep books of account, with intent to conceal his true financial condition, it is sufficient to say that he was not engaged in any business, aside from that of the Hennebry Clothing Company, of which he was a member and an active manager, that would require him to keep such book accounts or records.

The conclusion therefore is that the specifications of objections to the discharge are not sustained by the proofs, and the discharge is granted. It is ordered accordingly.

FOX v. CHICAGO GREAT WESTERN R. CO.

(District Court, N. D. Iowa, C. D. September 17, 1913.)

No. 24.

1. NEW TRIAL (§ 76*)—GROUNDS—EXCESSIVE VERDICT.

Since the amount of the verdict in a personal injury action will not be reviewed by the Circuit Court of Appeals, the trial court should carefully consider a motion by defendant for a new trial on the ground that the verdict allowed was excessive, to the end that no injustice should be permitted because of an award not warranted by the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

2. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES.

Plaintiff, a mail clerk, in perfect health, of good habits, and a strong, vigorous young man earning \$1,100 a year, and between 25 and 26 years old, was injured in a wreck on March 15, 1912, on defendant's railroad. Plaintiff was pinned under the wreckage for some hours, and was only released by cutting into the car. He received a severe and compound fracture of both lower bones of one leg near the ankle joint, and other bruises and injuries of a lesser nature. He was taken to a hospital, where the bones were set; but they did not unite well, became infected, and after three months he was taken to another hospital, where the bones were reset, and they, with the wound, treated for several weeks, during all of which time he suffered much pain, mental and physical. It was several weeks before he could get around at all, or that he was able to move with the aid of crutches, and at the time of trial in June, 1913, he used a cane for that purpose. While in the hospital chronic nephritis

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

developed as a direct result of the injury, which will prevent his engaging in any arduous work, mental or physical. The ankle is permanently stiffened, and he will continue to suffer mental and physical pain and require medical attention in the future. Under civil service rules he received full salary up to March 15, 1913, after which he will receive half salary until March 15, 1914, when his pay will cease. *Held*, that a verdict allowing plaintiff \$17,500 was not so excessive as to indicate passion or prejudice on the part of the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

At Law. Action by Roy A. Fox against the Chicago Great Western Railroad Company. On motion for new trial. Denied.

Kenyon, Kelleher & O'Connor, of Ft. Dodge, Iowa, for plaintiff.

Carr, Carr & Evans, of Des Moines, Iowa, and Price & Joyce, of Ft. Dodge, Iowa, for defendant.

REED, District Judge. The plaintiff, while in the performance of his duties as a railway postal clerk in a United States mail car drawn by the defendant upon its railroad, was on March 15, 1912, near Eagle Grove, Iowa, injured by the derailment of the car in which he was employed, and sued the railroad company to recover of it damages for the injury he so sustained, alleging negligence of the defendant, which caused the derailment and wreck of the car. The trial resulted in a verdict and judgment for the plaintiff in the sum of \$17,500.

[1] The defendant moves to set aside the verdict and grant a new trial upon the grounds alone that the verdict is excessive and appears to be the result of passion and prejudice. No other complaint is made of the trial which resulted in the verdict and judgment. It is not probable that the appellate court will review, at the instance of the defendant, the action of the court if it denies its motion based upon such grounds. *Newcomb v. Wood*, 97 U. S. 581-584, 24 L. Ed. 1085; *Chicago & Northwestern Railway Co. v. O'Brien*, 153 Fed. 511-514, 82 C. C. A. 461. The trial court should, therefore, carefully consider the motion of the defendant, to the end that no injustice shall be done to it because of an award of the jury not warranted by the evidence.

[2] Is the verdict unwarranted by the evidence, or is it the result of some improper motive of the jury in fixing the amount thereof? At the time of the injury the plaintiff was 25 or 26 years old, in perfect health, of good habits, and a strong, vigorous young man, earning a salary in the government service of \$1,100 a year, with an allowance for expenses while away from home, and was in the line of promotion at an advanced salary. In the wreck the car was turned over once or twice, completely demolished, the plaintiff caught in the wreckage, and pinned therein for some hours, and was only released by cutting into the car so that he might escape therefrom. He received a severe and painful fracture of both lower bones of one leg near the ankle joint, the broken parts extending or protruding through the flesh, and other bruises and injuries to his person of a lesser nature. The weather was extremely cold, and he was exposed to it without sufficient clothing or cover to protect him against its severity until he was taken

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

to a hospital at Eagle Grove several hours after the wreck. The bones of the leg were there set, but they did not unite well, the wound did not heal and became infected, and after some three months or so he was taken to a Chicago hospital, where the bones were reset, and they, with the wound, treated for several weeks or perhaps months. During all of this time, he suffered much pain, both mental and physical, and some of the time severely. It was several weeks before he was able to be around at all, later he was able to move around with the aid of crutches, and at the time of the trial (in June, 1913) he used a cane for this purpose. While in the hospital at Eagle Grove an affection of the kidneys developed, which continued during the time he was in Chicago and down to the time of the trial.

The medical evidence regarding his condition is such as to warrant the jury in finding that the kidney trouble was the direct result of his injury in the car and the exposure immediately following it, which finally developed into chronic nephritis, from which he will never recover, and which will prevent his engaging in any arduous work, mental or physical, in the future; that the injury to the leg may improve some, but the ankle is permanently stiffened, and he will suffer mental and physical pain in the future as the direct result of his injuries, and will require medical attention and assistance during the remainder of his life. He has not been able to do any work since his injury, but the government, under the civil service rules, has paid him the full amount of the salary he was then earning for one year thereafter, or until March 15, 1913, and one-half of such salary since then until the time of the trial, and will continue to do so until March 15, 1914, when such pay will cease, unless he is restored to the service, which under the rules he may be within a certain time, if there is a vacancy to which he may be reappointed and he is able to perform the duties that would be required of him. If he had remained in the service he would have been entitled to \$1,200 a year after November 1, 1912, \$1,300 a year after July 1, 1913, and \$1,400 a year after July 1, 1915, which would be the limit of his pay, unless the grade of the run on which he was employed should be changed, or he should be promoted to some higher position. The defendant admits its liability for the plaintiff's injuries, and has paid the larger part of his hospital and other expenses, and contests only the extent of his injury and the amount he is entitled to recover therefor, and for such expenses as he may have paid.

The foregoing is a brief statement of the evidence upon which the jury fixed the measure of the plaintiff's recovery. The plaintiff's loss of time and impairment of his earning capacity may be fairly approximated from the evidence as to the extent and value thereof. But this is not the limit of his recovery. He is also entitled to recover for his physical injuries, and the pain and suffering that he has endured as a direct result of such injuries to the time of the trial, and for such time in the future that it is reasonably certain from the testimony that such pain and suffering will continue. There is no mathematical rule by which this can be measured; and, while there may be difficulty in measuring it, it rests very largely in the sound discretion and good

judgment of the jury, based upon the evidence as to the character and extent of his injuries. The verdict under review is large, and, though it may be larger than the court, if sitting as a juror, would allow, this alone is not sufficient to warrant interference therewith; for to do so would be to arbitrarily substitute the judgment of the court upon the amount of the damages for that of the jury, which it cannot rightly do.

The true rule for determining the question presented by the motion is that unless the verdict is so large as to indicate gross error or reckless disregard of the evidence upon the part of the jury in fixing the amount thereof, or that the jury was actuated by some improper motive in arriving at the verdict, it should not be disturbed. *Arkansas Cattle Co. v. Mann*, 130 U. S. 69-75, 9 Sup. Ct. 458, 32 L. Ed. 854, and cases cited; *Retan v. Lake Shore & Michigan Southern Ry. Co.*, 94 Mich. 146, 53 N. W. 1094-1097. In this case the verdict is not so large as to indicate a reckless disregard of the evidence as to the character and extent of the plaintiff's injuries, or his condition directly resulting therefrom, and should not, therefore, be disturbed upon that ground. Nor is there anything to indicate that the jury was actuated by prejudice against the defendant, or by any other improper motive, in fixing the amount thereof.

In this class of cases a defendant sometimes assails the moral character of the plaintiff as affecting the amount of his recovery, without adducing any substantial evidence to sustain such claim. In such cases it may satisfactorily appear to the court that the jury has enlarged the amount of the recovery as a punishment of the defendant for so assailing the plaintiff's character, and when it so appears the court should set aside the verdict, or require the plaintiff to remit a part thereof or submit to a new trial. There is an entire absence of anything of this sort in this case, for, as before stated, the defendant admits its liability for the plaintiff's injuries, and offered only such testimony as might lessen the nature and extent of the plaintiff's injuries and the amount he was entitled to recover therefor. The defendant's testimony was such that the jury might well find that it did not materially contradict that of the plaintiff as to the character and extent of his injuries. The jury was composed of men of the highest character, drawn from different walks of life, and there is no reason for believing that it was actuated by any other motive in assessing the plaintiff's damages than to award him such sum as would, in its judgment, fully, but justly, compensate him for the injuries he sustained, and the pain and suffering he has endured and will endure in the future as the result thereof.

It would serve no useful purpose to review the many cases in which verdicts much larger than this for injuries no more severe than plaintiff has suffered have been sustained as not excessive or prompted by any improper motive on the part of the jury, or to others where a lesser amount has been for some reason reduced, for the conclusion is that no sufficient reason is shown for disturbing this verdict.

The motion for new trial must therefore be denied, and it is accordingly so ordered, to which ruling the defendant excepts.

READ v. NEFF et al.

(District Court, S. D. Iowa, S. D. June 19, 1913.)

No. 26M.

1. PROCESS (§ 119*)—PRIVILEGE—PARTIES IN ATTENDANCE ON COURT.

Where the plaintiff, in an action pending in the United States Court for the district in which the defendant resided, was a nonresident of the state, he was privileged from being sued in such court while attending the trial of such action for the purpose of conferring with his lawyer, performing such duties as a litigant usually performs at a trial, and testifying in that and other similar cases.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 148, 149; Dec. Dig. § 119.*]

2. ATTORNEY AND CLIENT (§ 16*)—PRIVILEGE—PROCESS—ATTENDANCE AT COURT.

Where a nonresident plaintiff, in an action pending in the United States Court, employed an attorney residing in another state, such attorney, while in attendance at the trial of such action, was privileged from being sued in such court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 23, 24; Dec. Dig. § 16.*]

3. ATTORNEY AND CLIENT (§ 16*)—PRIVILEGE—PROCESS—TERMINATION.

The privilege of a nonresident attorney from being sued in the United States Court while attending the trial of an action therein in which he was attorney did not cease upon the submission of the case to the jury, where he remained in the hope that the verdict would be announced before his departure, though he finally left before the return of the verdict.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 23, 24; Dec. Dig. § 16.*]

Action by Elbert A. Read against F. T. Neff and another. On motion by defendants to vacate the summons and the officer's return and to dismiss the case. Motion sustained, service vacated, and case dismissed.

Earl R. Ferguson, of Shenandoah, Iowa, for plaintiff.

D. W. Higbee, of Creston, Iowa, for defendants.

SMITH McPHERSON, District Judge. [1, 2] This and two cases similar in principle are pending upon motion of both defendants to vacate the summons herein and the return of the officer making return of the summons and to dismiss the case. The motion is based upon the proposition that each of the defendants was privileged from being sued in this court at the time this action was brought.

At the recent term of this court the said F. T. Neff had pending in this court at Creston, Iowa, an action against the said Elbert A. Read and two others for damages growing out of an alleged fraudulent transaction involving corporate property at both Shenandoah, Iowa, and near Ottawa, Ill. Mr. Neff came to Creston, Iowa, to be present at the trial of this case to the end that he could have conferences with his lawyer and perform such duties as a litigant usually performs at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a trial. He also was a witness in this and the other two cases of like nature. He now resides and for many years has resided in Illinois.

The defendant Strawn is a member of the bar of many years' experience and one of prominence. He is engaged in the general practice of law in Illinois and likewise is holding the office of Assistant Attorney General of that state. He was employed by Mr. Neff as his senior counsel. Mr. Neff employed Mr. Higbee, of Creston, Iowa, as his junior counsel.

[3] Mr. Neff and Mr. Strawn came from Illinois to Creston, Iowa, solely for the purpose of attending to such litigation, arriving at Creston the evening before the trial commenced, and departed for their homes in Illinois the morning following the conclusion of the trial, but departing before the jury had been able to reach a verdict. They could have left Creston, Iowa, for their homes in Illinois the evening before after the jury had retired, but they elected to wait over hoping that the verdict would be announced before their departure. But, finding that the jury was not able to reach an early conclusion, they concluded to await no longer. The jury retired to consider its verdict at about 9 o'clock in the evening. At a later hour that evening the petition in this case was filed, the summons issued, and service thereon made on Mr. Neff and Mr. Strawn at the law office of Mr. Higbee. On these facts each defendant insists that he was privileged from being sued. I am of the opinion that each defendant is correct in his contention. This conclusion is in harmony with both reason and the authorities.

It is true that Mr. Neff voluntarily came into the state of Iowa, but he could not have brought his action in the courts elsewhere than in Iowa because Mr. Read resided in Iowa within this district and division. Mr. Neff must either have gone into the state courts of the county where Mr. Read resided and against whom he contended he had a cause of action or have come into this court to insist upon his alleged cause of action. So that he was compelled in any event to come to the state of Iowa to look after his litigation and testify as a witness or else abandon his claim. He elected, as he had a right to do, to bring his case in this court, and the contention that he must either abandon his claim and not present it to the court and not testify as a witness, or to not submit himself to litigation, is not at all persuasive to this court. This court is open to all litigants who can make averment of jurisdictional facts. He had the perfect right to come to this court and look after his case, aid in the management thereof, and give his testimony. This is not denied. But it is contended that, if he did elect to come, he must come with a club over his head, terrorizing both him and all other litigants of like position. This is unsound and utterly at variance with the undoubted right of all such litigants to personally present their case, either alone or with the aid of lawyers. And, if litigants coming from another state come at the peril of being sued, many would not come. And this is true whether such litigant is to be sued on a just cause of action or is to be sued in vexatious litigation without merit.

It is said that this litigation grows out of and is connected with

the alleged cause of action presented by Mr. Neff. If this is true, the inquiry suggests itself that a counterclaim could have been presented and one trial would have concluded the differences between the parties.

Every litigant has the undoubted right to select from the entire bar any lawyer deemed by him best to select. It is true that Mr. Strawn was an Illinois lawyer. It may be true that Mr. Neff could have gotten an Iowa lawyer who could have presented his case just as well. But Mr. Neff desired the services of Mr. Strawn and such selection was the concern of no other person. There is a spirit of comity between all courts, national and state, by reason of which any court allows, on motion, an attorney from another jurisdiction to appear in a particular case. And it is not within the spirit of fair dealing and such comity for this court to hold that, if a lawyer from another state comes into this court, he does so at the peril of being sued. The contention that Mr. Strawn should have left on the first train that left Creston after the jury had been charged need only be stated as a refutation of such a statement. Ordinarily it is the duty of a lawyer to be in attendance when a verdict is returned and judgment thereon rendered. Mr. Strawn elected to attend to his duty, but finally concluded to await no longer and left the matter in the hands of his associate, Mr. Higbee.

There were five cases tried at one and the same time to the jury; they being consolidated for trial purposes. One of the cases was by a trustee in bankruptcy, an officer of a United States court for the Northern District of Illinois. Mr. Strawn was attorney also for that trustee. Mr. Neff was also a witness for that trustee. It is true that the trustee has not been sued in this court, but his lawyer has been, and his witness has been, and the bringing of such action is tolerably close to the line of being in contempt, because it is the duty of this court to protect such trustee and his witness and his lawyer while so presenting their litigation. The lawyer and witness are entitled to the protection of this court. There is a holding otherwise in *Blight v. Fisher*, Pet. C. C. 41, Fed. Cas. No. 1,542. But that was overruled by Judge Kane with the concurrence of Chief Justice Taney and Justice Greer in *Parker v. Hotchkiss*, Fed. Cas. No. 10,739. *Central Trust Company v. Milwaukee* (C. C.) 74 Fed. 442; *Hoffman v. Bay*, 113 Mich. 109, 71 N. W. 480, 38 L. R. A. 663, 67 Am. St. Rep. 458, with cases cited to illustrate the point involved. And see *Murray v. Wilcox*, 122 Iowa, 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263.

There are cases which hold that a party is not immune when at court in another county of the state of his residence. But that is a proposition differing from the one now before the court. And that there are cases adversely holding to that which this court holds is also true. *Mullen v. Sanborn*, 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721, 47 Am. St. Rep. 421; *Guynn v. McDaneld*, 4 Idaho, 605, 43 Pac. 74, 95 Am. St. Rep. 158; *Baldwin v. Emerson*, 16 R. I. 304, 15 Atl. 83, 27 Am. St. Rep. 741; *Iron Dyke Copper Co. v. Iron Co.* (C. C.) 132 Fed. 208; *Robbins v. Lincoln* (C. C.) 27 Fed. 342; *Greenleaf v. Peo-*

ple's Bank, 133 N. C. 292, 45 S. E. 638, 63 L. R. A. 499, 98 Am. St. Rep. 709. Some of these cases are but inferentially in point. Those that are in point are not persuasive.

The correct rule is as stated by Judge Ladd in the case of *Murray v. Wilcox*, 122 Iowa, 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263, where he said:

"The immunity from service of civil process of a witness while attending a trial in a state other than that of his residence to give evidence seems to be universally recognized."

And defendant Neff was such a witness. And as I think the equality before the law, as relied on in some of the opposite holding opinions, requires a holding that all persons are equal before the law. And such equality should allow *all* persons to have the lawyer of his choice, wheresoever residing, to sue in any court, national or state, of any state or district in which the defendant resides. And such rights of equality are not naked or barren rights, but rights which should be followed by his protection while going to, while attending, and returning from such court. The circumscribed state-line argument, across which it is perilous to go, is too nearly obsolete to be longer persuasive.

The motion will be sustained, the service of the summons vacated, and the cases dismissed.

McBRIDE v. KIRKPATRICK.

(District Court, N. D. West Virginia. September 24, 1913.)

COURTS (§ 349*)—FEDERAL COURTS—RULES OF DECISION—CONSTRUCTION OF STATE STATUTE.

In determining the meaning or construction to be given to the words "personal transaction" and "communication," as used in Code W. Va. 1906, § 3945, prohibiting a witness to testify as to personal transactions or communications between herself and a person since deceased, the federal courts will be governed by the decisions of the Supreme Court of Appeals of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 925; Dec. Dig. § 349.*]

2. WITNESSES (§ 159*)—TRANSACTION WITH PERSON SINCE DECEASED—"PERSONAL TRANSACTIONS"—"COMMUNICATIONS."

The words "personal transactions" and "communications," used in Code W. Va. 1906, c. 130, § 23 (section 3945), prohibiting a party from testifying to personal transactions or communications with a person since deceased, should be given a broad and liberal construction, to exclude all evidence of work or labor performed or acts done by the party interested, or party to the suit, which would create or tend to create a liability against the estate or interests of such deceased person, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5365, 5366; vol. 2, p. 1342.]

3. EVIDENCE (§ 138*)—RELEVANCY.

Where, in a suit by an executrix against a tenant for years of a limited portion of testator's farm for an accounting, the tenant claimed cer-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tain animals and personal property on the farm as having been purchased for herself, evidence showing her payment for other animals during her 12 years' occupancy of the farm, which animals were long since dead or consumed, was irrelevant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 414, 414½; Dec. Dig. § 138.*]

4. WITNESSES (§ 159*)—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED.

Where, in a suit by an executrix against a tenant for years of a portion of testator's farm for an accounting, defendant claimed that she purchased certain animals and personal property for her own use, she was incompetent to testify, in explanation of checks executed and bills paid by her, and introduced in evidence to show that she made such purchases on her own account, and not as agent for testator, as such evidence would relate to personal transactions or communications between herself and decedent, concerning which she was disqualified to testify, by Code W. Va. 1906, § 3945.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.*]

In Equity. Suit by Harriet Elizabeth McBride against Emma Jane Kirkpatrick. On motion to exclude testimony. Granted in part.

See, also, 203 Fed. 449, 120 C. C. A. 328.

Henry M. Russell, of Wheeling, W. Va., and Thomas M. Kirby, of Cleveland, Ohio, for plaintiff.

Wm. H. Cochran, of Philadelphia, Pa., for defendant.

DAYTON, District Judge. [1] It is substantially admitted that Mrs. Kirkpatrick is an incompetent witness under the West Virginia statute (Code 1906, § 3945), which must govern by virtue of the act of Congress of June 29, 1906 (34 Stat. at Large, 618 [U. S. Comp. St. Supp. 1911, p. 271]) amending section 858 of the United States Revised Statutes, as to "all personal transactions or communications" between her and decedent, Lee McBride; but her counsel insist that her testimony is free from this objection, for that it relates only to the identification of checks, and bills given by and receipted to her for items of personal property bought of others and paid for by her. It becomes necessary for us to determine, therefore, the meaning or construction given the words "personal transaction" and "communication," as used in this statute. In doing this, we should be governed by the decisions of the Supreme Court of Appeals of the state. The question has been discussed in Hogg's Equity Procedure, vol. 1, §§ 524-527, and the West Virginia cases are there cited.

[2] As stated in the last section cited:

"A broad and liberal construction is given to the words 'personal transaction,' in order to carry into effect the true spirit and meaning of the law, and avoid the evils against which it was designed to guard."

It is further there stated that:

"The statute excludes all evidence of work or labor performed or acts done, given by the party interested or a party to the suit, which would create or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tend to create a liability against the estate or interests of such deceased or insane person, whether the work was performed in or about the presence of the deceased" (or otherwise).

[3] In *Fouse v. Gilfillan*, 45 W. Va. 213, 32 S. E. 178, and *Poling v. Huffman*, 48 W. Va. 639, 37 S. E. 526, it is held that the test of admissibility of such testimony is: "Does it tend to prove what the transaction was?" If it does it is inadmissible. In this case this court by its decree ascertained that Mrs. Kirkpatrick was a tenant for years of a limited portion of McBride's "Brookside" farm—that is, of the hotel and cottages, other than Gaymont—but not of any other portion of the real estate. This decree was affirmed by the Circuit Court of Appeals for this circuit. 202 Fed. 144, 120 C. C. A. 322. Certiorari was likewise refused by the Supreme Court. Subsequently, however, the Circuit Court of Appeals, upon rehearing, directed a modification of the original decree for two purposes, and two only: First, to permit the parties "to put in such additional *competent* testimony as they may be advised upon the question of the ownership of the personal property as claimed in the said answer [of Mrs. Kirkpatrick], and that said District Court do thereupon, upon the testimony in this cause and such additional testimony as may be introduced, proceed to a final decree upon such question"; and, second, to give leave to the complainant (Mrs. McBride) "to prove any sums of money that were paid to the defendant [Mrs. Kirkpatrick] by Lee McBride during his lifetime, and require of her an accounting therefor." 203 Fed. 449, 120 C. C. A. 328.

In obedience to that direction, this court has appointed an examiner to take the testimony tendered by the parties and report the same. The items of personal property, as set forth in Mrs. Kirkpatrick's answer, are not excessive in number nor their value great comparatively; nevertheless she has been introduced as a witness on her own behalf, and has been examined, to the extent of over 250 typewritten pages, largely about her payments for horses, cattle, pigs, chickens, and turkeys during the 12 years of her stay at Brookside—animals dead, consumed, and it would be supposed forgotten, long ago. For what purpose? Can it be assumed that such testimony can be relevant (to say nothing of its competency) to the determination of whether she is entitled to certain existing property claimed by her answer, the right to which alone her inquiry is, by the Circuit Court of Appeals ruling, restricted? Admit instantly that she purchased all this mass of poultry, pigs, sheep and cattle; that she executed these hundreds of checks therefor; that she paid these bills. What is there to show whether she did so for her own use in her conduct of the summer resort hotel or not? Whether she did so as agent for McBride or on her own account? How can she undertake to testify in explanation of these checks and bills paid by her without attempting to prove "what the transactions were" between herself and McBride, a thing she is incompetent under the statute to do? The items of personal property existing, claimed by her in her answer, are fully known; they have been inventoried and listed.

[4] It would seem to be an easy thing to take these items one by one, present any *competent* evidence showing her title thereto and pass on to another. If counsel have an idea that this court will undertake to make a settlement of all the mass of items, accounts, and transactions arising from Mrs. Kirkpatrick's conduct, for 10 or 12 years, of the summer hotel business at Brookside, of McBride's 10 or 12 years' conduct of the farming, dairy, poultry, and cattle business at Brookside, and also of the jumbled, intermingled, and confused joint conduct by both of these affairs, during all of which years no settlements are shown to have ever been attempted by them, they are entirely mistaken. This court does not so understand the Circuit Court of Appeals order, and will await further direction before undertaking such a practically impossible task. For the present I will direct that any and all checks, receipted bills, and paper evidence of title presented by Mrs. Kirkpatrick, that relate directly to any item of existing personal property claimed by her in her answer, remain as evidence in the record, excluding, however, her evidence in explanation thereof, so far as such explanation would tend to establish her right as against said decedent's estate to such property; this, on the ground of her incompetency to testify. Such testimony must be produced aliunde. This substantially takes her oral testimony, on both direct and cross examination, out of the record, and makes insistence upon the right to further cross-examination unnecessary.

I may add, however, in the interest of sound practice, that such authorities as *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, *Thomson-Houston Electric Co. v. Jeffrey Mfg. Co.* (C. C.) 83 Fed. 614, and 7 Standard Proc. 311, 312, are conclusive in condemnation of counsel's right to instruct his witness to refuse to answer questions on cross-examination, on the ground that such questions are immaterial and irrelevant; also that *Caldwell v. Prindle*, 11 W. Va. 307, settles the question that when a witness, incompetent under the statute we have been considering, has been called and examined under objection, the cross-examination or the recall for further examination of such witness by the opposing party does not either waive the disability nor render the evidence admissible.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. August 25, 1913.)

No. 1,734.

1. NUISANCE (§ 3*)—INJURIES TO PROPERTY FROM OPERATION—"ACTIONABLE NUISANCE."

The consequential, incidental, and unavoidable annoyance or damage resulting to the occupiers of land adjacent to a duly authorized railroad from its nonnegligent and careful operation does not constitute an "actionable nuisance," irrespective of the extent of such annoyance or damage.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 1, p. 149.]

2. CONSTITUTIONAL LAW (§ 278*)—EMINENT DOMAIN (§ 2*)—TAKING OF PROPERTY WITHOUT COMPENSATION—DAMAGES FROM OPERATION OF RAILROAD.

Nor does the causing of such damage to the property owner by such nonnegligent operation of the railroad constitute a taking or appropriation of his property without due process of law, or just compensation, in violation of the Constitution of the United States.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 763, 765, 767-770, 772-777, 779-806, 808-810, 816-824, 907-924, 942; Dec. Dig. § 278;* Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*

Consequential and indirect damages, see note to 16 C. C. A. 468.]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Suit in equity by the Roman Catholic Church of St. Anthony of Padua against the Pennsylvania Railroad Company. Decree for defendant, and complainant appeals. Affirmed.

Frank M. Hardenbrook, of Jersey City, N. J., for appellant.

Vredenburg, Wall & Carey, of Jersey City, N. J. (James B. Vredenburg, of Jersey City, N. J., of counsel), for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a decree of the court below, dismissing a bill in equity, asking for an injunction and an award of damages. The bill of complaint alleges that complainant is a religious corporation and has been active as such since 1884, upon the lands and premises described in the bill.

That the defendant was incorporated in 1846 as a common carrier, with authority to lease, hold, and operate a line of railway in the states of Pennsylvania and New Jersey, "and as such, at all the times hereinafter mentioned, has maintained and operated, and still maintains and operates a railroad, with its main and side tracks, locomotives, freight and passenger cars, upon what is known as Sixth street, in Jersey City, Hudson county, New Jersey."

That on the 20th day of September, 1884, the complainant became the owner of three lots in Jersey City, county of Hudson, and state

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 207 F.—57

of New Jersey, fronting on the westerly side of Monmouth street. (No map of the premises having been presented on either side, we assume that Monmouth street runs at right angles to Sixth street, and that the lots in question are situate in a block bounded on the south by Sixth street, on the east by Monmouth street, on the north by Seventh street, and on the west by Brunswick street.) How far these lots were from Sixth street, nowhere appears. That immediately thereafter, it caused to be erected thereon, at a large cost, a church edifice, since which time it has held continuously religious services therein.

That on the 10th day of May, 1893, complainant became the owner of a lot of land in the said city of Jersey City, situate on the north side of Sixth street, 100 feet west from the northwest corner of Sixth and Monmouth streets, and in the same block as the aforementioned lot. That complainant caused to be erected thereon, at a large cost, a residence for the officiating priests attached to and connected with said church, since which time, the same has been continuously occupied as a home by said priests.

That on June 11, 1898, complainant became the owner of four certain lots of land in said city, and in the same block as the lots above referred to, fronting on Brunswick street 100 feet, but how far from Sixth or Seventh street does not appear. That immediately thereafter, complainant caused to be erected thereon a parochial school for educational purposes, since which time the same has been continuously used as a school for upwards of 1,100 children.

That on August 8, 1902, complainant became the owner of a lot of land on the northerly side of Sixth street, in said city, in the same block as the lots aforementioned. That immediately thereafter, it caused to be erected thereon an addition to the residence of the officiating priests connected with complainant's said church.

That on March 20, 1905, complainant became in like manner the owner of a lot of land on the southerly side of Seventh street, in the said city, in the same block as the aforementioned lots, and that immediately thereafter it caused to be erected thereon, at large expense, a home and residence for the Sisters and female teachers connected with said church and school; since which time, it has been continuously so used and occupied.

That the buildings so erected are of substantial and costly construction, and, except for the acts of the defendant complained of, convenient, pleasant and healthful, and adapted and used for the respective purposes aforesaid; and that the immediate neighborhood has long been and now is thickly populated and exclusively a residential one.

That the said defendant, for upwards of six years last past, in the operation of its said railroad, has maintained and operated *upon said Sixth street*, and immediately to the south of said lands and premises and structures of complainant, a line of railroad track, upon which it operates a great number of freight and passenger trains, cars, switches, engines and locomotives, which continuously, at all hours of the day and night, pass upon said tracks, each making its characteristic noises, which locomotives attached to said trains, are now burning,

and for upwards of the past six years have continuously burned, vast quantities of what is known as soft or bituminous coal, and from the burning and partial combustion of which there arises, and continuously for upwards of the past six years there has arisen, large and dense volumes of black smoke, soot, cinders, carbon, ashes, particles of unconsumed coal, coal dust, and noxious, unwholesome gases, offensive odors and vapors, which are carried to, over, into, upon and through the lands, premises and structures of complainant, so owned, used and occupied by it as aforesaid; by reason of which, the buildings of said complainant are seriously injured and their use, for the purposes aforesaid, seriously interfered with, to the great inconvenience and discomfort of those occupying said buildings and worshipping in said church.

The bill then charges that the said acts of the defendant have taken from the complainant property, consisting of the easement of light and air, and deprives it of the same without due process of law and without just compensation, or any compensation whatever, "and that such acts of the defendant in such interference with and appropriation of said property of your orator, has been and now is a violation of the provisions of the Constitution of the United States."

The bill then avers that the aforesaid acts, use, occupation of and appropriation by the defendant, as aforesaid, constitute and are a nuisance and of special injury to the complainant, "and are unnecessary, avoidable and unreasonable, and not necessarily connected with the construction or a reasonable operation of said railroad, and which acts are continuous and will cause great and irreparable loss to your orator and subject your orator to the prosecution of a multiplicity of suits for damages, unless the defendant be restrained by injunction from the commission thereof."

The bill then concludes with the averment that the complainant is remediless in the premises, under and by the strict rules of the common law, and can only have relief in a court of equity. The bill therefore prays that defendant may be deemed to pay to complainant the sum of \$50,000 damages suffered by it, by reason of the premises, and that there be granted to complainant "a writ of injunction, commanding the said defendant, its agents, servants and employes, to absolutely desist and refrain from so operating its said railroad locomotives and engines as to cause or permit black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives, to fall upon or enter into the premises and structures of your said orator, in such appreciable quantity as to interfere with the reasonable use thereof and render uncomfortable the reasonable enjoyment of the same by your orator, and the priests connected therewith and persons using the said respective structures of your orator." The bill then concludes with a prayer for a subpoena and answer by the defendant, without oath.

The answer of the defendant denies that it had ever maintained or operated a railroad on *Sixth street* in Jersey City.

It alleges that, as lessee, it has maintained and operated, since 1871,

an elevated railroad, with five tracks, on the duly authorized right of way of the United New Jersey Railroad & Canal Company, on land between Fifth and Sixth streets, but not *on* any part of Sixth street.

The defendant, further answering, avers that the Legislature of the state of New Jersey, by an act entitled "An act to incorporate the New Jersey Railroad & Transportation Company," passed March 7, 1832 (P. L. p. 96), created a body politic and corporate, to exercise all the powers and privileges pertaining to corporate bodies and necessary for the purposes of said act; with all the rights and powers necessary to the construction of a railroad, with as many sets of tracks as they may deem necessary, from a point in the city of New Brunswick to a point in the Hudson river, opposite the city of New York, and to take possession of lands needed for the site of the said road, and to acquire the same by purchase or condemnation, in fee simple, and to charge and collect tolls, etc.

That immediately after the passage of said act, the said New Jersey Railroad & Transportation Company surveyed and filed the route of their railroad from the city of New Brunswick to Jersey City, opposite the city of New York, and acquired the land and constructed a railroad thereon, in accordance with the terms of the act, and in September, 1834, opened said railroad as a public highway for the transportation of property and persons, and maintained and operated said railroad up to the time of the execution of the lease thereafter mentioned.

That the state of New Jersey, by an act entitled "An act to enable the United Railroad & Canal Companies to increase their depot and terminal facilities at Jersey City," approved March 30, 1868 (P. L. p. 551), empowered the said New Jersey Railroad & Transportation Company, and the United Delaware & Raritan Canal Company, and the Camden & Amboy Railroad & Transportation Company, to acquire from the state the land under water in Harsimus Cove, in Jersey City, lying between tide water mark on the west, the deep water of the Hudson river on the east, the center of South Second street on the north, and the center of South Seventh street on the south, in the name of the New Jersey Railroad & Transportation Company, and to fill up and improve the same, by erecting wharves, piers, car and engine houses, and other buildings, and to build a branch railroad, not exceeding 100 feet in width, from said property, so purchased as aforesaid, to some point in the present line of the New Jersey Railroad, eastward of the deep cut in Bergen Hill, with as many separate tracks and rails as shall be deemed necessary, with power to procure the right of way for such branch railroad, either by purchase or by condemnation, in the manner prescribed by the original charter; and to construct the same as an elevated railroad, so as to pass over the streets of said city at least 12 feet in the clear above the same, in consideration of a sum of money to be paid out by said companies to the state of New Jersey, the amount of which was to be ascertained by the Attorney General and three commissioners to be appointed by the Supreme Court. Subsequently, and agreeably to such an ascertainment, the New Jersey Railroad & Transportation Company and the other companies paid to the state of New Jersey

the sum of \$500,000, and thereafter made a survey of its said branch line and filed the route thereof in accordance with law, and at great expense acquired from the owners thereof, for the purpose of such branch railroad, as provided by said act, a route 100 feet wide from a point in the New Jersey Railroad, in the deep cut in Bergen Hill, to said lands in Harsimus Cove, and constructed and built on said route the elevated branch road authorized by the act; that thereafter, the companies erected on the said lands in Harsimus Cove a terminal yard in connection with said branch railroad, with wharves, sheds, and a grain elevator, warehouses and tracks, all at great expense. That the defendant commenced to operate the said branch railroad and said terminal yard on or about the first day of May, 1872, with the full knowledge of and without objection from the owners of any of the lands set forth in the bill of complaint.

That on or about the 30th day of June, 1871, the Delaware & Raritan Canal Company, the Camden & Amboy Railroad & Transportation Company, and the New Jersey Railroad & Transportation Company (commonly called the United Railroad & Canal Companies), by indenture bearing date that day, did grant and demise unto the Pennsylvania Railroad Company, the defendant, all their railroads and appurtenances, and real and personal property, including the said Harsimus Cove property and the said branch line leading thereto, for the full term of 999 years. That said lease was validated and confirmed between the Companies and the Pennsylvania Railroad Company, by an act of the Legislature of the state of New Jersey, approved March 27, 1873.

That defendant has been in possession of the property so leased, including the said land at Harsimus Cove and the said branch line from Harsimus Cove to the main line from the Bergen Cut, as lessee thereof, since the year 1871, and is now in such possession under said lease, and has been during all that time and still is using and operating the same for the transportation of goods and passengers in and across the state of New Jersey, from the city of Philadelphia to the city of New York.

That the land for the said route to Harsimus Cove was acquired by the New Jersey Railroad & Transportation Company, prior to the year 1873, in accordance with the terms of their said charter, and that some of the persons from whom they acquired said land were at that time also the owners of the lands set forth in the bill of complaint, and that the said lands were granted to the said New Jersey Railroad & Transportation Company by said owners for use in operating and maintaining a railroad thereon, in the way and in the manner in which said railroad is now maintained and operated; and that from the year 1873 up until the present time, the defendant has, by force of the franchises above mentioned, derived from the above mentioned public grants, maintained and operated its railroad and run its trains along said route, doing no more damage to the lands adjacent to said route than that which incidentally and necessarily results from the transaction of such acts and business.

The answer also avers that the defendant has, for over 30 years,

and since the said legislative grant, had actual possession of the lands on said route uninterruptedly, and has uninterruptedly continued to operate their trains, cars, switch engines and locomotives over the said railroad on said route, in the same way and manner as they now maintain and operate the same, and that there has been acquired, both by statute and prescription, the right so to do.

And defendant finally denies that it has in any wise infringed upon the rights of the complainant, as alleged in the said bill of complaint.

These allegations of the answer, for the most part, especially those in regard to the legislative history and operation of the railroad during the period since 1871, are not denied, and from the answer and evidence, we may also take, as undisputed, the following facts:

In 1887, an embankment 100 feet wide, with stone retaining walls on each side, was substituted for the trestle. The top of this embankment is generally 18 feet above the level of Sixth street. The whole of the embankment is to the south of Sixth street, and of the tracks on the embankment, no portion of the same, or of the embankment, is located on that or any other street, but entirely on the land or right of way of the defendant company.

There has been no change in the number of tracks on this embankment since 1887.

From 1873 to 1905, the use of these tracks in transportation increased, but since 1905, has remained stationary.

The locomotives by which the trains are moved have always burned bituminous coal, from the burning of which characteristic smoke arose from the smoke stacks, and the cinders and dust forming this smoke were carried from this right of way to the adjacent land in different directions and different distances, depending upon the force and direction of the wind. The church of complainant fronts on Monmouth street, not on Sixth street. A four-story brick building, 25 feet in width, neither owned by nor in possession of the complainant, intervenes between the church property and Sixth street. All other property, within an equal distance from the railroad, must be similarly affected by the operation of the same.

It is also admitted that, owing to the nearness of this portion of the branch road to the freight terminal at Harsimus Cove, the road having been built to connect the said Harsimus Cove with the main line at Bergen Cut, the tracks on the south side of Sixth street, between Monmouth and Brunswick streets, are much occupied by shifting engines and in the making up of trains, incident to terminal operations.

It is admitted that no portion of the railroad is on Sixth street, as alleged in the bill of complaint, but is situated on a strip of land 100 feet wide, south of Sixth street and running parallel therewith, and we shall consider the bill as if amended in that important respect.

The charge of the complainant, as set forth in its bill, is two-fold:

(1) That the acts of the defendant have taken from the complainant its property, consisting of the easement of light and air to which it is legally entitled, and deprives it of the same without due process of law and without just compensation, or any compensation whatever, in violation of the Constitution of the United States.

(2) That the aforesaid acts, use, occupation of and appropriation by the defendant, as aforesaid, constitute and are a nuisance of special injury to complainant, and are unnecessary, avoidable, and unreasonable, and not necessarily connected with the construction or a reasonable operation of the said railroad.

The latter paragraph seems to suggest, although it does not charge, negligent management by the defendant of its locomotives, and that the injury complained of was the result of such negligence. On page 66 of his brief, counsel for complainant says:

"While this action is not based upon any allegation of negligence, yet the acts of nuisance of which the plaintiff complains are due to negligence."

On page 70 of his brief, complainant's counsel makes the following statement:

"The allegations of the plaintiff's bill, that the acts of the defendant are unreasonable and unnecessary, do not charge that they are negligently done, as they may have been committed after the exercise of all the care and caution possible."

On this ground, he distinguishes the present case from the case of *Bunting v. Pennsylvania Railroad Co.* (C. C.) 189 Fed. 551, saying that that was an action based entirely upon negligence, which, being alleged, it became the duty of the plaintiff to establish, and in failing to do this, the plaintiff did not make out a case. So also on this ground, the present case is distinguished, by counsel for the complainant, from *Jenkins v. Pennsylvania R. R. Co.*, 67 N. J. Law, 331, 51 Atl. 704, 57 L. R. A. 309, in which the action at law was brought against the defendant company for *negligently* operating its locomotives in such manner as to cause them to emit smoke denser and greater in volume than was reasonably required for the proper operation of the railroad.

These positions of the complainant are somewhat confusing, as a number of pages of its brief are devoted to showing that the defendant was guilty of negligence in its use of bituminous coal, and in so firing its engines as to produce more smoke than was necessary for the proper operation of the road.

But the gravamen of complainant's argument rests on two propositions:

First, that the emission of smoke from the engines of the defendant, while operating its road on its own land, parallel with Sixth street and in the block between Brunswick and Monmouth streets, in such quantities as to enter into and upon complainant's premises, constituted of itself an actionable nuisance and a taking and appropriation of the complainant's property, to wit, its easement of light and air, without due process of law and without compensation, in violation of the Constitution of the United States and of the state of New Jersey in that behalf.

Second, that the complainant is entitled to an award of damages and to an injunction inhibiting such conditions, without regard to whether the smoke, gases and noises were occasioned by any negligence on the part of the defendant, or resulted after the exercise of all care and caution possible on its part.

The defendant relies upon the fact that it is a quasi public corporation, and as such has been authorized by the Legislature in its charter to locate its railroad as a highway for the transportation of passengers and commodities between the two definite points, Harsimus Cove and Bergen Cut, and that as a public corporation, it has been clothed with the right of eminent domain, without which, such a necessary improvement as a turnpike road or a railroad could not be constructed for the accommodation and convenience of the public.

It is not denied that the railroad of the defendant, as here complained of, was lawfully located, as authorized by the Legislature of New Jersey and for the public purposes stated in its charter. To fulfill these public purposes, it was authorized, among other things, to use steam for the propulsion of its engine and the movement of its trains. Steam, of course, cannot be created except by the combustion of fuel, and the combustion of fuel inevitably produces more or less smoke. These usual and normal results of the operation of a railroad, like the noises created by the movement of its trains, are necessarily contemplated and taken into account by the Legislature that authorizes its construction. They enter into the common experience of modern life and are recognized as necessary accompaniments of the convenience and advantages which railroad transportation brings to the public. Their sufferance is one of the penalties of living in a large community like a city. The annoyance and inconvenience occasioned thereby are to be viewed from the same legal standpoint as are the annoyance and inconvenience necessarily suffered by those who live along a turnpike or other highway. Some dust and noise arising from the traffic along such highways, are the necessary and unavoidable incidents of the authorized and lawful use thereof. The same may be said of the noise of street cars. It is an undoubted annoyance to the people living along their route. To many people, it is a serious annoyance, often interfering with sleep and quiet home life. As said by Judge McPherson in the case of *Bunting v. Pennsylvania R. R.*, *supra*, the perfectly proper use of these vehicles constitutes an annoyance, from which people suffer and sometimes seriously, but this inconvenience is an injury for which there is no redress.

[1] It may be stated, therefore, as a principle well established by reason and authority, that the consequential, incidental and unavoidable annoyance or damage resulting to the occupiers of land adjacent to a duly authorized railroad, from its nonnegligent and careful operation, does not constitute an actionable nuisance. It is also equally well established that, where such damages are the result of the want of due care and skill in the conduct and operation of the railroad, the defendant company is liable to those injured thereby.

[2] The correctness of these propositions seems to be recognized by the complainant, as the stress of its argument, as we have pointed out, is not placed upon any contention that the damage complained of was caused by the negligent operation of its railroad by the defendant, but, that the coming of the smoke and cinders upon the complainant's premises, without regard to whether such coming was the result of negligence of the defendant in the operation of its road, or was con-

sistent with the utmost care and skill in such operation, was a taking of complainant's property without due process of law or just compensation, and was within the constitutional inhibition in that regard.

This point is urged with much plausibility of argument by counsel for complainant, and the cases cited in its support require careful consideration.

There must be something peculiar and exceptional in the situation, to warrant the contention that the normal result of the careful operation of a railroad authorized by law, is the taking of private property for public use, within the inhibition of the Constitution. A careful examination of the cases cited and quoted from in the brief of the counsel for the complainant, justifies this assumption. We refer now to a few of those which seem to be most relied upon, and the opinions in which are most largely quoted from in complainant's brief.

The first of these, *Chicago G. W. Ry. Co. v. First M. E. Church*, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, was a case in which the defendant company, by virtue of the right granted by a municipality to operate and maintain a railroad on a public street, claimed the right to erect a water hydrant in the middle of said street, for the use of its locomotives, opposite the center of the church building of the plaintiff and 35 feet distant therefrom, and a depot or station on the opposite side of the street, 60 feet distant from said church. The gravamen of the complaint, as stated by the court, was that, by reason of the location of said depot and the erection of said water tank, the engines of the defendant company were constantly going backwards and forwards in front of the church, on Sundays and other days, for the use of said water hydrant, and by the noise, smoke, cinders, etc., interfered with and impaired the easement of the complainant as an abutting owner on said street. In reference to these facts, the court of Appeals for the Eighth Circuit said:

"Whatever the fact may be, no complaint is made in the petition in this case on account of the mere movement of trains over the defendant's track in the street. It is the consequences flowing from the use of the street and its track for other purposes than merely moving its trains, that is complained of. * * * Granting, therefore, that the defendant had a right to run its trains over the track on Choctaw street, and that it was not liable for any damages unavoidably resulting therefrom, this concession falls far short of supporting the defense in this action. It did more than run its trains over its track. It erected a station, at which its passenger trains stopped, and a water hydrant in the middle of the street, under the very windows of the church, at which all its trains, freight and passenger, stopped to take water. * * * It was not competent for the city to make a grant to the railroad company, which would exempt it from liability to the abutting owner for maintaining such a private nuisance. But the city made no such grant, either expressly or by implication. The rule, that no one will be heard to complain of the proper exercise of a lawful authority, cannot be invoked to shield the defendant in this case. The railroad company had no authority to erect its water hydrant where it did. * * * Conceding that the noise, vibrations and inconveniences and annoyances which are unavoidable in the lawful running of trains over a railroad track, and which are common to the whole public and to all the abutting owners of property on the street, are not actionable injuries, the plaintiff's right of action is not affected thereby."

The language quoted by counsel in his brief, from this opinion, refers to this unlawful occupation of the street in front of complainant's property, which, together with the noises, smoke, etc., incident thereto constituted a nuisance and invasion of the easement of the complainant upon said street, as an abutting owner thereon.

The acts complained of were not necessary to the authorized operation of defendant's road. It is in this respect not unlike the leading case of *B. & P. Ry. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, cited by the complainant and recently considered by this court in the case of *Bunting v. Penna. R. R. Co.* The hydrant and station, the sources of the injury complained of, were not necessary to the operation of the road. Like the repair shop in the *Fifth Baptist Church Case*, they concerned the rights and conduct of the defendant in its private capacity, and they could have been located in some other convenient place, where the annoyance therefrom would not have constituted either a private or public nuisance.

So, in the well-considered case of *Muhlker v. Harlem Railroad Company*, 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872, cited by complainant. Plaintiff sued to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee, value of certain easements of light, air and access, and other rights appurtenant to property abutting on said public street. It appears that, in pursuance of legislative authority prior to the erection of the elevated railroad complained of, the road ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by walls three feet high. Pursuant to an act of the Legislature of the state of New York, of 1892, there was constructed along said Park avenue, in front of plaintiff's premises, a new permanent elevated railroad structure of iron and steel, about 59 feet wide, with four tracks laid on a solid road bed, having a mean elevation of about 31 feet above the surface of said avenue. It was contended by the defendant company that this was a mere change of its railroad from the surface to the elevated structure, and within the general powers granted to it by the Legislature. The court held, however, that the new structure was a new taking of private property rights, to wit, the easement of light and air of an abutting owner on the street, above the surface thereof, Mr. Justice Day saying in the course of his opinion on behalf of the court:

"It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access."

The abutting owner, subject to the right of the public in the street, as a highway, had a well recognized property right in the easement of light and air and access in and to such street. This property right was clearly invaded, if not destroyed, by the change made by defendant from a surface or sunken road to the permanent physical structure of the elevated road complained of, and by the smoke and other annoyances incident to the operation thereof. But it will be observed that the smoke annoyance was only considered as part of and

incident to the unlawful taking, by the permanent structure, and part of the consequences of an unlawful act, and there is no intimation that it would have been considered by itself an actionable nuisance, or unlawful taking, as incident merely to the surface or sunken road.

The importance, if not the paramount authority, of the New Jersey decisions in this regard must not be overlooked, and it is recognized by counsel for the complainant, who relies strongly for the support of his contention upon the supposed authority of *Penna. R. R. Co. v. Angell*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1. The facts, as disclosed in the opinion of the court in that case, are that the complainants were owners and occupants of a dwelling house, on the southerly side of Bridge street, between Second and Third streets, in the city of Camden. The defendant's tracks ran through the central part of Bridge avenue, in front of complainant's dwelling, across Second street, into its terminal yard, which extends from the westerly side of Second street to the Delaware river. The bill averred that the defendant used its tracks in front of complainant's house, for the purpose of distributing cars and making up trains in its freight and passenger business, and that it kept locomotives and cars laden with live stock standing there, so that by reason of the stench, noises, smoke, steam and dirt thereby occasioned, the comfort of complainant's home was seriously impaired. And an injunction was prayed for.

The defendant's justification was rested upon the ground that the Legislature and the common council of Camden had authorized the defendant to use Bridge avenue for its business; that its business required such use as the defendant had hitherto made, and therefore the use could not be, in a legal sense, injurious. The court said:

"There are two sufficient answers to this claim. The first is that neither the Legislature nor the common council has attempted to grant so extensive a privilege as is here set up. The charter of the Camden & Amboy Railroad Company (the lessor of the defendant), passed in 1830, authorized it to construct and operate a railroad, with all necessary appendages, within limits embracing the locality now under consideration. In 1834, the Camden common council, by resolution, authorized that company to use Bridge avenue for the purpose of its roadway. * * * In 1862 the city council, by 'An ordinance to afford facilities to the Camden & Amboy Railroad Company for the running of their trains through the city of Camden,' gave its consent and authority to the company to lay side tracks, running obliquely from a point on the railroad, along Bridge avenue, between Second and Third streets, to and upon the company's depot property lying west of Second street. From these laws and regulations arise whatever rights the defendant, which is the lessee of the Camden & Amboy Railroad Company, appears to have in Bridge avenue, in front of complainants' house. In our judgment, they indicate that those rights are such as pertain to the use of the avenue for the purposes of a way, not for the purposes of a station yard. The primary privilege given is that of passage; this and its reasonable incidents cover the whole scope of the grant. * * * But when, in the ordinary course of its business, the company devotes a portion of its roadway to station purposes, it goes beyond express legislative sanction, and can support itself, if at all, only as a private individual might. This is what the defendant did in Bridge avenue. Having a right of passage there, it used its tracks as though they were within its terminal yard, and so used them constantly in its every-day concerns. For this there is no legislative or municipal authority.

"But, secondly, an act of the Legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for pub-

lic benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners."

Of course, this language must be taken in connection with the facts of this case, as discussed in the previous part of the opinion. It had just been decided that neither the Legislature nor the common council, by authorizing the defendant to build its road on Bridge avenue, had authorized it to create a terminal yard or station on that avenue, and that the location and buildings of such yard and station must be taken to be done in the private individual capacity of the defendant, and therefore not incident to the public purposes for which a passage way for its tracks was granted along Bridge avenue. It was therefore in the second place properly and logically argued that neither the Legislature nor the common council of Camden *could* authorize the use of the street for these private purposes of the corporation, as distinguished from its public purposes, to the detriment of the owners and occupants of dwellings abutting on said avenue, without making compensation therefor. This is the doctrine in *B. & P. Ry. Co. v. Fifth Baptist Church*, viz., that in the location and erection of a repair shop, the company was acting in its private capacity, and it was not necessary for its public purposes that such shop should be erected on the particular site chosen. The opinion concludes:

"It must not be gathered from these propositions that all those inconveniences, which are the necessary concomitants of the location of railroads in populous neighborhoods, are to be considered civil injuries. That railways shall be so constructed and operated is required by the unanimous consent of the community, and the annoyances thence unavoidably arising are not of sufficient importance to be regarded as invasions of those rights of property which society recognizes and protects. They must be classed rather among those limitations which the social state imposes upon the enjoyment of private property for the common good."

We cannot, however, agree with the closing sentence of this paragraph, quoted by complainant's counsel, if it means, as argued by him (which we do not assume that it does), that the liability of the defendant can be made to depend upon the degree of the annoyance caused by the operation of the road, without regard to whether that operation be conducted negligently or with the utmost skill and care. If, by the exercise of due care, such annoyances are avoidable, of course the defendant company should be held liable therefor. What we have said, however, as to the facts and opinion in this case are sufficient to show that its ratio decidendi does not touch the issues in the case now before us.

This judgment of the Court of Errors and Appeals was made in 1886. In 1888, the Supreme Court of New Jersey delivered its opinion, by Chief Justice Beasley, in the case of *Beseman v. Penna. R. R. Co.*, 50 N. J. Law, 235, 13 Atl. 164.

The suit was for damages alleged to have been done to the houses and lands of the plaintiff, by the running of defendant's trains. The defendant was the same as the defendant in the present case, and the part of the road on which it is alleged the injuries complained of originated, is the same as that involved in the present suit, to wit, that

part of the road between Harsimus Cove and Bergen Cut which runs on an elevated structure south of Sixth street and parallel therewith.

The declaration, in substance, alleged that the plaintiff was the owner of certain lots of land in Jersey City, fronting on Fifth street, on each of which lots there were dwelling houses on the front and rear, and that the defendant, on the 1st of January, 1874, built an elevated track for a railroad (the same which is now complained of), running at the rear of said lots and very near, to wit, within ten feet, to the rear of the dwelling houses situated on the rear of said lots, and has so used said elevated track for the passage of locomotives and cars in the transportation of cattle, sheep, swine, etc., as to render said dwelling houses of said plaintiff unfit for habitation, and of no use or value to said plaintiff whatever, and that said defendant, during all the time aforesaid, both on the day named and at all hours of the nighttime, has wrongfully allowed its cars, so loaded, emitting noisome and unhealthy odors, to stand upon said track within close proximity, to wit, the distance of ten feet, to the dwelling houses on the rear of said lots, and has then and there shifted and distributed its cars and blown the whistle of its locomotives, and started its trains of cars, and suddenly stopped and backed them, and started them again, causing great and unusual noises in the neighborhood of said dwelling houses, and causing divers noxious, offensive and unwholesome vapors, fumes, smoke, smells and stench to flow, arise and surround said dwelling houses, and thereby also jarring the doors and walls of said dwellings and breaking plaster upon the walls, and by means aforesaid has driven the tenants from said houses and has rendered the same untenable and unfit for use, etc.

The first plea was the general issue. The second was a special traverse, in which the defendant set out its chartered right to build this elevated road between Fifth and Sixth streets, in Jersey City, and parallel therewith; that after its construction, the defendant, in order to carry into effect the objects of the incorporation, used the same in the prosecution of its business as a common carrier of passengers and freight, during the time mentioned in the declaration, as it lawfully might do, by reason of the authority aforesaid, and that the noises arising from the passage, shifting and distribution of its cars and blowing of the whistles of its locomotives, and the smoke from its engines, complained of by the plaintiff, were necessarily created in the careful and skillful operation of its road, and were the supposed grievances of which the plaintiff in her declaration complained; "without this," etc.

On the demurrer to this plea, Beasley, Chief Justice, speaking for the court, said among other things:

"Its [defendant's] position is that for such incidental and unavoidable damage it is not responsible. The plaintiff occupies the opposite ground, claiming that with respect to private property a railroad is, per se, a nuisance whenever it throws a detriment such as would be actionable at common law on such property. That this proposition, on which the plaintiff's case rests, is a most momentous one is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to the

plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damaged by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damaged at all—unless, indeed, the loss sustained be so small as to be unnoticeable by force of the maxim, '*De minimis non curat lex.*' The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide spreading, impairing in a sensible degree, some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching such landowners, general tort-feasors; their tracks run for miles through the cities of the state, and every land owner on each side of the track would be entitled to his action; and so in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility."

The whole of this opinion must be read, to appreciate the clearness of its reasoning and the broad statesmanship, as well as the judicial acumen of its conclusions. In the course of his opinion, the Chief Justice refers to the case of *Pennsylvania Railroad Co. v. Angell*, supra, and the *B. & P. Ry. Co. v. Fifth Baptist Church*, supra, upon both of which counsel for the plaintiff relies.

"Neither of these decisions," he says, "is in point, and the principles of law declared in the latter is (sic) directly adverse to the proposition laid as the basis of this suit. The former of these precedents presented to the court the naked proposition whether the railroad company, the defendant in the proceeding, should be restrained from doing certain acts which were obviously ultra vires. * * * The decision of the Supreme Court of the United States, just referred to, rested on the same basis. A railroad company had located its repair shop and engine house next to a church, to which it was a nuisance by reason of the noises occasioned by the business carried on at the place. The court declared that the company could not justify the maintenance of such a nuisance. The propriety of this result seems unquestionable. The railroad company, in selecting a place for repair shops, acted altogether in its private capacity. Such location was a matter of indifference to the public, and consequently, with respect to such an act, the corporation stood on the footing of an individual and was entitled to no superior immunities. But in this same case Mr. Justice Field, in his opinion, is careful to emphasize the difference in legal results between those damages which are the necessary product of the running of a railroad and those which are not of that character, for he says: 'Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if when used with reasonable care it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation.'"

The opinion in the *Beseman Case* then disposes of the constitutional question, as to the taking of private property without compensation, on the reasoning hereinbefore indicated. We have dwelt upon this case at such length, because of the importance and authority it has attained as a leading case in the jurisprudence of this country. We have been referred to no decision of the federal or state courts, in which its reasoning and conclusions have been directly controverted.

This judgment of the Supreme Court of New Jersey was afterwards unanimously affirmed by the Court of Errors and Appeals, for the reasons given by the Supreme Court. 52 N. J. Law, 221, 20 Atl. 169.

Many cases in other states have been cited by counsel for the defendant, in which *Beseman v. Penna. R. R. Co.* is approvingly referred to. The principle established has also been affirmed by so many decisions in the courts of New Jersey, that it may now be considered as the settled law of that state, as shown in the following list of cases cited by counsel for the defendant: *Church of Holy Communion v. Paterson Extension R. R. Co.*, 46 N. J. Eq. 376, 20 Atl. 169; *Simmons v. Paterson*, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642; *M. E. Church v. Penna. R. R.*, 48 N. J. Eq. 455, 22 Atl. 183; *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 72, 24 Atl. 964, 17 L. R. A. 97; *Hayes v. Waverly & Passaic R. R. Co.*, 51 N. J. Eq. 350, 27 Atl. 648; *Ridge v. Penna. R. R. Co.*, 58 N. J. Eq. 176, 43 Atl. 275; *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 362, 45 Atl. 985; *Thompson v. Penna. R. R. Co.*, 51 N. J. Law, 43, 15 Atl. 833; *Costigan v. Penna. R. R. Co.*, 54 N. J. Law, 236, 237, 23 Atl. 810; *Roebing v. Trenton Ry.*, 58 N. J. Law, 674, 34 Atl. 1090, 33 L. R. A. 129; *Church of the Holy Communion v. Paterson R. R.*, 68 N. J. Law, 410, 53 Atl. 449, 1079; *Jenkins v. Penna. R. R. Co.*, 67 N. J. Law, 332, 51 Atl. 704, 57 L. R. A. 309.

In some of these cases, it is expressly pointed out that the judgment in *Beseman v. R. R.* in no wise conflicts with that in *Penna. R. R. v. Angell*, which fact is apparent from the examination already made of the two cases. It would unduly extend this opinion to discuss the numerous decisions cited by counsel on either side, in their respective briefs. Many of them distinctly support the position here taken, and none of them seriously controvert or oppose it.

We have carefully examined the so-called "New York Elevated Railroad Cases," referred to and relied upon by complainant, to wit: *Lahr v. Met. El. Ry. Co.*, 104 N. Y. 268, 10 N. E. 528; *Story v. New York El. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Bohm et al. v. Metropolitan El. Ry. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344; *Sperb v. Metropolitan El. Ry. Co.*, 137 N. Y. 155, 32 N. E. 1050, 20 L. R. A. 752. We have already indicated the grounds upon which they should be distinguished from the present case, in our examination of the decision of the Supreme Court, in *Chicago G. W. Ry. Co. v. First M. E. Church*, *supra*, as also in what has been said as to the principle involved in the decision of the Supreme Court in *Balt. & P. Ry. Co. v. Fifth Baptist Church*, *supra*.

It only remains to again note, in regard to these cases, that the decisions therein proceeded upon the ground so clearly stated in one of them (*Story v. N. Y. El. R. R. Co.*, *supra*), by Danforth, J., speaking for the Court of Errors and Appeals. After stating the relative rights of the public and abutting owners in the street in question, he says:

"It is conceded to be a public street. But besides the right of passage, which the grantee, as one of the public, acquired, he gained certain other rights as purchaser of the lot, and became entitled to all the advantages which attached to it. The official survey—its filing in a public office—the convey-

ance by deed referring to that survey and containing a covenant for the construction of the street and its maintenance, make as to him and the lot purchased a dedication of it to the use for which it was constructed. The value of the lot was enhanced thereby, and it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value. There was thus secured to the plaintiff the right and privilege of having the street forever kept open as such. For that purpose, no special or express grant was necessary; the dedication, the sale in reference to it, the conveyance of the abutting lot with its appurtenances, and the consideration paid were of themselves sufficient. *Wyman v. Mayor of N. Y.*, 11 Wend. [N. Y.] 487; *Trustees of Watertown v. Cowen*, 4 Paige [N. Y.] 510 [27 Am. Dec. 80]. The right thus secured was an incorporeal hereditament; it became at once appurtenant to the lot, and formed 'an integral part of the estate' in it. It follows the estate and constitutes a perpetual incumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way or street the servient tenement. *Child v. Chappell*, 9 N. Y. 246; *Hills v. Miller*, 3 Paige [N. Y.] 256, 24 Am. Dec. 218; *Trustees of Watertown v. Cowen*, 4 Paige [N. Y.] 514 [27 Am. Dec. 80]. Nor does it matter that the acts constituting such dedication are those of a municipality. The state, even, under similar circumstances, would be bound, and so it was held in the *City of Oswego v. Oswego Canal Co.*, 6 N. Y. 257. * * * But what is the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way."

In *Lahr v. Met. El. R. R. Co.*, supra, we quote these paragraphs from the syllabus:

"An elevated railroad in a street of a city, supported by columns placed along the outer line of the sidewalks, and operated by steam power, is a perverter of the use of the street from the purposes originally designed, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon property of abutting owners. Abutters upon a public street of a city, claiming title to their premises by grant from the municipal authorities, which grant contains a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their premises, and, also, for the free and uninterrupted passage and circulation of light and air."

No one can carefully read these important and much discussed cases, without at once perceiving the peculiar conditions, with reference to which they were decided, which distinguished them from cases such as the present. The bills of complaint in these cases were framed to logically meet the contention, that the building of the elevated railroad on the street and in front of the houses occupied by the complainants, was a physical taking of property without compensation, and the prayer was in the alternative, for the payment of such damages assessed by a referee duly appointed, or an injunction to restrain further building or operation of the road until such damages were paid. All this is clearly pointed out by the author, in *Pomeroy's Equity Jurisprudence*, vol. 5, § 470.

Notwithstanding the disclaimer of complainant's counsel, that the action below was based upon any allegation of negligence, the prayer of the bill and a part of the argument of counsel compel us to turn to that aspect of the case, as to which claim is made for an injunction and damages, on the ground that the nuisance produced by the

smoke, vapors, and noises emanating from defendant's railroad, were due to its negligent operation.

A careful examination of the testimony in this case does not permit us to find that the annoyance complained of (and we do not doubt that it was serious in its character) was due to negligence on the part of the defendant. That an unnecessary amount of black smoke may at times, from particular engines, have been emitted, is quite probable, but there is no evidence to convince the court that the road was operated without due care in respect to the firing of its locomotives. There is no charge, as in the Bunting Case, much less any evidence amounting to proof, that the defendant was negligent in not using other fuel than bituminous coal, or that it was possible to have used such other fuel and successfully have carried on the business of the railroad. Nor was there any direct evidence on the part of the complainant, of such negligence in the operation of the road and the firing of the engines, as would account for the nuisance complained of. On the contrary, the evidence of the defendant, consisting of the various printed instructions given to its firemen at different times, and the testimony of Alfred W. Gibbs, its chief mechanical engineer, shows the efforts made by the defendant to so manage its locomotives as to minimize the emission of smoke, and would seem to dispose of the suggestion of liability on the ground of negligence.

Moreover, the prayer of the bill, as framed, does not ask for such definite and specific exercise of injunctive relief, as would be reasonably enforceable. There is no specific allegation or proof of the particular conduct or practices which constitute such negligent operation of the road as cause the annoyance in question, and which, if established, should be enjoined. There is no allegation and no showing that other fuel could reasonably have been used by the defendant for the lessening of the smoke, upon which a mandatory injunction could be asked, requiring the use of such fuel, or a direct injunction on that ground against the use of soft or bituminous coal.

No specific act or acts of misfeasance or nonfeasance, constituting negligence on the part of the defendant, and as such the cause of the grievance complained of, has been so sufficiently alleged or proved as would enable a court of equity effectively to prevent its continuance. Of course, if complainant's principal contention (presumably founded upon the mistaken allegation that defendant's road was maintained and operated upon Sixth street) had been established, the existence of the road itself on Sixth street would, so far as the property of complainant situated on that street was concerned, and such property alone, have been a taking of complainant's property without compensation, and entitled it to an injunction against the operation of such road until such compensation had been duly ascertained and paid, conformably to the doctrine of the New York Elevated Railroad Cases, as above referred to.

The prayer of the bill, as we have seen, asks for an injunction, commanding the defendant, its servants, etc., to absolutely desist and refrain from so operating its said railroad locomotives and engines as to cause or permit black smoke, etc., from its said engines and

locomotives, to fall upon or enter into the premises and structures of complainant "in such appreciable quantities as to interfere with the reasonable use and enjoyment thereof."

We have already shown that no case has been made out for such a general injunction as this. In the absence of any determination in a suit at law, as to the fact of negligence by the defendant in the operation of its road, in the respect referred to, a court of equity would be embarrassed in undertaking, by its decree, to enjoin the defendant against the issuing of more soot and cinders than was necessary to the careful and proper operation of its road. Such a decree would be futile and unenforceable.

Assuming, however, that the bill had been duly amended in the important respect we have pointed out, to wit, the location of the road on the route acquired by the plaintiff south of Sixth street, and not on Sixth street itself, and that sufficient averments of negligence, general and specific, were contained in the bill, we are constrained to find that the record fails to disclose sufficient evidence to amount to proof of such negligence, or that the acts of defendant, in the operation of its railroad, have constituted, and do now constitute, an actionable nuisance and are so unnecessary, avoidable, and unreasonable as to warrant the issuing of an injunction, restraining the defendant from the commission of such acts.

Without at all minimizing the annoyance and discomfort suffered by the complainant, as set out in its bill of complaint, this case cannot be taken from without the operation of the principles which we have already discussed, and which were so clearly announced in the case of *Beseman v. Penna. R. R. Co.* In the absence of clear proof of negligence on the part of the defendant, the right of action or the right to equitable relief cannot be made to depend upon the greater or less degree of the annoyance complained of. As said in the *Beseman Case*:

"When property has been incidentally injured, no matter to what extent, as an unavoidable result of a public improvement, such loss has always been deemed remediless, and it has never been supposed that the property so injured was taken, in the constitutional sense, for the public use."

In the view here taken, it is unnecessary that we should express any opinion as to the defenses of "laches" and "prescription," urged by defendant's counsel.

For the reasons stated, the decree of the court below, dismissing the bill of complaint, is hereby affirmed.

NATIONAL ELECTRIC SIGNALING CO. et al. v. FESSENDEN.

(Circuit Court of Appeals, First Circuit. August 22, 1913. Rehearing Denied October 20, 1913.)

No. 999.

1. CORPORATIONS (§ 187*)—AGREEMENTS BETWEEN STOCKHOLDERS—CONSTRUCTION.

Plaintiff and W. transferred certain patents, etc., to a corporation in exchange for all of its stock. They subsequently transferred a majority of the stock under an agreement that they should be paid therefor \$300,000 out of the profits of the company before any dividends should be declared. The majority stockholders had advanced large sums of money to the corporation, for which they held interest-bearing notes, and plaintiff became dissatisfied because the amount due him did not also bear interest. One of the majority stockholders, who was also a director, prepared an agreement stating that plaintiff demanded that the \$300,000 be put on an equal basis to that advanced on the notes, that he agreed to that proposition and thought the best way to do this was by the issue of 6 per cent. preferred stock, to be repurchased by the company out of surplus as accumulated, that plaintiff was to receive a specified salary, that the majority stockholders would make other advances as needed, that all questions of policy in the company as to which differences might arise between the majority and a minority should be submitted to arbitration, and that the provision for issuing preferred stock should include all money payable by the company under its contracts. This agreement was signed by such majority stockholder and by plaintiff. *Held*, that this did not constitute an agreement by the corporation to assume an indebtedness to plaintiff of \$300,000 or to put plaintiff's claim on an equal basis with the promissory notes, leaving the way of doing this open, but was an agreement between the stockholders to equalize their claims by advancing the claim of plaintiff and W. to the form of interest-bearing stock; the majority stockholders to waive their position as creditors by exchanging their notes for preferred stock, especially as the corporation could not require the majority stockholders to accept stock in exchange for the notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 702, 703; Dec. Dig. § 187.*]

2. CORPORATIONS (§ 174*)—STOCKHOLDERS—RELATION TO CORPORATION.

Holders of preferred stock of a corporation are not creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 649-652; Dec. Dig. § 174.*]

3. CONTRACTS (§ 47*)—CONSIDERATION—NECESSITY.

Where the owners of all the stock of a corporation transferred a majority thereof under an agreement that they should be paid therefor out of the profits of the company before any dividends should be declared, the corporation, not being indebted to the sellers of the stock, could not assume the payment of the debt due them without a consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 220, 221, 256-258; Dec. Dig. § 47.*]

4. CONTRACTS (§ 75*) — CONSIDERATION — SUFFICIENCY — ASSUMPTION OF LIABILITY.

Plaintiff and another, owning all the stock of a corporation, transferred a majority under an agreement that they should be paid therefor out of the profits of the company before any dividends should be declared. The purchasers of this stock had advanced large sums of money to the corporation, for which they held interest-bearing notes. Plaintiff becoming dissatisfied because the amount due him did not also bear interest, an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agreement was made between him and one of the majority stockholders to equalize his claim and those of the majority stockholders, the agreement providing that the best way to do this was by issuing preferred stock. In consideration of this agreement, plaintiff, who had been in the company's employ, agreed to remain with the company. It was plaintiff's contention that the agreement was merely one to equalize the claims, leaving the way of doing this open, and that the company subsequently assumed the payment of the amount due him with interest. *Held* that, plaintiff having agreed to remain with the company in consideration of the agreement with the majority stockholder, his agreement to remain in the company's service was not a sufficient consideration for the corporation's alleged promise to assume the debt due him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273-285; Dec. Dig. § 75.*]

5. CONTRACTS (§ 330*)—ACTIONS—PARTIES.

Plaintiff and W. transferred certain patents, etc., to a corporation in exchange for all of its stock, and subsequently transferred a majority of the stock under an agreement that they should be paid therefor \$300,000 out of the profits of the company before any dividends should be declared. The purchasers of this stock had advanced large sums of money to the corporation, for which they held interest-bearing notes, and plaintiff became dissatisfied because the amount due him did not bear interest. An agreement was made between him and one of the majority stockholders to equalize these claims by exchanging them for preferred stock, to be repurchased by the company out of surplus as accumulated; the contract further providing that plaintiff was to be employed at a specified salary, that the majority stockholders were to make further advances if required, that all differences in the management of the company, arising between the majority and a minority, should be arbitrated, and that the provision for issuing preferred stock was to include all money payable by the company under its contracts, with accrued interest. *Held* that, assuming that W. assented to this agreement, he did not thereby surrender his right in the \$300,000, and the contract did not change the ownership of that right to a sole right in plaintiff; and hence the contract could be enforced only by plaintiff and W. jointly.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1589, 1591-1594, 1596, 1597, 1602-1604; Dec. Dig. § 330.*]

6. CONTRACTS (§ 9*)—ESSENTIALS—MEETING OF MINDS.

Plaintiff and W. transferred certain patents, etc., to a corporation in exchange for all of its stock. They subsequently transferred a majority of the stock under an agreement that they should be paid therefor \$300,000 out of the profits of the company before any dividends should be declared. The majority stockholders had advanced large sums of money to the corporation, for which they held interest-bearing notes, and plaintiff became dissatisfied because the amount due him did not also bear interest. One of the majority stockholders, who was also a director, prepared an agreement stating that plaintiff demanded that the \$300,000 be put on an equal basis to that advanced on the notes, that he agreed to that proposition and thought the best way to do this was by the issue of 6 per cent. preferred stock, to be repurchased by the company out of surplus as accumulated, that plaintiff was to receive a specified salary, that the majority stockholders would make other advances as needed, that all questions of policy in the company as to which differences might arise between the majority and a minority should be submitted to arbitration, and that the provision for issuing preferred stock should include all money payable by the company under its contracts. This agreement was signed by such majority stockholder and by plaintiff. Plaintiff contended that the agreement merely provided for equalizing claims, leaving the manner of doing it open. *Held* that, if the agreement was not a completed contract to equalize the claims by exchanging them for preferred stock, it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was no contract whatever, since, it being left uncertain whether the majority stockholders should surrender their claims or whether the corporation should assume a new indebtedness to plaintiff and W., the minds of the parties had not met.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

Aldrich, District Judge, dissenting.

In Error to the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Action by Reginald A. Fessenden against the National Electric Signaling Company and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Charles F. Choate, Jr., and John L. Hall, both of Boston, Mass. (John W. Worthington, of Boston, Mass., on the brief), for plaintiffs in error.

Walter I. Badger and Browne & Woodworth, all of Boston, Mass. (Alex. P. Browne, William H. Hitchcock, and George K. Woodworth, all of Boston, Mass., on the brief), for defendant in error.

Before ALDRICH, BROWN, and HALE, District Judges.

BROWN, District Judge. This is a writ of error for review of the rulings of the District Court in an action of contract wherein a verdict was had by Fessenden, the plaintiff below, in the sum of \$406,175.

The pleadings in the case are of a most extraordinary character, and are full of irrelevant allegations. Under such pleadings confusion of issues was to be expected.

[1] The declaration charges that Fessenden and the company entered into a contract. This contract is referred to as the contract of September 2, 1908, evidenced by an instrument in writing marked "Exhibit C."

To understand Exhibit C, which refers to a previous contract, it is necessary to consider certain facts that preceded it. For the purposes of this writ of error we may take from the brief of the defendant in error, Fessenden, the following statement:

"The plaintiff is an electrical engineer. Since 1896 he has paid particular attention to wireless telegraphy. In 1902 he had invented and developed his system so that it was a complete working system. Together with one Darwin S. Wolcott he then owned numerous patents and inventions covering this system and the apparatus used in connection with it. The defendant was incorporated under the laws of New Jersey on November 5, 1902. Its main office is at Pittsburg, Pa., which is also the residence and place of business of the parties in interest other than the plaintiff.

"On November 29, 1902, Fessenden and Wolcott entered into a contract with Thomas H. Given and Hay Walker, Jr. (Exhibit A, Rec., p. 15), by which it was agreed that Fessenden and Wolcott should transfer their wireless patents and inventions and any further inventions in that field to the defendant; that all the stock of the defendant should be issued to Fessenden and Wolcott; that they should thereupon transfer it to one Reed under the following trusts:

"(a) Given and Walker to advance not more than \$30,000 to be used in demonstrating the system.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(b) If the tests proved satisfactory Given and Walker to have an option for nine months to purchase 55 per cent. of the stock of the company for \$300,000.

"(c) In case this option is not exercised Fessenden and Wolcott to return the advances made or to deliver 10 per cent. of the stock of the company. The trust is then to terminate."

The remainder of the agreement is immaterial.

"The patents were duly assigned to the defendant and the stock issued and transferred to the trustee according to this agreement. Subsequent patents have also been assigned.

"On November 2, 1903, Fessenden and Wolcott entered into an agreement with Given and Walker (Exhibit B, Rec., p. 19) modifying the previous agreement, Exhibit A. This provided that a further sum of \$30,000 was to be advanced by Given and Walker to the defendant and that before any dividends should be declared by the defendant the following payments should be made by it out of its earnings:

"(1) \$10,000 and interest to Fessenden in repayment of a loan.

"(2) \$30,000 and interest to Given and Walker in repayment of the amount advanced under this agreement.

"(3) \$300,000 to Fessenden and Wolcott in place of the payment under the option provided in the previous agreement."

This agreement also canceled the option on 55 per cent. of the stock held by Given and Walker and provided that this stock should at once become their property, but that it should be held by the trustee until the foregoing payments had been made.

"On November 9, 1903, Walker, Given, Wolcott, Fessenden and Martin were elected directors of the defendant and they have continued such during all events in question."

At the execution of Exhibit C, Walker and Given were joint owners of a majority of the stock of the corporation, 55 per cent. or 60 per cent. of all the shares. For the purposes of this case it is unnecessary to decide whether it was 55 or 60 per cent.

Walker and Given had advanced a large sum of money (\$728,000), for which they held demand promissory notes of the corporation, bearing interest at 6 per cent.

Fessenden and Wolcott were owners of a minority of the stock, 40 per cent. or 45 per cent., and, under the contract Exhibit B, were jointly entitled to be paid out of the earnings of the company, before any dividends should be declared, the sum of \$300,000. In other words, Walker and Given were creditors of the corporation for moneys advanced to the corporation to the amount of \$728,000, with interest, while Fessenden and Wolcott were not creditors of the company and had no claims except upon the earnings of the company. Their right to receive \$300,000 from the earnings of the company arose from contract with the other stockholders, and not from contract with the defendant corporation.

Fessenden was then receiving a salary of \$300 per month and had become dissatisfied because the sum of \$300,000 was not bearing interest, and for other reasons, and, as he testifies, had a talk with Walker and Given in July or about the first of August, 1908, and asked them to put the \$300,000 on the same basis as theirs as regarded interest, which they declined to do. On September 11th he had an inter-

view with Walker, and told him that he was dissatisfied and was going to leave the company unless they would put his \$300,000 on the same basis as the money they had advanced. This was refused. There were threats of an application for a receivership and communications through Firth, a third party.

On September 12, 1908, Firth had an interview with Walker and later returned with Walker, who, in conversation with the plaintiff, "said he understood from Firth that plaintiff was willing to accept the proposition which he (Walker) had made him, and that plaintiff told him yes"; that plaintiff "suggested that we get a lawyer," and Mr. Walker or Colonel Firth said, "Don't let us have a lawyer in on this; let us just draw up the agreement; let it be a gentlemen's agreement," etc.; that Walker wrote the agreement and the plaintiff and Walker signed it. The agreement is as follows:

Exhibit C.

"Col. John Firth.

"Fort Pitt Hotel, Pittsburgh.

"Dear Sir: After considering the demands of Prof. Fessenden in regard to the National Electric Signaling Co. which I understand in a general way to be (1) that the \$330,000 that under our contract is a deferred payment without interest, to be paid out of the first profits, be put upon an equal basis to the money advanced on promissory notes by Mr. Given and myself—I will agree to this proposition to date from the time the Fruit Co. contract was signed and think the best way to do this is by the issue of 6 per cent. per annum preferred stock as of that date.

"Whenever the company accumulates a surplus of \$100,000, cash in bank, then immediately they are to appropriate all such balance over a working balance of \$50,000 to the purchase of preferred stock in pro rata proportion among the holders thereof.

"(2) Hereafter or say from September first Prof. Fessenden to receive a salary of \$600 per month.

"(3) Messrs. Given and Walker to advance from time to time if it should be needed a farther sum of money up to \$50,000 to construct stations under contract and provide funds for the running expenses of the company, they to receive notes for said advances bearing interest at 6 per cent. said notes to be paid out of the first receipts of money received on account of various contracts.

"(4) It is further agreed that all questions of policy in the company or all questions as to the erection of new stations or all questions of licensing subsidiary companies or all questions of patent suits shall be voted upon by the stockholders according to their holdings and should any difference arise between the majority and a minority amounting to 25 per cent. of the stock then the question shall be referred to an arbitrator and it is hereby agreed that the present arbitrator shall be Col. John Firth but either side can ask a new arbitrator at any time to be appointed by both sides in the usual way.

"It is also understood that any or all questions that may arise in the company shall be covered by this arbitration clause.

"Sept. 12, 1908.

Hay Walker, Jr.

"Accepted: Reginald A. Fessenden.

"Witness to both signatures,

"John Firth.

"It is understood that the clauses above providing for the issue of preferred stock for the debts and other obligations of the company is to include all money payable by the company under its contracts with accrued interest on such obligations as call for interest.

Hay Walker, Jr.

"R. A. Fessenden."

It is very clear that Exhibit C does not disclose an agreement by the corporation to assume a debt to Fessenden of \$330,000.

It is also very clear that it does not disclose an agreement by the corporation to put a claim of Fessenden for \$330,000 upon the basis of promissory notes.

The persons signing the agreement were officers of the corporation, and were interested in the stock.

Aside from any question whether Walker had authority to act for Given, who was jointly interested with him as owners of a majority of the stock, and from any question whether Fessenden was authorized to act for Wolcott, we find that the intention of the parties who signed the document is clearly expressed. The company is to issue preferred stock and to repurchase it from surplus earnings, and to employ Fessenden at \$600 per month. It is thus to be relieved of indebtedness to the amount of \$728,000. It is to issue preferred stock to Walker and Given, and to Fessenden and Wolcott, thereby making Walker and Given preferred stockholders instead of creditors.

Fessenden and Wolcott's claim is not advanced to a debt, but is to be changed to the form of interest-bearing stock.

In the form of preferred stock it is still to be payable only out of earnings, but is to bear interest.

Walker and Given are to exchange their promissory notes for preferred stock, thus waiving their position as creditors.

Thus it is plain that it is not the corporation which is to put the parties upon an equality, but Walker and Given, by waiving their claims as creditors and becoming preferred stockholders. This, of course, the corporation could not do, for the simple reason that a debtor has no power to cancel his debts.

Walker and Given are also to advance additional moneys to the corporation.

The equalizing of the claims is to be through the act of Walker and Given, and the issue of preferred stock to Fessenden and Wolcott is but a matter of form, so far as the principal sum of \$300,000 is concerned. The corporation is to change substantially its relation to Fessenden and Wolcott only by giving interest on \$300,000 which previously did not bear interest. The agreement for arbitration between stockholders is, of course, not an agreement to which the corporation could be a party.

The plaintiff's contention that the company agreed in general terms to put \$300,000, to be paid out of first profits, upon an equal basis to money advanced on promissory notes, and that the way of doing this was left open, is clearly fallacious and unsound, and by signing Exhibit C Fessenden is estopped from such a contention. This argument violates the elementary rule of construction, that the intention of the parties must be gathered from the whole instrument, and should it be accepted would only lead to making the contract void for uncertainty, since until the parties had agreed as to the manner of equalizing the debts the proposed obligations of the corporation were wholly indefinite, and might vary between being discharged of a debt

of \$728,000 and assuming a new debt of \$300,000. There is a proposal of a specific way of doing this accepted by Fessenden, by signing both the body of the agreement and the supplemental agreement. The proposal was from the persons (assuming Given's consent) who alone could accomplish it in this way.

The acceptance of a proposal to do it in this way, i. e., by the issuing of preferred stock for outstanding debts, is absolutely inconsistent with the theory of a contract with the corporation to equalize the debts.

It may clear the discussion of this case to point out again two things which are substantially different in character, and which, far from being two methods of doing the same thing, are essentially different things, which cannot be done by the same person.

[2] 1. The surrender by creditors of a corporation of its interest-bearing notes to the amount of \$728,000, more or less, and the receipt in lieu thereof of preferred stock with interest at 6 per cent. By such an arrangement the noteholders cease to be creditors of the corporation, and must look to profits for dividends on their stock. It is well settled that holders of preferred stock are not creditors. *St. John v. Erie R. R. Co.*, 22 Wall. 136, 147, 22 L. Ed. 743; *Warren v. King*, 108 U. S. 389, 398, 399, 2 Sup. Ct. 789, 27 L. Ed. 769; *New York, etc., Ry. v. Nichols*, 119 U. S. 296, 305, 308, 7 Sup. Ct. 209, 30 L. Ed. 363. Such a mode of equalizing claims is merely a stockholders' agreement. *Spencer v. Smith* (C. C. A.) 201 Fed. 647.

The corporation has no power to surrender, or to agree to surrender, the creditors' notes, and if it assents to such an arrangement does not assume a debt, but merely agrees that a debt may be lifted from its shoulders, and that it will distribute profits as the stockholders entitled to them may direct.

[3] 2. An agreement by a corporation to assume as a debt the sum of \$300,000 which, by agreement of stockholders, was to be paid to two of them out of profits before the declaration of a general dividend to stockholders, converts what is not a debt into a debt. A corporation, of course, has no power to assume such a debt without consideration, and there is in this case, as we shall point out, no evidence whatever of any consideration for a promise by the corporation to add \$300,000 to its indebtedness.

The difference between these two arrangements is the difference between discharging \$728,000 of debts owed and the taking on of \$300,000 of debts not owed; the difference to the corporation in result is about a million dollars.

[4] The defendant denies that there was any consideration for a promise by the corporation to assume the debt of \$300,000.

The plaintiff sets up as the consideration an agreement by Fessenden to remain with the company. The plaintiff testified, however, that when the rough draft of Exhibit C was presented to him he said:

"Yes; if that is signed, I will agree to stay on with the company, and to tell Mr. Wolcott to drop the receivership proceedings, and that will be entirely satisfactory to me."

According to this, the oral agreement to continue with the company was in consideration of what was contained in Exhibit C. This was merely Walker's agreement, or at best Walker and Given's, to equalize the debts, for the reason that no one other than Walker or Given could do it in this way.

The plaintiff's contention that the consideration for the corporation's promise to assume a new debt of \$300,000 was his agreement with the company to remain in its service is not only highly artificial, but is entirely inconsistent with Fessenden's testimony that he orally agreed to remain in consideration of the signing of Exhibit C. Upon the construction of that contract most favorable to the plaintiff it was not intended that the company should pay him \$300,000, but only that the corporation should issue to him and to Wolcott preferred stock to be repurchased by the company out of earnings.

As a matter of construction, however, Exhibit C is clearly not an agreement in general to equalize the debts, either by corporate action or by individual action. The proposition to equalize is qualified by what follows, and is a proposition to equalize in a specific way, and, if we disregard the provisions for the issue of preferred stock as matter of form, the substance of the proposition is that Fessenden's and Wolcott's \$300,000 shall still be payable out of earnings and that the debts to Walker and Given shall be put on the same basis.

There is nothing in Exhibit C which amounts to an agreement that Fessenden and Wolcott's right to profits shall be transformed into a debt of the corporation, either to Fessenden alone or to Fessenden and Wolcott jointly.

Furthermore, if it be assumed that Exhibit C was ratified by both Given and Wolcott, either as individuals or as officers of the corporation, this did not change its character.

We are, therefore, of the opinion that the trial court was in error in submitting to the jury the question whether Walker and Fessenden intended paper "C" as a present agreement then binding the corporation, that the corporation should stand liable to Fessenden for \$330,000 and also in instructing them as follows:

"Now, in my judgment, gentlemen, it is for you to say what the purpose of that paper was on the question whether it bound the corporation or not."

As we are of the opinion that both in substance and in form the agreement to equalize the claims was not a corporate agreement, it becomes unnecessary to consider the question of Walker's authority to act for the corporation. The jury should have been instructed that Exhibit C did not bind the corporation to pay Fessenden the amount claimed as a debt.

[5] We are also of the opinion that the court erred in refusing a request for instruction that as Wolcott was jointly interested in the sum of \$300,000 any claim for enforcement could be made only by Wolcott and the plaintiff jointly.

There remains for consideration the argument that after the execution of Exhibit C Wolcott adopted or accepted it as an agreement that the company should stand indebted to Fessenden alone. There is not

a word in the contract which indicates an intent to change the ownership of the right under Exhibit B to a sole right in Fessenden. The contract deals with what belongs to Wolcott as well as to Fessenden. It recognizes an existing right to profits, and simply seeks to change its form and to add interest.

Assuming that the jury might have found that Wolcott assented to Exhibit C, he did not thereby cancel or surrender to Fessenden his right under Exhibit B. The contract will not support such a contention. It is expressly in evidence that Wolcott assented to nothing of that kind.

We may add a word to what we have already pointed out as to the error of the plaintiff's contention that Exhibit C was a general agreement by the corporation to equalize the claims and that the mode of doing so was left open.

This is based principally upon the expression in the agreement Exhibit C, "and think the best way to do this is by the issue of six per cent. per annum preferred stock." This expression was, of course, Walker's, and not the corporation's, and is followed by distinct and definite paragraphs, and by an addendum, and Fessenden's acceptance is of what is proposed by Walker as the best way, and which, by his signature, becomes the specified and agreed way, and the only way to which the signers are bound. To construe this expression as an official corporate utterance would involve the assumption that to the corporation the question whether it should be released from \$728,000 debts or take on \$300,000 more debts, was a mere question of what was the best way for the corporation to meet Mr. Fessenden's demands.

Granting for the argument's sake that Walker was acting as agent for the corporation as to any part of the contract contained in Exhibit C, there was then no question of a best way. The corporation could not exercise a choice between retiring the debts of Given and Walker and assuming a new debt. It had no such choice. It had only the power to assume a debt, and this for a consideration.

[6] The plaintiff's contention that the way or method by which the debts were to be equalized was left open is destructive of his contention that a contract was completed, for so long as it was left uncertain whether Walker and Given should surrender their claims, or the corporation assume a new debt, the minds of the parties had not met. Until it was agreed which person was to do the act which equalized the claims, whether the corporation should take on a new debt or Walker and Given surrender a debt, there could be no contract. Walker, perhaps, had a choice whether he would act upon his own rights as a creditor or upon his rights as an officer of the corporation; but until he had made this choice, and so long as Fessenden left him this choice, there could be no contract, since it would be left wholly uncertain whether the corporation should take on merely a new obligation to pay interest on \$300,000, or a new debt of \$300,000.

The only theory, then, by which Exhibit C, upon which plaintiff sues, can be regarded as a completed contract of the corporation, is that its full obligation is set forth in Exhibit C. This is to pay Fessenden \$600 per month, which it has done, and to issue 6 per cent.

preferred stock, which it has not done. Here, if anywhere, is the only obligation of the corporation, contemplated under Exhibit C that is still unperformed; and this was not sued upon, and is not before us.

The plaintiff relies, however, upon certain evidence to show that the corporation entered his claim upon its books as a debt. This evidence is most uncertain and equivocal, but is quite as consistent with an intention to carry out the provision of Exhibit C to pay interest as with an intention to convert a claim payable out of profits into a debt immediately payable.

Aside from the fact that no such subsequent contract is declared upon, and in view of the fact that Fessenden's remaining with the company was in consideration of the execution of Exhibit C, it is clear upon the present record that there was no additional consideration which could support a new contract to do more than the corporation was to do under the provisions of Exhibit C.

Furthermore, all evidence of ratification by Wolcott is confined to Exhibit C, and it expressly appears in Fessenden's testimony that he had not seen nor communicated with Wolcott subsequent to Wolcott's supposed ratification of Exhibit C.

We think that the sixteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth assignments of error are well taken, and that it is not necessary for us to consider specifically the other assignments of error.

It may be said of the case generally that the rights of Fessenden and Wolcott are really based upon their transfer of a majority of the stock of the corporation to Walker and Given, and not upon any transfer of property to the corporation. The corporation was at no time before the execution of Exhibit C indebted to Fessenden and Wolcott.

The plaintiff's brief urges that this is a mere verbal pretense, but it is evident that the parties to Exhibits A and B well understood that after Fessenden and Wolcott had transferred the patents to the corporation, and had taken all its stock, they were to receive their profits as stockholders and from the sale or transfer of stock. The contention that the company should now pay Fessenden for the patents, etc., and that a debt therefor should be created which cuts under the value of the stock, is wholly inconsistent with the plan that the patents, etc., should be transformed into the form of stock which Fessenden and Wolcott should own, hold, or dispose of upon such terms as were acceptable to them. Having issued its stock for these patents, there could be no consideration for any further promise to pay Fessenden for the patents. He could not claim both stock and payment for what he contributed to the stock. This is not reasonable.

At the oral argument it was suggested that the conduct of Walker and Given had been unfair or at least oppressive to the plaintiff. We fail to find in this record anything that gives support to such a criticism. They invested large sums in the enterprise, beyond the requirements of their contracts. If Fessenden contributed his inventions, they contributed a very large amount of capital at the risk of the business. It was not unreasonable that Fessenden, who drew a substantial salary, should, like Walker and Given, look to the profits of the

enterprise. This was clearly the intention of the parties, as expressed in Exhibits A and B, and we think it is equally expressed in Exhibit C, upon which the present suit is founded.

The verdict of the jury is clearly inconsistent with this intention of the parties, and leads to the absurd result that the corporation is charged with a debt for the shares which Fessenden and Wolcott as stockholders had transferred to Walker and Given.

The judgment of the District Court is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion; and the plaintiffs in error recover costs in this court.

ALDRICH, District Judge (dissenting). In this case it is unmistakable and beyond question—indeed it is conceded—that the interested parties intended and sought through a written agreement to establish an equality between certain creditors of the corporation; and under the agreement of September 12, 1908, it was provided that Fessenden's \$330,000, which, as recited, stood under a former agreement as a deferred payment, without interest, be put upon an equal basis with the money advanced by Mr. Given and Mr. Walker, for which they held promissory notes payable on demand, with interest.

That putting the claims of the three parties against the corporation upon an equal basis was the sole or paramount idea underlying the agreement of September 12, 1908, is a thing established. This being so, the rule of liberal construction applies, because the law seeks for all reasonable ways in which to establish and furnish a remedy for carrying out what parties intended. It is true the agreement was signed by Walker and Fessenden only, but it was signed by them as an agreement which should furnish a basis for going along with the corporate enterprise, and it had reference to the internal affairs of the corporate business, and in no sense contemplated anything ultra vires.

Questions of authority, the question of consideration, questions of ratification on the part of the corporation, and all parties interested, were comprehensively submitted to the jury under proper instructions.

The action is in contract, and Mr. Fessenden seeks to recover an undisputed amount, with interest, based upon what he was to receive for his patents and for incidental expenses in the field of wireless telegraphy.

The point is taken that Fessenden can have no recovery because the contract contemplated satisfaction of the claim through issuing preferred stock. The grievance back of Mr. Fessenden's insistence that his claim should be placed upon an equal basis with that of Given and Walker was that Given and Walker held demand notes, with interest, while his claim was not founded upon notes, and was without interest. Fessenden's relation to the corporate situation was based upon consideration of the assignment of inventions and patents, and the value was fixed, while that of Given and Walker was based upon money advances, and that amount was fixed. In this respect the one consideration is as potent as the other.

It must always be borne in mind that in the broad sense, if not in the technical sense, the corporation was indebted to Fessenden from

the moment of his assignments—indebted to him for the rights which he surrendered, as well as to Given and Walker for their money advances. It is quite true that the original agreement contemplated payments to Fessenden out of profits, but this was changed, and the consideration for changing or advancing Fessenden's claim to an interest-bearing debt was the recognition of the fact that it should be placed upon a basis like that of Given and Walker's, and upon the further consideration of certain engagements on the part of Fessenden which were of important benefit to the corporation. Under any reasonable construction of the agreement of September 12, 1908, it is certain that the purpose was to equalize the claims of Given and Walker and that of Fessenden. There is nothing in any of the agreements or in the record which reasonably warrants the conclusion that Given and Walker waived or surrendered their attitude of indebtedness, while the evidence tended to show, and the verdict must have been based upon the grounds, that the relations of the parties were equalized by advancing Fessenden's claim to an interest-bearing debt. In the event of the recovery of Fessenden's indebtedness, his right to stock and his right to receive payments from profits would be merged in the judgment based upon recoverable indebtedness created by the scheme for equalizing these claims against the corporation.

Under the contract, or agreement, known as Exhibit C, dated September 12, 1908, entered into with a view to carrying out the intentions of the parties as to placing them upon an equal footing, the provision in respect to preferred stock, under reasonable construction, should only be accepted as an expression by the parties that that was the preferable way of carrying out the contract, or, in other words, quoting from the contract, Mr. Walker says, speaking for himself: "I * * * think the best way to do this is by an issue of six per cent. per annum preferred stock of that date," referring to the contract with the Fruit Company. The paragraph which follows this expression as to the preferable way and the short addendum, having reference to preferred stock, as well, in view of the terms of the double aspects of the contract and the subsequent acts of the parties with reference to the transaction, should be accepted as provisional, and as describing what should happen in case the parties adhered to the scheme of issuing preferred stock as the best way of placing their interests upon an equal basis.

But the parties holding these claims, and the corporation, saw fit not to adhere to what in this agreement of double aspects was suggested as the best way, but devised another and what subsequently seemed a better way for effectuating the original purpose, and that was to establish the claim of Mr. Fessenden for his \$330,000 and the claims for the money advanced by Mr. Given and Mr. Walker for which they held notes, on the books of the company as indebtedness, under corporate action which contemplated that interest should be charged up every half year. One of the reasons for this, as expressed by Mr. Walker, according to the testimony of Mr. Fessenden, was that, while the scheme of satisfaction through preferred stock was at first thought the best one, yet it was subsequently thought that by dealing with the

claims as corporate book indebtedness they could avoid the payment of taxes on nearly a million dollars. It was this act of the corporation, acquiesced in by all parties in interest, and in practical construction of the agreement to be performed under its double aspects, in furtherance of the original and sole purpose of the parties and within the reasonable scope of the agreement, that advanced Fessenden's claim to the recoverable position of corporate indebtedness. It was perfectly legitimate, under the double aspects of the agreement, to which reference has been made, for the corporation and the parties interested in the corporation, to change to that kind of corporate indebtedness, provided the parties holding the claims assented to it. According to the testimony of Mr. Fessenden, such was the fact; and, while there was a conflict of testimony upon this point, the instructions were full and complete, and the jury found for the plaintiff. The instructions upon this question were as follows:

"You have heard the evidence fully detailed, fully commented on. It is for you to draw what conclusions you think the preponderance of the evidence warrants. As to either Given or Wolcott, if you should find that, having knowledge that the company had undertaken to agree as expressed in Exhibit C, either of them said to the plaintiff that that was all right, or if after such knowledge either of them remained silent and said nothing, knowing all the time that the plaintiff was going on in reliance upon Exhibit C—that you would be at liberty to regard as evidence warranting a finding on your part that Given and Wolcott, as the case may be, had approved and accepted the contract, provided you will have found that such a contract was made. In that you will, of course, consider the conflicting evidence regarding the plaintiff's statement that something was said to him about his \$300,000 being put on the books and drawing interest or as to any admission of Braun, the secretary, either by words or by looks or by silence, that it was the fact that that \$300,000 or \$330,000, whatever it was, had been in fact put on the company's books, and that he was led to believe that anything of the kind was true."

Under the instructions as a whole, and under the paragraph quoted, the jury must have found, not only ratification of the agreement of September 12, 1908 (Exhibit C), by all parties interested and by the corporation, but that the corporation, with the acquiescence of the parties interested, established the claims, not only of Given and Walker, but of Fessenden, upon the books of the corporation as a corporate indebtedness, with interest. Indeed, under the instructions this, in substance and effect, was made a condition of recovery; and, as the jury found for the plaintiff, and as the transaction related not only to the affairs of the corporation, but to its existence and the development of its enterprise, there is no reason for disturbing the verdict.

The primary and fundamental idea was to place the claim of Mr. Fessenden upon an equal basis with those of Given and Walker with respect to interest and the right of recovery. That idea being clear and unequivocally expressed in the agreement which was ratified, it should be established, and a remedy should be furnished for the enforcement of the right, unless, under the rule of liberal construction in its favor, which should hold in a case of this kind, it is made impossible by the terms of the agreement.

As already said, satisfaction through issuing preferred stock was only set out as the best way, and the paragraph which follows the ex-

pression as to the best way, as well as the addendum, had reference to how it should be done provided it should be accepted as the best way and adhered to by the parties. But the corporation and parties devised what seemed to them to be a better scheme. This was a thing perfectly open to them under the nonconclusiveness, and double aspects, in respect to ways and means, and it being open to them to do so they subsequently put their own practical construction upon the agreement, and devised what seemed to be a better way than that first thought of.

Under ambiguity or under double aspects, the parties are bound by their acts and sayings in respect to a practical construction of the purposes, terms, and possibilities of a contract. *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683; *Lovejoy v. Lovett*, 124 Mass. 270; *Stone v. Clark*, 1 Metc. (Mass.) 378, 35 Am. Dec. 370; *Choate v. Burnham*, 7 Pick. (Mass.) 274, 278; *Clark v. Munyan*, 22 Pick. (Mass.) 410, 33 Am. Dec. 752; *Frost v. Spaulding*, 19 Pick. (Mass.) 445, 31 Am. Dec. 150; *Cambridge v. Lexington*, 17 Pick. (Mass.) 222; *Waterman v. Johnson*, 13 Pick. (Mass.) 261; *Mann v. Dunham*, 5 Gray (Mass.) 511; *Howard v. Fessenden*, 14 Allen (Mass.) 124; *Morris v. French*, 106 Mass. 326; *Stevenson v. Erskine*, 99 Mass. 367; *Shaffer v. Sawyer*, 123 Mass. 294; *Company v. Perley*, 46 N. H. 83, 103.

"Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the courts in giving effect to its provisions." 11 *Century Digest*, 755, § 753, and numerous cases cited.

"The parties are bound by the interpretation which they themselves give to the contract." *Id.*, p. 757.

See, also, 1 *Fed. Rep. Digest*, 2291, § 87. These propositions are so well established that it would seem unnecessary to set out the authorities.

The instructions in this case were full and complete, and all that were necessary, in respect to the consideration for the contract, its ratification by the corporation, and as to acquiescence by all parties interested, and a right which the parties intended to establish will be overthrown, and justice will be defeated, unless the judgment and the verdict stand.

Though we are considering the rights of the parties in an action at law, where certain questions of fact were submitted to the jury under proper instructions, and where a verdict under such circumstances is ordinarily accepted as conclusive in respect to such facts, the reasoning of the majority opinion would seem to have reference more to a situation in which there had been no jury trial, or to one in which the court is at liberty to deal with all the questions involved *de novo*, with the result, as it seems to me, of finding facts not only as to the claim of Fessenden, but as to those of Given and Walker as well, which neither of the parties contemplated in the final adjustment of their rights under the double aspect agreement of September 12, 1908.

In the view which I take of this case it requires straited and extremely refined and technical reasoning to overthrow the verdict and judgment reached after a long and comprehensive trial.

THE HOWARD REEDER. THE COLUMBIA. THE ELIZABETH E. VANE.

(Circuit Court of Appeals, Fourth Circuit. July 8, 1913.)

No. 1,114.

1. COLLISION (§ 95*) — STEAMER AND MEETING BARGE IN TOW — EXCESSIVE SPEED.

The steamship Columbia, while passing down the Brewerton Channel from Baltimore at night, came into collision with and sank a barge passing up in tow of a tug. An agreement for passing port to port was made when the vessels were a mile or more apart, and the steamship went to starboard, but kept her speed of 12 knots almost until collision, which was caused by her sudden sheer, from running too close to the edge of the channel, or some other cause not clearly shown. The channel was 600 feet wide, and the tug and tow were about the center. *Held* that, whatever started the sheer, the real cause of the collision was the excessive speed of the steamer, and that, being the burdened vessel, with ample room to keep out of the way of the tow, she could not avoid sole liability by charging the tug with minor faults.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

2. COLLISION (§ 90*) — STEAM VESSELS MEETING IN CHANNEL — STARBOARD HAND RULE.

Article 25 of the Inland Rules (30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which provides that "in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel," does not state an absolute requirement, so as to warrant one of two meeting vessels in acting on the assumption that she is entitled to the full half of the channel on her starboard side.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 181-186, 196; Dec. Dig. § 90.*]

Appeal and Cross-Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty for collision by Frederick Hale, master of the barge Elizabeth E. Vane, against the steamship Columbia, the Chesapeake Steamship Company, claimant, and the tug Howard Reeder, brought in under admiralty rule 59 (29 Sup. Ct. xlv). Decree against the Columbia and the Howard Reeder, and their claimants appeal. Reversed, and decree directed against the Columbia alone.

For opinion below, see 195 Fed. 1000.

This is an appeal and cross-appeal from a decree of the United States District Court for the District of Maryland, in admiralty, rendered on the 11th day of April, 1912, and involves the damages arising from a collision between the steamship Columbia and the barge Elizabeth E. Vane, in tow of the steam tug Howard Reeder, that occurred in the waters of the Patapsco river on the 19th day of October, 1911.

The facts are briefly that on the evening of the day in question the tug was proceeding up the Patapsco river, towing the barge Vane en route from Port Deposit, on the Susquehanna river, to the harbor of Baltimore, loaded with a cargo of 550 tons of crushed stone, for the purpose of subsequently completing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 207 F.—59

her tow for Hampton, Va., and when about opposite buoy 26 in the Brewerton Channel, the barge came into collision with the steamship *Columbia*, one of the passenger steamers of the Chesapeake Steamship Company, en route from Baltimore to Norfolk. The *Vane* was a wooden barge 178 feet 9 inches long, 23 feet 7 inches wide, laden as aforesaid, in tow of the *Reeder* on a hawser of 75 fathoms, and was at the time of the collision making between 5 and 6 miles an hour. The *Columbia* was a fast passenger steamer of 287 feet over all, 46 feet beam, gross tonnage 2,500, and making about 12 knots an hour, having a draft at that speed of about 16 feet 4 inches. The steamer struck the barge on her port side some 20 feet abaft of the beam, cutting deeply into and largely tearing off that side, causing her to quickly sink, resulting in a total loss of the barge and cargo. The *Columbia* was uninjured, and the *Reeder* sustained no injury save the breaking of her hawser.

The libel was promptly filed by the owners of the barge against the *Columbia*, which in turn answered bringing in the tug *Reeder* under the fifty-ninth admiralty rule, and the latter thereupon filed its cross-libel against the *Columbia*. The lower court heard the testimony, most of which was taken before the court orally, though some was by deposition, and made its finding of facts and rendered the opinion found in 195 Fed. 1000, holding the *Vane* free from fault, and the *Columbia* and the *Reeder* both in fault, and divided the damages between them. From this decree the *Reeder* and the *Columbia* appealed.

The faults assigned by the *Reeder* against the *Columbia* are, briefly, that she failed to direct her course so as to avoid the *Vane*, that she failed to keep a safe distance from the *Vane*; that she failed to observe the rules requiring the ship to keep to that side of the channel on her own starboard side, and that she failed to avoid collision with the barge as she was proceeding up the Brewerton Channel; on the part of the *Columbia* against the *Reeder*, that the tug was not in command of a competent pilot, master, or other person, that it failed to keep a good lookout, that it was towing on a hawser of unusual length, that it failed to keep itself and the barge to the starboard or right-hand side of the fairway, that it failed to keep the barge under control, and permitted it to be towed into the steamer, and that it gave an improper signal of one blast to pass the *Columbia* port to port, having shortly before passed the Florida starboard to starboard; and on the part of the *Columbia* against the *Vane*, that it permitted itself to be towed on a hawser of unusual length, and failed to steer properly after the tug. The *Reeder* in its cross-libel charged that the *Columbia* was without proper steering gear, and not properly equipped and manned, that she failed to keep the side of the channel which lay to the starboard of mid-channel, that she was running at an unreasonable rate of speed at and until the collision, and failed seasonably to stop and reverse, or otherwise meet the burdens imposed upon her as the unencumbered vessel meeting a tug and tow under the circumstances she did, and that she failed to keep out of the way of the tug.

Daniel H. Hayne, of Baltimore, Md., for the *Howard Reeder*.

Arthur D. Foster, of Baltimore, Md. (John Henry Skeen, of Baltimore, Md., on the brief), for the *Columbia*.

H. N. Abercrombie, of Baltimore, Md., for the *Elizabeth E. Vane*.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

WADDILL, District Judge (after stating the facts as above). The averments of fault thus stated by the vessels against each other are many in number, but when considered in the light of the testimony and the findings of fact of the lower court it will be found that but few of them are meritorious. Those against the barge were entirely withdrawn at the trial, as were those of the steamship against the tug, and the tug against the steamship, that they were not each properly

manned and equipped; at all events, no evidence to that effect was introduced by either side. The averment as to the failure of the Columbia to have proper steering gear, certainly at the time of the collision, was not established.

What is said of the number of averments of fault largely applies to the assignments of error, especially those of the tug, some 39 in number. The case is a simple one of a collision between an incumbered and an unincumbered vessel, namely, between a fast passenger steamer and a barge in tow of a tug in a straight channel, certainly as much as 600 feet wide at the point of collision, after the vessels had seen and observed each other for several miles, and had interchanged passing signals when a mile or more apart. The collision occurred in the Brewerton Channel, at a point about opposite buoy No. 26; and before the Columbia had come into the Brewerton Channel from the Ft. McHenry Channel she had observed this tug and tow coming up the Brewerton Channel near where it intersects with the Cut-Off Channel, a distance of more than four miles; that after rounding into the Brewerton Channel from the Ft. McHenry Channel, at or near buoy 30, she observed the tug and tow proceeding up the channel; that the distance from the entrance to the Brewerton Channel to the point of the collision was between a mile and a quarter and a mile and a half; that shortly after coming into the Brewerton Channel, she received a signal from the Reeder, which was then showing its red light, of one whistle, to pass port to port; that the Columbia for the moment failed to respond to that signal, and upon its being repeated by the Reeder, the Columbia replied with one blast, accepting the proposed maneuver to pass port to port, and promptly ported her wheel with a view of so passing, and continued to navigate at the speed of 12 knots an hour until she passed abreast of the tug some 150 feet, and sheered and ran into the barge, causing the injuries sustained.

The Brewerton dredged channel was 600 feet wide and 35 feet deep, and at the point of the collision there was in addition water to the southward of from 18 to 20 feet deep for approximately 100 feet, making 700 feet of navigable water.

The Columbia's contention is that, having received the signal to pass port to port, she had the right to assume that the tug and tow was to the starboard hand of mid-channel, and that there was no necessity for her slackening speed; and that she found, as a matter of fact, that the tug and tow was to the southward of mid-channel, which caused the Columbia, in passing, to go so near to the southward side of the channel as to cause her to sheer and run into the barge.

[1] The main findings of the lower court are substantially as follows: (a) That the collision occurred to the southward of mid-channel, the tug being slightly and the barge about 100 feet therefrom; (b) that the Columbia was approximately half a mile from the scene of the collision when the passing signals were exchanged; (c) that the time the collision actually occurred was not 7:35, as contended for, but 7:41; (d) that the steamer Florida, which passed the tug and tow starboard to starboard on a signal inaugurated by the Florida,

did not pass at the intersection of the Brewerton Channel with Cut-Off Channel, some $2\frac{1}{8}$ miles below the scene of the collision, as claimed by the Reeder, and in effect testified to by the Florida's master, but about three-fourths of a mile below the scene of the collision. And the court endeavored to establish each of these positions largely by mathematical demonstration.

In the view this court takes of the case, assuming these findings of fact to be correct, its judgment in the final result would not be materially affected thereby, though we do not concur in the judgment of the court below as to most of them, and do not appreciate the materiality of some of them; for instance, whether the collision occurred about 7:35, as contended for by the Reeder, or 7:41, as calculated by the court below. The evidence is not expected to be entirely accurate on a matter of fact of this kind, occurring on a dark and misty night, as many of the witnesses testified it was, though they admitted there was no difficulty in seeing a vessel's lights. Nor is it really material just how the Florida passed the tug and tow, whether starboard to starboard or port to port, since upon the court's showing it was three-quarters of a mile below where the collision occurred. The Columbia was charged with the duty of avoiding a collision with this incumbered tug and tow, that was in full view; and she had no right to govern her movements by what another steamer did a mile and a half away, as shown by the court, and very much further below, as claimed by the Reeder. Where, in the channel, the collision happened, is a matter of some moment, and one which, while we are not unmindful of the weight justly to be given to the findings of fact of the lower court, who saw and heard the witnesses, as respects this particular finding, very important testimony was introduced by depositions. Therefore, as to that, the lower court had not the full advantage of seeing the witnesses; and it appears to us that the preponderance of the testimony establishes that the tug, in order to insure a safer navigation, was gradually making its way to the northward line of the channel, on which was the line of buoys, and at the time of the collision the tug was somewhat to the northward of, and the barge approximately in, the middle of the channel, and at the time of accepting the passing signal the Columbia was navigating slightly to the northward of mid-channel for the purpose, also, of directing her course by picking up the buoys on that side, and at that time ported with a view of passing the tug and tow port to port, and at the time of collision she, too, was also approximately about mid-channel. This is shown by the position of the wreck in the channel, the range lights marking the midway of the 35-foot channel, the admission of the Columbia's master as to the location of the wreck, the evidence of the wrecker and others who examined and measured the grounds, and of the navigators of other vessels passing by the spot where the collision occurred. As to the time of the exchange of passing signals, while the court heard all the witnesses respecting that matter, still it does not seem very positive in its findings on the subject, as it says:

"The Columbia at the time of the interchange of signals would have been at most a trifle over half a mile from the point of collision. Many witnesses

think that there was a longer interval between the sounding of the one blast, the signal by the Reeder, and the collision."

Then, after giving certain calculations respecting the time of the collision and the location of the buoys, based on the testimony of the Reeder's master, the court says:

"I believe there was much less time between the interchange of the signals and the collision than many of the witnesses supposed. What happened after they were interchanged can be more easily understood upon the assumption that the time was very short."

It seems to us, while, as above stated, not essential to the determination of this case upon its merits, that the lower court is certainly mistaken as to the distance that the two vessels were apart at the time the Columbia accepted the Reeder's signal; and in the most unfavorable view to the tug, they were over a mile apart, which is borne out by the almost undisputed testimony of the witnesses, including those of the Columbia. The master of the Columbia gave the distance at about a mile and a half; her second officer, while not naming a specific distance, clearly showed, having regard to the place of giving the signal, that it was more than a mile away; her quartermaster, at from a mile and a quarter to a mile and a half; and her outlook, that the passing signal was given a little above buoy 28, which certainly places them considerably more than a mile apart, the collision itself having occurred off buoy 26. The master of the tug fixes the same distance as a little over a mile, and the master of the barge that the signal was given as the Columbia straightened down the Brewerton Channel, and that the second signal was given in a few seconds, and promptly answered by the Columbia, which would place the vessels considerably over a mile apart.

We have made this reference to the evidence in order to show the different viewpoints from which the testimony may be considered; but, as before stated, even upon the findings of the lower court, having regard to the rules of navigation applicable at the time of the collision, there can be but one conclusion in this case, namely, that the Columbia is responsible for not avoiding the collision with this barge under the circumstances here. There was nothing in the condition of the weather to make navigation difficult, further than it was a dark, misty night. Lights could be seen, and were seen, for several miles; the vessels were approaching each other on a straight course, end on, or nearly so; the channel not obstructed; neither wind nor tide were disturbing elements; and at the time, with a channel of 600 feet of deep water, marked with spar buoys on its northern side, and 100 feet of water additional at the scene of the collision of depth more than ample for the purposes of both vessels. The tugboat was undoubtedly the incumbered and favored vessel; the Columbia was the burdened vessel; and she cannot escape responsibility for omission to conform either to the rules of navigation, or to take such steps as good seamanship required of her, carrying the burden with which she was charged, by attempting to throw suspicion or doubt upon the acts of others; nor will she be permitted to rely upon what she presumed the incumbered vessel could or ought to have done. In fact,

the presumptions of fault are against her, rather than otherwise, for a collision occurring under the circumstances of this case.

Upon the lower court's finding, she accepted the signal of the tug given nearly a mile away to pass port to port. Hence she had ample time, had she exercised the prudence required of her, not only to have avoided collision with the barge, but any risk thereof. She could have initiated the passage signals, and taken either side of the channel she wanted to, and with her searchlights playing upon the buoys to the one side, and the tug and tow in or near the center of the channel, there was no difficulty in her determining what course she should pursue, and if difficult, or if she misunderstood the tug's signal, then her course was simple. She should have given danger signals, and stopped until she found out what was safe to do, and, in the then conditions, should certainly not have proceeded at 12 knots an hour, without absolutely knowing the position in the channel of the tug and tow. Upon the court's finding, there was 200 feet of 35-foot depth of water within the channel, and also 100 feet of sufficient depth for her to have passed over in safety, had she prudently navigated with respect to her speed, which she did not do. The Columbia was presumed to know the depth of the channel, of the existence of the deep-water channel and its width, of the difference in the draft of the ship, in running at high or low speed, and of the danger of sheering in passing in too close proximity to the banks. Whether this collision occurred because of the Columbia's sheer, from running too close to the channel's banks, or because, while running at such speed, she put her wheel hardaport and suddenly reversed, and from the kick incident thereto, is utterly immaterial, since in either event the sheer was caused by the excessive rate of speed of the Columbia at a time when prudence required that she should have slowed down. Without such sheer there manifestly could have been no collision in 300 feet of clear channel way. The Columbia's navigator should not have waited to slow down until she was abreast of the tug, as he admits he did, and until his vessel, as he says, began to "run," as he calls it, or sheer from the bank. She was at the time only some 450 feet away from the barge, and manifestly the effort to check her speed, then for the first time made, was too late to accomplish any real good. Good seamanship required that she should have anticipated danger in such a maneuver, and for the consequences arising therefrom she can neither escape responsibility nor justly call upon others to share her losses. Authorities to sustain the views herein expressed might be cited almost without number, and only a few need be given. *The Syracuse*, 75 U. S. (9 Wall.) 672, 674, 19 L. Ed. 783; *The America*, 92 U. S. 432, 437, 438, 23 L. Ed. 724; *The New York*, 175 U. S. 187, 201, 207, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Ohio*, 91 Fed. 547, 548, 551, 33 C. C. A. 667; *The Caldy* (D. C.) 123 Fed. 802, 806; *The Georgetown* (D. C.) 135 Fed. 854; *The Westhall* (D. C.) 153 Fed. 1014; *The Maryland* (D. C.) 182 Fed. 829, 831.

[2] The master of the steamer indicates in his testimony that, on receiving the signal to pass port to port, he assumed that the tug would give him the south half of the channel; and counsel for the

Columbia seek to maintain this position in argument, namely, that the Columbia had the right to the southern half of the channel, and the additional right, upon receiving the signal to pass port to port, to consider the same clear. This, we do not understand to be the law. Article 25 is that:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the star-board side of such vessel."

That it would be best to have vessels so navigate—that is, each proceed to the right—is very clear, if it could in all cases be done, and would largely obviate the necessity of passing signals at all in channels of the character in question. But the rule is when it "is safe and practicable so to do," leaving it largely a matter of discretion to the navigator, made necessary by many considerations which arise en route, among them the necessity for crossing from side to side of the channel, the existence of shoal waters, the sinuosities of the channel, leaving or approaching a channel, and the following of buoys or other aids to navigation on dark nights. This case shows the difficulty of conforming strictly to this rule. Not one of the vessels mentioned in connection with this accident, was pretending to conform to the rule, save the tug Reeder and its tow, which was navigating gradually to the northward side of the channel. The Columbia, as found by the lower court, at the time of receiving the first signal from the tug, was coming down the river, to the northward, instead of the southward, side of the channel; and the Florida's master admits that he was within 50 feet of the bell buoy on the north side of the channel when he passed the same into Cut-Off Channel, and at the time the tug and tow insists it was then rounding its way into the channel, and when the Florida gave the Reeder a signal to pass green to green. Clearly, the inland rules of navigation give no countenance to such contention, namely, that on receiving a passing signal each vessel has the right to assume that the other is on a particular side of the channel, or will make room for the approaching vessel on the other side. On the contrary, certainly between an unincumbered and an incumbered vessel, such condition could not well exist, and as between them the unincumbered or free vessel is the burdened one of the two vessels. The incumbered vessel should not embarrass the free vessel, it is true, or do anything to obstruct its navigation. But when it has duly signaled to a free ship, giving notice of its presence, and the character of its burden, as was done here, and the same was known by the latter, and the maneuver inaugurated by the tug, accepted by it in ample time for each ship to control its movements, the incumbered vessel discharges its full duty, in the absence of some unusual emergency, by proceeding on the course indicated by it, and acquiesced in by the ship; that is, as is certified to by the lower court as a fact, by navigating gradually to the northward, and away from the course of the Columbia. Under the circumstances of this case, to require more would in effect be to shift the burden of responsibility from the unincumbered to the incumbered vessel.

No rules of navigation are more important than these under consideration here, and to lessen or in any way alter the burden placed upon vessels to so navigate in narrow channels as to pass each other in safety, after giving and accepting signals so to do, by any such idea or notion that either vessel may do what it chooses, or take as its own the one-half of the channel on the side it happens to be navigating, would be unfortunate in the extreme; indeed, would in effect do away with and destroy the rules entirely. In this case, the presence of the tug and tow, ascending the channel, was known of when it was several miles away, the agreement to pass port to port made when a mile or more away, and the free vessel directed its course to port, but did nothing more, and continued at the speed of 12 knots an hour in the dark, passing the tug only by a margin of 150 feet, when it sheered and caused the collision. The sheer confessedly would not have occurred, but for the speed; and this alone, in the court's view, brought about the accident, and the ship cannot escape liability because of alleged unforeseen and whimsical occurrences in connection with its navigation, which good seamanship and ordinary prudence and foresight would have anticipated and provided against. *The Syracuse*, 76 U. S. (9 Wall.) 672, 675, 676, 19 L. Ed. 783; *The Saratoga* (D. C.) 1 Fed. 730, 733; *The Britannia* (D. C.) 34 Fed. 546, 557, 558, and cases cited; *The Portia*, 64 Fed. 814, 12 C. C. A. 427; *The Georgetown*, 135 Fed. (D. C.) supra, 854, 859; *The Westhall*, 153 Fed. (D. C.) supra, 1014, 1016; *The No. 1*, 180 Fed. 969, 973, 104 C. C. A. 125; *The Ralph Cregke*, 4 Asp. Mar. Cases, 19; *Coyzer v. Carron Co.*, 9 App. Cas. 873, 883.

It follows from what has been said that the *Columbia* should be held solely responsible for bringing about the collision in question, and that the decision of the lower court, holding the *Reeder* and *Columbia* both in fault, and apportioning the damages between them, should be reversed, at the cost of the *Columbia*, the cross-appellant; and it will be so ordered.

Reversed.

THE PHILADELPHIA.

(Circuit Court of Appeals, Third Circuit. September 20, 1913.)

No. 1,733.

COLLISION (§ 95*)—TUG AND SCHOONER CROSSING—FAULT.

A decree holding a tug solely in fault for a collision with a schooner on a crossing course in the Delaware river affirmed on the findings of fact of the trial court.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in admiralty for collision by L. Furman Smith and others, owners of the schooner *Eugene Cathrall*, against the tug *Philadelphia*; Joshua E. Tracy, claimant. Decree for libelants, and claimant appeals. Affirmed.

For opinion below, see 199 Fed. 299.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Howard M. Long, of Philadelphia, Pa., for appellant.

Willard M. Harris, of Philadelphia, Pa., for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. This is an appeal from a decree in admiralty in a case of collision. The determination of the case below involved and turned upon findings of fact as to the relative positions, just before the collision, of a schooner and tug crossing courses in the Delaware river. The court's opinion (reported in 199 Fed. 299) sustained the schooner's contention, and, under the rules of navigation and the law, held the tug in fault. While there is much to be said in the tug's favor, we incline to agree with the court's conclusion. Reference to the full and discriminating discussion by the learned judge of the court below of all the questions involved suffices to indicate our views, and we avoid mere repetition by affirming, on such opinion, the decree entered.

OSHKOSH GRASS MATTING CO. v. WAITE GRASS CARPET CO.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913.)

No. 1,932.

1. PATENTS (§ 234*)—INFRINGEMENT—EVIDENCE.

Similarity of structure cannot be predicated on similarity of names, nor the mere use of old elements, as new combinations make new inventions.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381; Dec. Dig. § 234.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GRASS TWINE MACHINES.

The Monahan & Kieren patents, No. 688,789, for a grass twine machine, and No. 785,070, for a material feeding device for such machines, while valid, are of narrow scope and limited to the specific form of the improvements shown; as so limited, *held* not infringed.

Appeal from the District Court of the United States for the Eastern District of Wisconsin; A. L. Sanborn, Judge.

Suit in equity by the Oshkosh Grass Matting Company against the Waite Grass Carpet Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 194 Fed. 885.

Arthur L. Morsell, of Milwaukee, Wis., for appellant.

Samuel W. Banning, of Chicago, Ill. (Thomas A. Banning, Thomas A. Banning, Jr., and Ephraim Banning, all of Chicago, Ill., of counsel), for appellee.

Before BAKER and KOHLSAAT, Circuit Judges, and WRIGHT, District Judge.

KOHLSAAT, Circuit Judge. Appellant (described hereinafter as complainant) filed its bill to restrain infringement of claims 23 and 24 of patent No. 688,789, granted to Monahan & Kieren, December 10, 1901, for an improvement in machines for making twine having re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lation "more particularly," says the specification, "although not necessarily, to twine composed of lengths of grass." The claims read as follows:

"23. In a machine for making twine, the combination of means for forcing the material forward, means for bringing the length of the material close together, compression means adapted to compress the material, after the lengths of said material are brought close together, and means, after the material is compressed, for wrapping the twine therearound.

"24. In a machine for making twine, the combination of means for forcing the material forwardly, a funnel into which the material is received, compression-rolls adapted to receive the material therebetween, after said material leaves the funnel, and means, after the material is compressed for wrapping a twine therearound."

The bill also sought to restrain infringement of claims 9, 14, 17, 18, 19, 20, 21, 23, and 24 of patent No. 785,070 granted to the same patentees on March 14, 1905, for an improvement in automatic material feeding devices, "especially adapted for feeding length of grass to the winding and spooling mechanism of grass twine machines," designed to be a simpler, less expensive, and speedier device than shown in the prior art. The claims read as follows, viz.:

"9. In a material-feeding device the combination of a frame constructed for the travel therethrough of the material to be acted upon, a rotatable roll journaled in the frame, a series of revoluble devices co-operating with the roll, each revoluble device provided with a concentrically-curved edge, the said devices being so set that the material is always acted upon by one or more of the curved concentric edges, whereby said material is pressed against the roll and moved along one frame of the machine."

"14. In a material-feeding device, the combination of a frame constructed for the travel therethrough of the material to be operated upon, a rotatable roll journaled in the frame, a series of revoluble devices co-operating with the roll, each revoluble device provided with means for pressing the material against the roll, whereby said material is moved along the frame of the machine, and two rotatable rolls in advance of the first-mentioned roll and adapted to receive therebetween the material so moved along the frame of the machine."

"17. In a material-feeding device, the combination of a frame constructed for the travel therethrough of the lengths of material to be operated upon, a pair of draw-rolls arranged in line with the travel of the material and transverse of the lengths thereof, and roller means for starting or forcing the ends of successive lengths of the material between the draw-rolls, whereby said rolls serve to grasp and draw a portion of the lengths of the material.

"18. In a material-feeding device, the combination of a frame constructed for the travel therethrough of the material fed therein, mechanism for moving the material along the frame, one member of said mechanism being movable and adapted to act at different longitudinal portions thereof successively on the material fed into the machine, and the other member thereof forming an opposing surface co-operating, and adapted, in connection with the successively-acting portions of the other member, to move the material along the frame of the machine.

"19. In a material-feeding device, the combination of a frame constructed for the travel therethrough of the material fed therein, mechanism for moving the material along the frame, one member of said mechanism having a circular path of movement and adapted to act at different longitudinal portions thereof successively on the material fed into the machine, and the other member thereof forming an opposing surface co-operating, and adapted, in connection with the successively-acting portions of the other member, to move the material along the frame of the machine.

"20. In a material-feeding device, the combination of a frame, constructed for the travel therethrough of the material fed therein, mechanism for mov-

ing the material along the frame, one member of said mechanism being movable and having different longitudinal portions thereof provided with differently-positioned grooves adapted to act successively on the material fed into the machine, and the other member thereof consisting of an opposing surface co-operating, and adapted, in connection with the successively-acting portions of the other member, to move the material along the frame.

"21. In a material-feeding device, the combination of a frame constructed for the travel therethrough of the material fed therein, mechanism for moving the material along the frame, one member of said mechanism being movable and adapted to act at different longitudinal portions thereof successively on the material fed into the machine, and the other member thereof forming a rotatable opposing surface co-operating, and adapted, in connection with the successively-acting portions of the other member, to move the material along the frame of the machine."

"23. In a material-feeding device, the combination with a frame constructed for the travel therethrough of the material to be operated upon, of mechanism for moving the material along the frame, one member of said mechanism being revoluble, and having material-engaging means carried thereby and located thereon transversely of or at an angle to the axis of said revoluble member, and the other member of the mechanism for moving the material having a surface opposed to the revoluble member, portions of the material-engaging means of said revoluble member, in the revolution of said member, successively co-operating with the opposing member, and thereby moving the material along the frame of the machine.

"24. In a material-feeding device, the combination of a frame constructed for the travel therethrough of the material to be operated upon, mechanism for moving the material along the frame, one member of said mechanism being movable and adapted to act at different longitudinal portions thereof successively on the material fed into the machine, and the other member thereof having an opposing surface co-operating, and adapted, in connection with the successively-acting portions of the other member, to start the movement of the material along the frame of the machine, and a pair of draw-rolls arranged in line with the travel of the material and transverse of the lengths thereof, and adapted to receive therebetween the lengths of material moved by the material-moving mechanism, and thereby draw said lengths of material therebetween."

On the hearing below the bill was dismissed for want of equity. Of these claims, complainant's counsel says:

"Appellant may well rely on claim 17, which clearly points out that the invention consisted not in the specific form of mutilated or grooved rotating member, but in the more general terms, 'roller means for starting and draw-rolls for advancing the stalks after they have been started.'"

Claims 23 and 24 of the first patent in suit differ only in wording. Both cover means for manufacturing straight grass twine as compared with prior art devices for making twisted grass twine. The steps of each are in substance the same, i. e., means for forcing the material forward, means for bringing the lengths or straws of material close together. (Claim 24 recites the means, i. e., a funnel.) Compression means (claim 24 recites rollers), and means after the material is compressed for wrapping it with twine. There must be read into the claims an endless belt 53 which receives the grass from the forward feeding rollers and carries it into the funnel in order to bring the stalks of grass close together, whence it passes in compacted form into the undriven compression rolls at the discharge end of the funnel. The patent in terms discloses no means for advancing the compacted grass through the compression rolls, which operate only as the grass drives them. It does not appear that the endless belt imparts any for-

hay, straw, sisal grass, manila grass, fiber, flax, rags and other available material. The Lowry patents differ mainly from the first and second patents in suit in that they add twistors and use different advancing means. Without these, with little or no modification, they could be used in making straight grass twine. The same is true of numerous other patents. Appellee's brief at pages 155 and 156 names over 30 prior patents, some of which show straight grass twine.

Mitchell patent, No. 63,921, shows the woof of a matting formed of manila grass, made up of overlapping fibers, but does not disclose the machine for making it. Here Russian grass is suggested as a substitute for manila grass.

British patent to Lyman shows a device for overlapping longitudinally strips of horn and then wrapping them with a helically applied thread, so as to make a twine-like article of straight lengths of material. Other patents cover the overlapping and wrapping of straight Tampico fibers, quills, and other articles for corset stiffeners. Thus the idea of making string and string-like articles from straight, untwisted material is old. It would seem that complainant has made no advance over the prior art which would justify his claim to a basic patent, so far as said claims 23 and 24 are concerned.

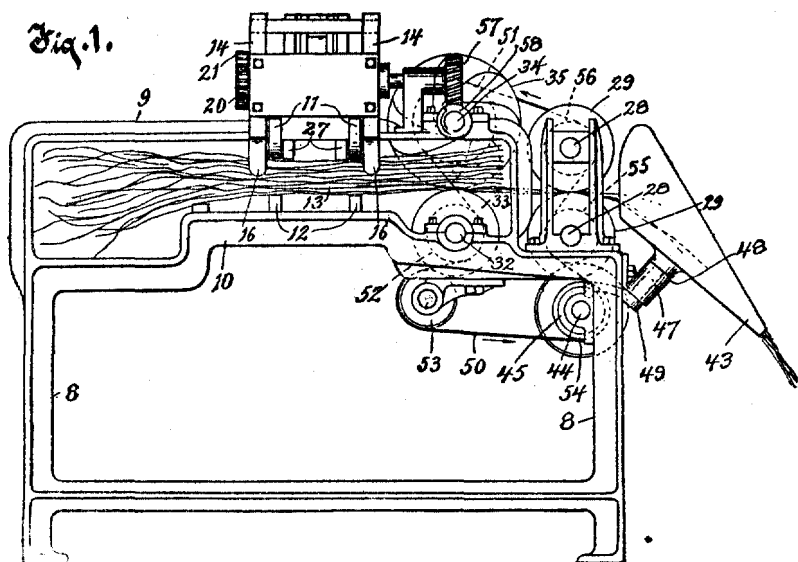
Appellee (hereinafter termed defendant) insists that the device of those claims is an aggregation merely, being the union of feeding mechanism with wrapping mechanism, neither one of which is dependent upon the other. Inasmuch, however, as the claims call for a straight grass twine made under complainant's device, wherein it is seen that the binding or wrapping of the grass contributes in a way to the forward movement of the strand from the funnel and compression rolls through the meshing of the blades of grass with the rearward ends of those the forward ends of which are already made into twine, it cannot be said that the wrapping mechanism does not in any degree co-operate with the advancing mechanism. The device of the two claims in suit are deemed to be valid for the purposes of this hearing when limited to the specific form shown in the patent.

It will be noted that the several claims of the second patent, No. 785,070, here in suit, all appertain to a feeding device only. In answer to question 334, at page 341 of the record, Monahan, one of the patentees, says that all of the feeding device of the first patent is omitted in the second, excepting only the feed rollers 46 shown in said first machine, which takes the grass from the nippers as shown in the first patent. These rollers are marked 29 in the second patent. The nippers of the first patent are replaced by a series of laterally arranged concentric segments carried by a rotating shaft and co-operating with a roller located directly under it. These segments are arranged on the shaft in such a manner that the acting concentric portions thereof successively follow each other; so that at all times some lengths of grass are engaged and forced longitudinally. Provision is made for independent movement of the segments in order to accommodate them to variations in the thickness of the lengths of material being operated upon, and hence they must rise varying distances. Each of the seg-

ments is provided with a groove or double groove, if desired in the edge thereof. After passing between the segments and underneath the roll co-operating therewith, the advancing ends of the grass pass between the rolls 29 above named and are drawn into a downwardly inclined funnel adapted to receive the same. To this funnel a so-called laterally-shaking movement is imparted to facilitate the sliding downwardly therein of the lengths of grass. As the grass advances, it converges into the narrowing neck of the funnel whereby the patentee claims it is compressed.

"It will be understood," say the patentees, "that our improved feeding mechanism is adapted to be used in conjunction with the winding and spooling mechanism of machines for making twine. * * * the funnel 43 leading and adapted to convey the material to the winding mechanism."

It would clearly involve the pull of the wrapping device, or of draw-rolls or other pulling element to extricate the compressed or compacted strands of grass from the narrow discharge end of the funnel where the second patent leaves it. Whether the action of gravity of the second patent would operate more effectively than the endless belt or curtain of the first patent seems doubtful. Of course, it would be a cheaper device; and that is one of the advantages the patentee claims for it. Lowry patent, No. 654,991, also uses the force of gravity and the converging, compressing funnel. He also provides a spread-out layer of grass from which his selecting device withdraws its substantially prearranged quantity of grass to be advanced. The Lowry twister is located close to and in alignment with the forward outlet of the gravity fed funnel. The grass in Lowry's machine passes into a short funnel-shaped sleeve which delivers the straw into the jaws of a pair of arms which are adjusted to effect the twisting. Were this device missing, Lowry would have had straight grass twine.



From the accompanying drawing, being Fig. 1 of second patent, the construction of complainant's latter device will be readily understood.

It has the merit of simplicity, speed, and cheapness. Whether the strands would emerge from the cylinder end of the funnel unassisted by further pulling influence is not clearly shown. It seems reasonably certain, however, that it would require the assistance of the attached wrapping mechanism or something having a pulling function to secure a complete delivery.

As before stated, nothing is said or claimed in this or either of the patents in suit in regard to the destruction of the epidermis of the grass straws. That result follows as an incident to the feeding elements of the claims in suit, and may not be appropriated as a patentable feature of the devices in suit. *American Grass Twine Co. v. Choate et al.*, 159 Fed. 429, 86 C. C. A. 409.

[1, 2] The result might, from all that appears, flow from any forcible manipulation of the grass, and may not be claimed as indicating an infringing machine. In view of the state of the twine art, and, it may be said, of the grass twine art at the date of the application for the second patent in suit, complainant is not entitled to any broad claim for a device adapted to the manufacture of straight grass twine. It is of little significance that in the said claims or some of them a similarity of names may occur, if such be the case here. Similarity in fact must be established. Nor can similarity of structure be predicated upon the mere use of old elements; new combinations make new inventions. *Fuller v. Yentzer*, 94 U. S. 296, 24 L. Ed. 103; *Gill v. Wells*, 22 Wall. 14, 22 L. Ed. 699; *Seymour v. Osborne*, 11 Wall. 555, 20 L. Ed. 33; *Standard Computing Scale Co. v. Computing Scale Co.*, 126 Fed. 639, 649, 61 C. C. A. 541.

We assume for the purposes of this hearing that said claims are valid, but only for the specific invention disclosed in the complainant's feeding device. It appears that complainant has not made the device of these claims the basis of its general trade, but has constructed and placed on the market what it terms its commercial machine. In this device there was added to those above described a steel nose which was attached to the funnel end at an angle to the inclined floor of the funnel, so that the grass blades in passing out would be sharply bent and more completely broken or freed from the hardened cuticle. To this they add a wrapper. Manifestly, they could, if desired, have used a twister instead, or both of them. Thus the grass is drawn in part, at least, from the nose by the pull of the wrapper and wrapped, making a complete machine.

The segments, as is the case with the nippers, are charged with a double function. They select or pick up the strands of grass from the lower roll and carry them to the advancing rollers, whence it is delivered to the vibrating downwardly inclined funnel.

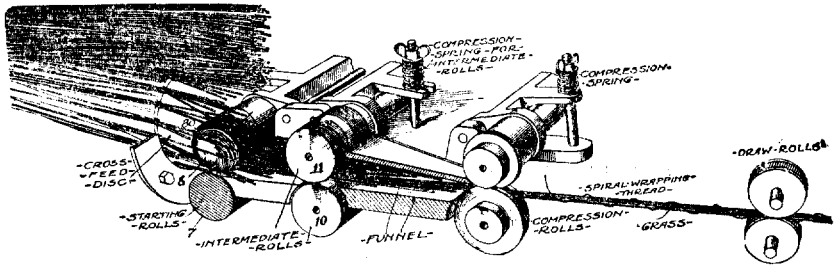
The defendant's machine is based upon Wessel patent, No. 896,783, granted August 25, 1908, for a grass twine machine.

"The invention," says the patentee, "is directed chiefly to improved mechanism for selecting from a suitable grass holder, the blades of grass in a

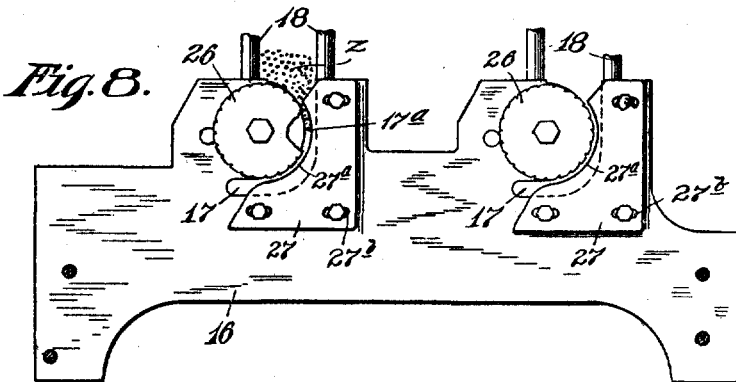
regular and uniform order of succession, and delivering the same to the twine-forming mechanism proper."

He claims that the invention involves minor, but important, novel features. Herewith is presented a drawing of its machine as used.

Appellee's Machine.



The machine neither needs nor employs anything like the undriven compression rollers of the first patent. Nor does it use side boards. The grass is separated and carried by the notched disc as shown in fig. 8 of the Wessel patent, presented herewith, around into the



throat formed by the tapering end of the upper roller 8 as shown by the defendant's commercial machine above set out, and the lower roller 7; the former being formed so as to taper inwardly, and the latter having a bell-shaped end (not shown in drawing) both screw-threaded, without advancing the grass materially. From this throat the grass is flexed inwardly by the helical screw-threads, the outer of which is coarser than the inner, until the bunch of grass is flexed into the bite of the feed-rolls, 7 and 8 of the drawing of defendant's machine. Up to this time the material is not substantially advanced, except as it is flexed towards the bite of the feed rolls. At this point the rolls are smooth. Here the advance of the material is fully caught in the forward drag of the rolls. Complainant's expert says of this position:

"Mainly I should say withdrawal is effected, that is withdrawal by endwise movement, by the plain portion of the lower roll and the opposed grooved portions of the upper roll, but it is possible that at times there might be some advance of the material before it passes into the fine grooves on the upper roll, since the feed of grass may vary slightly, and if there is sufficient grass, or the blades are particularly thick, that there might be some advance before the lengths reach the fine grooves. I might add that, in witnessing the operation of the machine, it would be impossible to discern this with great exactitude, because the initial endwise feeding rolls are operated at a high speed and the grass moves forwardly in rapid longitudinal succession."

These rollers are indicated by numerals 47 and 38 in the drawings of this Wessel patent. They in turn, after the grass has been flexed into their bite, force it forward into and between "a pair of heavy crushing rollers 48 and 49, the latter being adjustably weighted or screw pressed, so as to increase its pressure against its under co-operating roller 48. This the patentee Wessel says is intended to crush and flatten out blades of grass and thereby increase the flexibility of the grass by disintegrating the brittle portions thereof."

From the above drawing of defendant's commercial machine, it will be seen that the upper roller 11 of the second set of rolls, corresponding to roller 49 of Wessel, is screw-threaded in such a manner as to force the grass into a compacted stand at or near the middle of the rollers and thus deliver it through "a rearwardly tapered concentrating spout," to the succeeding rolls also compression rolls which actively draw it forward through the funnel and pass it on to the draw-rolls and wrapping device. It is at all times under roller control. Complainant's spring-pressed undriven compression rollers are entirely wanting.

Defendant claims that it employs no means for bringing the material together, since it retains practically the bunched relation of the straws to each other produced by the notches on its disc, and never becomes anything like a layer. Such tendency to spreading out as it may disclose will be fully corrected by the inwardly tending screw threads upon the upper one at its second set of rollers. Complainant's experts, in comparing the devices of the two patents in suit with that of defendant reject defendant's element of the notched disc and its operations, and assume that the threaded or grooved rollers 7 and 8 of defendant's commercial machine are the equivalents of complainant's nippers and segments. This is manifestly unfair; nor is it fair to compare defendant's notched disc with complainant's cross-feed mechanism. The former selects and feeds forward from the mass only measured portions thereof, while complainant's cross-feed device makes no selection or separation. It simply spreads the grass out for the use of the nippers and segments.

From figure 8 of the Wessel patent, it will be seen that the mass of grass shown as Z between the posts 18 and 22 is fed down into a curved slot 17 into which the periphery of the notched disc extends. The notches are thus in position to seize mouthfuls of grass, so that, as the disc revolves, the former select and carry away from the mass their several measured amounts of stalks. The butt-ends of the material in the mass overhang the rollers 7 and 8 as shown in cut of de-

fendant's machine. The disc carries its several notches with their mouthfuls in succession about four inches apart, into the throat of said rollers, being the space between the outside ends of 7 and 8 caused by the bell-shaped outer end of 7 (not shown), and the inwardly tapering end of roller 8; both of said rollers being threaded so as to flex the grass into their bite as above stated. Thus, while complainant's nippers and segments select from a spread-out layer of grass, their several measured portions of grass and pass it to the feed rollers of the patents in suit in defendant's device, a measured quantity from the mass is forced into defendant's disc notches, which in turn deliver it to the flexing influences of the feed rollers and thereby to the bite and advancing parts thereof. As counsel for defendant say:

"In complainant's machine the measuring and forward feeding are effected by one and the same agency, while in defendant's machine these operations are individually and successively performed by different agencies."

Defendant's feeding elements, for purposes of comparison, should include the selecting and delivery elements of its machine, otherwise its vital parts are eliminated. So considered; and in view of the conditions of the art, the lack of novelty in the compression and draw-roller employed, the absence of the undriven compression rolls at the end of the funnel, the downward tending agitated funnel, and of the absence of the nose applied at an angle to the floor of the funnel of the commercial machine of complainant, the presence of continual forward pull at all times up to the winding, even granting that defendant's second pair of rolls constitute a cuticle destroying device, the presumption of validity growing out of the grant of the Wessel patent, which is owned by defendant, it is apparent that defendant's machine differs from that of the patents in suit in a greater degree than that in which they differ from each other. Indeed the difference is such that it is difficult to compare them. For the reasons aforesaid, they are held not to infringe, and the decree of the trial court is affirmed.

KRELL AUTO GRAND PIANO CO. OF AMERICA v. STORY &
CLARK CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913.)

No. 1,968.

1. PATENTS (§ 310*)—VALIDITY—DETERMINATION ON DEMURRER.

A patent cannot be held invalid on demurrer to a bill for its infringement unless inevitably void either on its face or by reason of matters of such universal or common knowledge that the court may take judicial notice of them.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

2. PATENTS (§ 25*)—VALIDITY—PATENTABLE COMBINATION.

A patent for a mechanism consisting of two or more elements is not necessarily invalid as an aggregation because there is no direct coercion

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

between the elements, where such coaction comes to produce a unitary result through the mediation of the operator or the operating force.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-29; Dec. Dig. § 25.*]

3. PATENTS (§ 328*)—VALIDITY—AUTOMATIC PIANO PLAYER.

The Welin patent, No. 825,784, for an automatic playing attachment for musical instruments, is not void on its face either for lack of patentable novelty or as an aggregation of old elements.

4. PATENTS (§ 25*)—"AGGREGATION" DEFINED.

In one sense (which, in the interest of accurate terminology, might well be taken as the exclusive sense) "aggregation," in the law of patents, means that the claims in and of themselves, independently of the prior art, show that the elements are incapable of coacting to produce a unitary result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-29; Dec. Dig. § 25.*]

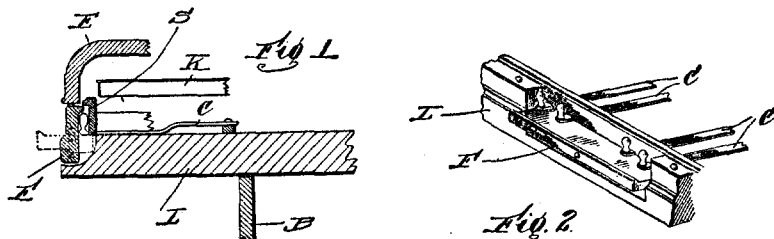
For other definitions, see Words and Phrases, vol. 1, p. 271.]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the Krell Auto Grand Piano Company of America against the Story & Clark Company and Harold J. Morris, agent. Decree for defendants, and complainant appeals. Reversed.

Appellant filed its bill, in the usual form, to hold appellees as infringers of the Welin patent, No. 825,784, issued July 10, 1906, on application filed July 20, 1904, for an "automatic playing attachment for musical instruments." Appellees demurred on the grounds (1) that no patentable novelty is disclosed in the specification and claims, and (2) that the claims are for aggregations of old elements which have not been brought into patentable combinations. Upon the demurrer's being sustained, the bill was dismissed for want of equity; and this appeal resulted.

Drawings, description, and claims of the patent are as follows:



"This invention relates to that class of automatic playing attachments which are housed within the casing of the pianos to which they are applied.

"The especial object of this invention is to combine the levers which control the automatic playing with the piano casing in a strong, compact, and convenient arrangement which will permit said parts to be entirely inclosed when the piano is to be played manually and while at the same time said parts will occupy comparatively little room within the casing itself.

"To these ends this invention consists of the piano casing and of the combinations of parts therein, as hereinafter described, and more particularly pointed out in the claims at the end of this specification.

"In the accompanying two sheets of drawings, Figure 1 is a sectional view of sufficient parts of a piano casing to illustrate the application of my invention thereto; and Fig. 2 is a perspective view of the controlling levers, showing the fall-board swung down into position to permit access to the levers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"In equipping a piano case with controlling levers for the automatic playing I arrange them above the ledge of the keyboard, and the ends of the controlling levers extend out into a recess which is normally closed by a small fall-board or swinging cover and which fall-board when opened forms a ledge for guiding the hands of the user in the lateral movement of the levers. The piano casing, as usual, has a keyboard ledge or board *L*.

"The controlling levers are preferably arranged underneath the piano keys and are ordinarily concealed from view so that there will be no indication on the exterior of the piano that the piano is provided with automatic playing attachments.

"As shown in Fig. 1, the keys *K* are located above the ledge or board *L*. Below the keys *K* are the controlling levers *C*, which extend forward, so that their front ends are located in a hollow key slip or recess of the keyboard ledge.

"As shown most clearly in Fig. 1, this recess has an inner stationary member *S* and can be opened and closed by an outer member in the form of a pivoted or rockable cover or fall-board *F*.

"When the lower fall-board *F* is closed, as shown in Fig. 1, it constitutes, in effect, part of a continuous rail co-operating with the fall-board or key-cover *E*, while when the small fall-board *F* is swung down or opened, as shown in Fig. 2, about its pivot, which is preferably lower than the ends of the levers, it forms, in effect, a supporting ledge for guiding the lateral movement of the hand of the operator when shifting the controlling levers.

"I am aware that changes may be made in applying my invention to piano cases of different styles and proportions. I do not wish, therefore, to be limited to the construction I have herein shown and described; but

"What I do claim, and desire to secure by letters patent of the United States, is:

"1. The combination of a piano casing, controlling levers for automatic playing attachments with the ends of said levers below and in front of the piano keys, and a fall-board or swinging cover for concealing said levers mounted to swing on a pivot located lower than the ends of said levers.

"2. The combination of a piano casing, controlling levers for automatic playing attachments, and a pivoted fall-board or rockable member which, when in normal position, conceals the controlling levers and forms part of the ledge or rail which co-operates with the key-cover and which when open, forms a ledge or support for the hand of the operator.

"3. The combination of a piano casing, controlling levers for automatic playing attachments, located below the piano keys and having their ends extending forward into a recess or opening in the key rail or ledge of the casing, and a pivoted fall-board, which, when in normal position, conceals the controlling levers, and forms part of the ledge or rail which co-operates with the key cover and which, when open, forms a ledge or support for the hand of the operator.

"4. In an automatic combination-piano, a recessed or hollow key-slip composed of an inner member and an outer movable member; in combination with the key-bed, manual keyboard, and expression-manipulatory devices, having their terminals beneath said key-slip.

"5. In an automatic combination-piano, a recessed or hollow key-slip comprising an outer rockable member in combination with the manual keyboard and expression-manipulatory devices, having their terminals beneath said key-slip, said rockable member being adapted to swing outwardly under said manipulatory devices."

Outside the record, which consists of bill, patent, demurrer, ruling, and decree, appellees call our attention to patents, articles on piano building and cabinet making in encyclopedias, photographs of old paintings, histories of musical art, and catalogues of museums and world expositions.

Russell Wiles and P. C. Dyrenforth, both of Chicago, Ill., and Joseph A. Minturn and Frank W. Woerner, both of Indianapolis, Ind., for appellant.

Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., for appellees.

Before BAKER and KOHLSAAT, Circuit Judges, and WRIGHT, District Judge.

BAKER, Circuit Judge (after stating the facts as above). [1] I. Is the exhibited patent inevitably void by reason of facts within judicial notice?

In *Lange v. McGuin*, 177 Fed. 219, 101 C. C. A. 389, this court said:

"The office of a general demurrer to a bill is to test the legal sufficiency of the averments to state a good cause of action in equity. Of course, a demurrer may be addressed to a bill for infringement of a patent as well as to any other bill. And, though the bill be in due form and complete in all its parts, yet, if the exhibited patent be inevitably void either on its face or by reason of matters of universal knowledge, the demurrer should be sustained.

* * * * *

"Bills in patent causes and demurrers thereto are not so unique that they are exempt from the general principles and rules of equity pleading. And therein it is not the province of a demurrer to speak of matters beyond the bill. Of course, every bill is written against the background of common knowledge; and in that view a demurrer may be said to invite the chancellor to take judicial notice of the background. But if a bill, in and by its own averments, states a *prima facie* case, that case cannot properly be overthrown by the chancellor merely on the ground that he judicially knows of facts that would support an answer. His judicial knowledge must go farther, and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill. This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on demurrer to the bill."¹

¹*Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Slawson v. Grand St. R. Co.*, 107 U. S. 652, 2 Sup. Ct. 663, 27 L. Ed. 576; *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; *Risdon Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899; *Kaolatype Engraving Co. v. Hoke* (C. C.) 30 Fed. 444; *N. Y. Belting & P. Co. v. N. J. Car-Spring & Rubber Co.* (C. C.) 30 Fed. 785; *West v. Rae* (C. C.) 33 Fed. 45; *Eclipse Mfg. Co. v. Adkins* (C. C.) 36 Fed. 554; *Buckingham v. Iron Co.* (C. C.) 51 Fed. 236; *Wall v. Leck* (C. C.) 61 Fed. 291; *American Fiber Chamois Co. v. Buckskin Fiber Co.*, 72 Fed. 508, 18 C. C. A. 662; *Caldwell v. Powell*, 73 Fed. 488, 19 C. C. A. 592; *Strom Mfg. Co. v. Weir Frog Co.* (C. C.) 75 Fed. 279, and *Id.*, 83 Fed. 170, 27 C. C. A. 502; *Conley v. Marum* (C. C.) 83 Fed. 309, and *Id.*, 84 Fed. 990, 29 C. C. A. 680; *Lappin Brake-Shoe Co. v. Corning Brake-Shoe Co.* (C. C.) 94 Fed. 162, and *Id.*, 99 Fed. 1004, 40 C. C. A. 215; *Higgin Mfg. Co. v. Scherer*, 100 Fed. 459, 40 C. C. A. 491; *Beer v. Walbridge*, 100 Fed. 465, 40 C. C. A. 496; *Richards v. Michigan Cent. R. Co.*, 102 Fed. 508, 42 C. C. A. 484; *Fowler v. City of New York* (C. C.) 110 Fed. 749; *Milner Seating Co. v. Yesbera*, 111 Fed. 386, 49 C. C. A. 397; *Mahler v. Animarium Co.*, 111 Fed. 530, 49 C. C. A. 431; *Chinnock v. Patterson Tel. Co.*, 112 Fed. 531, 50 C. C. A. 384; *Hocke v. New York Central R. Co.* (C. C.) 117 Fed. 320; *Drake Castle Pressed Steel Co. v. Brownell*, 123 Fed. 86, 59 C. C. A. 216; *American Sales Book Co. v. Carter-Crume Co.* (C. C.) 125 Fed. 499; *Brunswick-Balke-Clender Co. v. Klumpp* (C. C.) 126 Fed. 765; *General Electric Co. v. Campbell* (C. C.) 137 Fed. 600; *American Type Founders Co. v. Damon & Peets* (C. C.) 140 Fed. 715; *Kuhn v. Lock Stub Check Co.* (C. C.) 157 Fed. 235, and *Id.*, 165 Fed. 445, 91 C. C. A. 389; *Southern Plow Co. v. Atlanta Agricultural Works* (C. C.) 165 Fed. 214; *Victor Co. v. Hawthorne* (C. C.) 168 Fed. 554, and *Id.*, 178 Fed. 455, 101 C. C. A. 439; *Neldich v. Edwards* (C. C.) 169 Fed. 424; *Westrumite Co. v. Commissioners*, 174 Fed. 144, 98 C. C. A. 178; *Charles Boldt Co. v. Nivison*, 194 Fed. 871, 114 C. C. A. 617; *International Mausoleum Co. v. Sievert* (D. C.) 197 Fed. 936.

As a general formula it is said that courts will treat as evidence "facts of universal notoriety," "facts that may be regarded as forming a part of the common knowledge of every person of ordinary understanding and intelligence"; and that for the purpose of "refreshing the memory" reference may be made to "standard publications." Public libraries and museums are open to all. But is every book a standard publication? Is everything in a standard publication true? If true statements were somehow marked for immediate identification, would all of them be known to the person of ordinary understanding and intelligence? Is there nothing in accessible records and memorials that is rare, curious, not commonly known? But we find it unnecessary to inquire how far, if at all, appellees have been flattering the common knowledge, for, if every item be accepted as evidentiary, we are nevertheless unable to draw therefrom the finding of ultimate fact which, under the rule stated in *Lange v. McGuin*, would be necessary to defeat the patent.

Two classes of matters are brought forward, general publications and patents.

All that we learn from the words and pictures of the publications is that in ancient desks, cabinets, and casings of musical instruments it is common to find recesses concealed by covers that slide or are variously hinged. The precise and limited combination of the patent in suit is not found. This combination is restricted to a piano that can be played both manually and mechanically, and has to do with an instrument that in form and mechanism has wholly developed since the ancient cabinet makers were at work.

Eighteen patents are cited. Half of these, by reason of their dates, would be eliminated as evidence of a defense if appellant on rebuttal should carry Welin's date of invention back to the beginning of the two-year period prior to his application. That is, patents and other publications since July 20, 1902, may be overcome by evidence which, if it exists, cannot be noticed except from proofs duly introduced, and which judicial knowledge or foreknowledge cannot say is nonexistent.

Among those that antedate July 20, 1902, we find none that in terms or apparent scope is exactly anticipative of Welin's combination. So the question would be whether the disclosures were so suggestive of the new modifications and constructions of Welin that mechanics skilled in the art of building combination-pianos would, or could when called on, at once adopt the suggestions, or whether there still remained room in the art for the exercise of the inventive faculty in producing the Welin device. If these prior patents be taken as proving that common knowledge includes the facts, that, at the date of Welin's production, combination-pianos were old and that various attempts to improve the location and relation of parts had been made, they do not afford the special knowledge necessary to determine whether the paper attempts in fact advanced the practical art; whether the mechanical relations between the parts necessary for manual playing and the parts for mechanical playing rendered the Welin construction difficult, if not seemingly impossible; whether mechanics skilled in the practical art had long and vainly striven to achieve the Welin result; and whether, if

all the evidence respecting the art, both paper and practical, left the presumptive validity of the patent wavering in the balance, the device filled a special need, met with prompt and great success, and was recognized as a meritorious invention by those specially skilled and interested in the art, either by their keeping away from the patent, or by their paying royalties for its use.

In this case no one thing among those of which we are asked to take judicial notice squarely anticipates Welin's combinations. Though all the elements may be old and may have been variously combined, a new combination of them may involve invention. Granting that appellees' showing and argument, in the absence of other evidence, might justify a finding that the defense of want of invention was sustained, we cannot find as a fact that judicial knowledge extends to the point of knowing that appellant can produce no competent and relevant evidence in support of the patent's presumptive validity and in antagonism of the inference of ultimate fact sought to be drawn from the evidence for the defense.

II. Are the claims void because elements have been aggregated and not patentably combined?

In the books the word "aggregation" is used in different senses. Of one of these, *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, on petition for rehearing 159 U. S. 477, 16 Sup. Ct. 53, 40 L. Ed. 225, is a good illustration. There Richards brought together certain elements in order to "do away with elevators, by securing the continuous and automatic transfer of grain from one car to another, weighing it in transit, and preserving the identity of each lot." On examination of the prior art it was found that each element was old. Invention, therefore, if present, lay in a new combination of old elements. But on analysis it appeared that Richards' combination "resolves itself into the omission of the storage feature and a necessary incident thereto"; that is, Richards took an old combination and omitted one element and also its function. So with respect to neither the elements considered separately nor the combination viewed as an entity had Richards produced anything new. The implication, however, is that, if he had, a patentable combination might have been found. In other words, the claims, in and of themselves, independently of the prior art, did not show that the elements were incapable of coacting to produce a unitary result. If the word "aggregation," in the sense that a patent is "void for lack of invention in view of the prior art," is sought to be applied in this case, the inquiry reverts to the question of fact considered in the first part of this opinion.

[4] In another sense (which, in the interest of accurate terminology, might well be taken as the exclusive sense) "aggregation" means that the claims, in and of themselves, independently of the prior art, show that the elements are incapable of coacting to produce a unitary result. Illustrative of this is the case of *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719. "A handle in common, a joint handle, does not create a new or combined operation." In the instances of pencil and eraser, pencil and pen, corkscrew and knife blade, tooth pick and ear spoon, granting that each element is novel, the claims, in and of themselves,

independently of the prior art, affirmatively disclose that a common handle cannot make any two or more of those elements coact to produce a unitary result, a combined operation.

Now, in Welin's device it is evident that the controlling levers *C* and the fall-board *F* have no immediate relation with each other. It is also manifest from the face of the patent that these elements are intended to coact through the mediation of the operator. That such coaction produces new and improved results appellant argues from the face of the patent and asserts can be established by evidence; but at this stage of the case it is enough, on the question of fact, to accept the presumption of utility arising from the grant.

[2] There remains the question of law: Can a claim for a mechanism be saved from the doctrine of aggregation, as last defined, where there is no direct coaction between the elements, and where the only coaction comes through the mediation of the operator (or, what seems to us the same, the mediation of the thing or material operated upon)?

In *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500, the object of one of the patents was "to so arrange the paper as to prevent more than a given quantity of it to be withdrawn from the roll at a single operation, and so that in the act of withdrawing such given quantity it shall be automatically severed from the roll, leaving pendent from the roll a free end, which shall serve as a means of withdrawing a like quantity by the next user." This was accomplished by having an oval roll upon an oscillating holder and a cutter fixed in such a relation that when the holder was oscillated by a pull upon the free end of the paper the roll would strike the cutter, whereupon the given quantity would be severed and the holder would return to its initial position. Several claims included the paper roll as an element of the combinations. Against these claims it was contended, first, that unlawful attempts at combination were disclosed, and, second, that the claims, if valid, were not infringed.

"The first defense," said the court, "raises the question whether, when a machine is designed to manufacture, distribute, or serve out to users a certain article, the article so dealt with can be said to be a part of the combination of which the machine itself is another part. If this be so, then it would seem to follow that the log which is sawn in the mill; the wheat which is ground by the rollers; the pin which is produced by the patented machine; the paper which is folded and delivered by the printing press—may be claimed as an element of a combination of which the mechanism doing the work is another element. The motion of the hand necessary to turn the roll and withdraw the paper is analogous to the motive power which operates the machinery in the other instances. But without expressing an opinion upon this point, we think the facts of this case fail to sustain the charge of infringement."

Other combination claims excluded the paper roll as an element. Respecting these, the court remarked:

"No question is made but that the mechanism by which the paper is served out to the user involves a patentable novelty."

Now although the court did not explicitly consider the question here-in propounded, it may be urged that this paper roll case argumentatively supports an affirmative answer. For the oscillating paper holder and

the fixed cutter have no direct connection, no immediate relation. It is only through the mediation of the operator that the parts coact to produce the new unitary results. Operator stands as motive power and paper roll as means of power transmission. So the oscillating holder and the fixed cutter (with their settings to bring them into one organization) can be a lawful combination only because the existence and the proper application of power are necessarily implied. Does not every claim of a mechanical combination say, "These elements, when power is properly applied, will co-operate to produce a new unitary result"? Is not this true of every patentable tool or machine? Utility is a statutory requirement. That tools and machines should be useful presupposes the existence and application of power. Whether the power be mediately or immediately human seems to us indifferent. For electricity, steam, and falling water have useful power only through human intervention, and in a machine are, after all, merely means of expressing the ultimate human power through the operator. And what difference does it make where the power is applied, whether at the beginning or the end or the middle of the group of mechanical parts? In a loom, for instance, is the operative law of the structure changed if the gears or belts, by which is transmitted from part to part the motive power that is applied only at the head of the group, should be omitted and the motive power applied independently to each part in proper time relation? Or if it were found that an intermediate belt between two parts could be omitted because the web of cloth was a sufficient power transmitter at that point?

At this session (*Oshkosh Grass Matting Co. v. Waite Grass Carpet Co.*, 207 Fed. 937) we are upholding, against the defense of aggregation, in a machine for making grass twine, claims for combinations of "means for forcing the material forwardly, a funnel into which the material is received, compression rolls adapted to receive the material therebetween after said material leaves the funnel, and means, after the material is compressed, for wrapping a twine therearound," although the compression rolls, in the middle of the group of elements, are incapable, in the machine as organized by the inventor, of co-operating to produce the twine except through the mediation of the twine material.²

In stating the question we expressed our belief that it is immaterial whether the unclaimed mediator between otherwise unrelated elements be the material operated upon or the operator. The paper roll and the grass twine cases have to do with the material operated upon, as the connecting means. But in *Burdett-Rowntree Mfg. Co. v. Standard Plunger Elevator Co.* (C. C.) 196 Fed. 43 (affirmed by the Court of Appeals for the Third Circuit, 197 Fed. 743), the intervention of the

² On this phase of the subject see also: 1 Robinson on Patents, § 155; *Taylor v. Wood*, 1 Banning & A. 270; *Hawes v. Antisdell*, 2 Banning & A. 10; *Stutz v. Armstrong* (C. C.) 20 Fed. 843; *Bowers v. Von Schmidt* (C. C.) 63 Fed. 572, 583; *Fuller v. Berger*, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381; *Diamond Match Co. v. Ruby Match Co.* (C. C.) 127 Fed. 341; *Novelty Glass Co. v. Brookfield*, 170 Fed. 946, 960, 95 C. C. A. 516; *Rand, McNally & Co. v. Exchange Scrip-Book Co.*, 187 Fed. 984, 110 C. C. A. 322.

operator was indispensable to the mechanical elements' co-operating to produce the improved result. Improvement of existing automatic electric elevators was the subject-matter; and it consisted of organizing a "one-point control," whereby quicker and safer work was accomplished. The elements were the elevator car, the electric motor in the basement of the building, call bells, floor bells, and door signals. Call bells informed the motor operator at what floors the car was wanted; floor bells announced that the car had arrived and was waiting for passengers; and door signals showed the operator that shaft doors were closed before he started the motor.

"By the grouping and arrangement that are said to be merely aggregation, it seems plain that an intimately related whole has in fact been evolved, in which each part has been made more effective to accomplish the common object, and in which this increased efficiency is due to the new relation of each part to the others. The total result is certainly greatly improved in the several particulars already referred to; and, while it is not a tangible product that has been improved, the new method of operation produces a clearly perceptible advance in the art. Elevators with one-point control arrangement of signals and motor are operated more rapidly, more easily, more safely, and more efficiently, and this greatly improved operation seems to be a new and beneficial result produced by a new combination and arrangement of known elements within the meaning of the language used in *Loom Co. v. Higgins*, 105 U. S. 580 [26 L. Ed. 1177]."

Unless an affirmative answer can be given to our question, many inventions in which the unitary result would be more apparent than in the automatic electric elevator case, might be denied the protection of the statute.

It seems to us that the man who first provided a gun with sights made a valuable invention. And although there is no co-operation between the front-sight and the rear-sight, or between them and the gun, except through the mediation of the marksman, yet truly the elements are brought into one organization and there contribute to a new and useful result. Between the strings and the chin rest of a violin, the hand rest of a mandolin, the finger rest of a banjo, there is no connection except through the player. But it is possible that invention was required to produce the new organizations that made better playing possible. So with the banding wheel for china decoration, wherein a revolving disk holds the china plate and a fixed rest supports the decorator's hand. So, too, with the lathe and tool rest. In *Union Edge Setter Co. v. Keith*, 139 U. S. 530; 11 Sup. Ct. 621, 35 L. Ed. 261, the combination of a burnishing machine and a finger rest was found to be unpatentable, not in law, but in fact, by reason of the prior art. In the *Selden* automobile patent (*Columbia Motor Car Co. v. Duerr & Co.*, 184 Fed. 893, 107 C. C. A. 215) the power of a gas engine is applied to the rear wheels of the vehicle through a clutch and reducing gears, and the separate power of the operator is applied to the front wheels through a steering wheel and column. Though there can be no co-operation between the driving mechanism and the steering mechanism except through the hands of the driver, no one questioned that the association of elements constituted a true combination.

[3] Our conclusion is that the statute should not be narrowed to

exclude improvements of the kind we have illustrated from the past, and that an affirmative answer to our question should be recorded.

As neither ground of demurrer is sustainable, the decree is reversed, and the cause remanded for further proceedings.

LONG ARM SYSTEM CO. v. NEW YORK SHIPBUILDING CO. et al.

(Circuit Court, D. New Jersey. August 3, 1905.)

PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction should not be granted in a suit for infringement of an unadjudicated patent of recent date, the validity of which is seriously contested, both in argument and by affidavits of experts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

In Equity. Suit by the Long Arm System Company against the New York Shipbuilding Company and others. On motion for preliminary injunction. Denied.

Ernest Wilkinson and Melville Church, both of Washington, D. C., for complainant.

Frederic R. Betts, James R. Sheffield, James J. Cosgrove, and William H. Davis, all of New York City, for defendants.

LANNING, District Judge. This application is based on bill, answer of the New York Shipbuilding Company, and affidavits. By the bill the complainant charges the New York Shipbuilding Company with having infringed four patents owned by the complainant, being No. 605,399, for hydraulic mechanism for closing bulkhead doors, dated June 7, 1898, No. 650,973, for improvements in electrical systems for water-tight doors, dated June 5, 1900, No. 651,004, for improvements in water-tight bulkhead doors, dated June 5, 1900, and No. 729,280, for improvements in electrically operated systems for closing water-tight doors, hatches, or the like, dated May 28, 1903. The discussion relates to claims 1, 2, 3, 5, 6, 7, 9, 10, 12, and 14 of patent No. 650,973, and claims 5 and 6 of patent No. 651,004. The conclusion I have reached is that a preliminary injunction cannot be granted. None of the patents has ever yet been adjudicated to be valid. They are all of recent date. Their validity is stoutly denied by the affidavits of the defendants' experts and the arguments of the defendants' counsel. I think the complainant has failed to establish a case free from reasonable doubt. The record of the case shows that one of the complainant's counsel himself thought, when patents Nos. 650,973 and 651,004 were first submitted to him, that they could not be upheld.

I am quite clear that the well-established rule of practice in regard to the granting of preliminary injunctions to restrain the infringement

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of patent rights requires that in this case no injunction shall be allowed until the complainant shall have shown on full proofs on final hearing its right thereto. Many cases in which this rule has been applied might be referred to, but I mention only *Standard Paint Co. v. Reynolds* (C. C.) 43 Fed. 304, and *Rogers Typographic Co. v. Mergenthaler* (C. C.) 58 Fed. 693, decided in this court, *Whippany Mfg. Co. v. United Indurated Fibre Co.*, 87 Fed. 215, 30 C. C. A. 615, decided in the Circuit Court of Appeals of this circuit, and *Standard Elevator Co. v. Crane Elevator Co.*, 56 Fed. 718, 6 C. C. A. 100, *George Ertel Co. v. Stahl*, 65 Fed. 519, 13 C. C. A. 31, and *Williams v. Breitling Metal-Ware Mfg. Co.*, 77 Fed. 285, 23 C. C. A. 171, decided in the Circuit Court of Appeals of the Seventh Circuit.

The application is therefore denied.

MINERALS SEPARATION, Limited, et al. v. HYDE.

(District Court, D. Montana. July 28, 1913.)

No. 1,076.

1. PATENTS (§ 16*)—PATENTABILITY—"PROCESS"—"PATENTABLE PROCESS."

Broadly speaking, a "process" is a definite combination of new or old elements, ingredients, operations, ways, or means to produce a new, improved, or old result, and any substantial change therein by omission, to the same or better result, or by modification or substitution, with different function, to the same or better result, is a new and patentable process. New or substantially changed methods whereby the product is bettered, increased, or cheapened may be a new and "patentable process."

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5642, 5643; vol. 8, p. 7766; vol. 6, p. 5235.]

2. PATENTS (§ 29*)—PROCESS—DESCRIPTION—STATEMENT OF QUANTITIES.

In a patent for a process, which is not of itself the result sought, but only the means thereto, a range of quantities that leaves something to the judgment of the operator is all that can be described, and is sufficient.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 29.*]

3. PATENTS (§ 92*)—PERSONS ENTITLED TO PATENTS—JOINT INVENTORS.

Where an invention was the result of experiments made by an employé under instructions given by his employers, after consultation between themselves, to which each contributed suggestions, from time to time observing his work and obtaining reports thereof, it was the joint invention of the employers, and properly patented as such.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 124; Dec. Dig. § 92.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF ORE CONCENTRATION.

The Sulman, Picard, and Ballot patent No. 835,120, for a process of ore concentration, was not anticipated, and discloses novelty and invention; also *held* infringed.

In Equity. Suit by Minerals Separation, Limited, and the Minerals Separation American Syndicate, Limited, against James M. Hyde. On final hearing. Decree for complainants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Henry D. Williams, of New York City, and O. W. McConnell, of Helena, Mont., for complainants.

Sheridan, Wilkinson, Scott & Richmond, of Chicago, Ill., and Kremer, Sanders & Kremer, of Butte, Mont., for defendant.

BOURQUIN, District Judge. Complainants are owner and its licensee of United States patent No. 835,120, for improvements in a process of ore concentration, issued on an application filed May 29, 1905, by said owner's grantors, Messrs. Sulman, Picard, and Ballot, of London, England, joint inventors and patentees, and this suit is for infringement of certain claims of said patent by defendant, a former employé of said owner, and by it trained in the process. The defenses are various grounds of invalidity, hereinafter noted so far as of merit and seriously urged, and noninfringement.

The invention claimed, in general terms, may be said to be the discovery, in March, 1905, that if a very small and appropriate quantity of an oily substance, ranging around .02 per cent. to .5 per cent. of the weight of the ore be added to a pulp of water and finely pulverized ore (the slimes being helpful and most easily recovered), and the whole vigorously agitated and thereby thoroughly aerated by great and excess quantities of air, the metalliferous particles are oiled and adhere in a complete envelope to or of bubbles of the air, and rise to the surface of the mixture on cessation of agitation, forming a strong, coherent, and stable froth easily removed. The process may be aided by heat to more quickly and effectively disseminate the oily substance through the pulp, and bring it into contact with the metalliferous particles, and may also be aided by a mineral acid or salt up to 1 per cent. thereof of the weight of the ore to increase the preferential affinity of the oil for metal over gangue, but not sufficient acid to cause chemical action on the metal, nor is it intended to generate gas for flotation. The patent specification is full, complete, and clear to those skilled in the art, and describes one well-known apparatus of mixing vessels, spitzkasten, etc., and the operation of the process therewith.

The claims are general and particular, all calling for oil and agitation to produce a froth, some defining a range of quantities of oily substance, some likewise of acid, some specifying oily substance alone, some oily substance in various combinations with heat or acid and with both. The main defense of invalidity is lack of novelty and anticipation. In reference thereto it appears from the evidence that the use of oil, air, and agitation in ore concentration, separately and in various combinations, and with other ingredients, was well known to the art prior to the discovery of the process in suit. To briefly summarize the prior processes, some of them were bulk oil processes, using oil in such large quantities that, it taking up the metalliferous particles in the pulp the mass thereof was yet sufficiently buoyant to float to the surface of the water, the gangue sinking. Concentration being more essential for lean ores, economy is the foundation of success; so other of these processes reduced the amount of oil to a degree where it was not sufficient of itself to float the metal, and to aid therein air, steam, or gas was injected to render the mass spongy. Another

process further reduced the oil, and to around 4 per cent. to 6 per cent. in weight of the metalliferous content of the ore, the somewhat novel result being that the metalliferous particles were by the oil agglomerated into granules which *sank* in the water and were retained in the mixing vessel, while the gangue *rose* and was carried off by upcast. Some dispensed with oil, and employed surface tension or skin flotation by floating off the powdered metalliferous particles on the surface of quietly flowing waters, or by injecting air, steam, or gas into the mixture of ore and water, or by generating gas therein, whereby bubbles attached to said particles and carried them to the surface of the water, in all the gangue sinking. Another process sought the same end by spraying the oiled metalliferous particles through the air and onto water, where they remained, the gangue sinking. In some processes acid was used to generate gas in situ for flotation, while in others it was used solely to render more pronounced the selective attribute of oil for metal over gangue. This last feature was the discovery, so far as ore concentration is concerned, of Carrie J. Everson, of Chicago, to whom a domestic patent embodying it was issued in 1886. In some heat was used to hasten the action of the oil, and some resorted to agitation.

For anticipation, defendant relies most upon Froment's patents and working description. They date from 1902 and 1903. The process thereof is one wherein the ore is carefully crushed in two operations so as to minimize slime, and is first deslimed, for that the slime is "too fine to be treated," quoting Froment. Thereupon to a mixture of deslimed ore and water, oil and carbonate of lime (which may be limestone) are added proportionate to the weight and richness of the ore, from 1 per cent. of oil in weight of the ore for ore containing up to 5 per cent. of metal, to $3\frac{1}{2}$ per cent. of oil for ore containing 50 per cent. of metal, and about 1 per cent. of carbonate of lime in weight of the ore, or $2\frac{1}{2}$ per cent. in difficult cases, or more, and in like proportions to the oil for richer ore, it requiring more gas. Agitation in mixers containing two stirrers revolving in opposite directions and for a few minutes, or about 10 minutes, at about 300 revolutions per minute, the "chief point" being that all metallic particles are brought "into thorough contact with the oil," is described by Froment. The mixture is then discharged into a vat containing a perforated coil through which sulphuric acid is introduced and in quantity about cent. per cent. of the carbonate of lime, and a rake therein turns slowly and about 10 to 12 revolutions per minute, to prevent the ore collecting at the bottom in too compact a mass.

Steam may also be injected through said coil to assist the reaction, but it is necessary in only cold countries. The reaction of the acid generates gas which in bubbles carry the sulphides to the surface, there skimmed or pushed into a hopper. Such thereof as fall back and sink are otherwise recovered. A large proportion of the oil may be recovered from the concentrates in a press. Froment's patents refer to the use of "gas of any kind," that the bubbles will "become covered with an envelope of sulphides," and, rising to the surface, "form a kind of metallic magma," and that the "formation of these

metallic spherules is singularly active if the gas is in a nascent state." Froment's patents, working description, and an apparatus therefor were purchased in 1903 by the patentees of the patent in suit. It may be noted that prior to said purchase, and continuously since, said patentees were and now are associates and metallurgists, chemists, experimenters, inventors, and operators in ore reduction in various parts of the world, with headquarters in London. To them and in that behalf have issued patents, domestic and foreign, and they have purchased others. They are of complainants, and much of their work has been for complainants. There is little evidence of practical use of any of these prior processes, and no substantial evidence that any substantial commercial success has accrued to any of them, or that any of them has had any considerable continuous successful operation. Some have operated commercially with some small success, and some are long since abandoned as impracticable, experiments, failures. Froment's process has not been in practical operation.

Complainants' process has, in instances, displaced some of the prior, and has firmly established itself as a new and valuable method of ore reduction. The evidence shows many and large plants thereof, built or building, in widely separated parts of the world. Its successful operations, practically from discovery, have recovered, and largely from waste and tailings, values aggregating near \$9,000,000, and at a profit of near \$4,000,000 to the patent owner and its licensees. Detailed comment in respect to anticipation is little necessary save to Froment. Looking to the evidence, and therefrom contrasting his process with complainants', Froment's requires several times the quantity of oil that does this in suit, both by examination of the patents and working description and by tests in evidence. Froment crushes the ore in two operations, and deslimes it before treatment because the slime is too fine to be treated by his process, while the process in suit needs but one crushing operation, and finds slime advantageous and most easily recovered. Froment employs carbonate of lime; the process in suit does not. Froment *requires* acid, and in greater quantity and for a different function than does the process in suit, which latter *may or may not* use acid. Both may use heat, and both require agitation, Froment, agitation only to disseminate the oil, the process in suit for that purpose, and also to aerate. Froment's result is by flotation by gas generated in situ; this in suit is by flotation by air introduced by vigorous agitation. Froment's product is like unto a magma, a spongy, pasty mass of oil and metallic particles, and more or less gas bubbles, while this in suit is a froth of oil and metallic particles and air bubbles. Froment's requires oil in such quantity that he deems it worthy of recovery from the concentrates so far as it can be; this in suit so little oil it disappears, is not sensible to sight or touch upon the concentrates, but only to analysis. In Froment's it would seem that the metallic particles are floated like the basket of a balloon, while in this, like the very envelope of a balloon. Froment's is costly, while this is cheap—relatively. And from the evidence it would seem that Froment's process would fail in practical operation, while this in suit has

succeeded. In Froment's, he oils the metallic particles by agitation, then when the mixture is quiescent, generates gas therein by quick reaction followed by immediate and direct rising of the gas bubbles to the surface in which they may come into contact with but few metallic particles. In this in suit vigorous agitation of the mixture beats great and excess volumes of air therein, likely bringing the ultimate air bubbles into repeated contact with many metallic particles. The action of the gas in Froment's is almost explosive in nature. He speaks of a proportion of carbonate of lime to be sought, as in his test tube example the reaction may be so sudden and violent as to project the metallic particles out of the tube. Froment's gas bubbles, quick formed and quick rising, it may be arrive at the surface with expansion still in progress. These or analogous reasons may account for Froment's magma, breaking gas bubbles, and fragile evanescent froth in so far as his result is like unto froth, and also may account for the process in suit's strong and lasting froth.

One of the complainant's experts, Dr. Adolf Liebman, of London, characterizes Froment's product as not a froth but a magma, and his process as one involving the principles of skin flotation assisted by bubbles of carbonic acid. He further testifies that in the process in suit is produced a result which was never obtained before; that the froth is of a peculiar character, "consisting of air bubbles which, in their covering film, have the minerals embedded in such manner that they form a complete surface all over the air bubbles"; that though "the very light and easily destructible air bubbles are covered with a heavy mineral, yet the froth is stable and utterly different, so far as this property is concerned, from any froth known" to him; that "it appears as if the minerals were protecting the tender air bubble like an armor guarding it," so that "the froth has a long life," and one is "tempted to say it is permanent, at least as far as metallurgical operations are concerned"; that he himself had "seen a froth standing for 24 hours without the least change having taken place"; that a "very striking difference between the previous processes and the process of the patent in suit is the difference between failure and success"; that "the simplicity of the operation as compared with the prior attempts is startling."

Another of complainants' experts, Dr. Charles F. Chandler, of New York, testified that the process in suit is new and surprising; that "there is nothing like it disclosed in the prior art." These and other learned gentlemen gave at length reasons for the foregoing and like views and conclusions. Defendant's expert, Dr. Eugene A. Byrnes, of Washington, is to the contrary.

[1] The differences hereinbefore set out between Froment's process and this in suit are so obvious, numerous, radical, and in many respects vital, it is clear they constitute different processes. They are different in ingredients, function of some thereof, combination, manipulation, principle, and result. Their points of resemblance only serve to accentuate their difference. Broadly speaking, a process is a definite combination of new or old elements, ingredients, operations, ways, or

means to produce a new, improved, or old result. Any substantial change therein, by omission to the same or better result, or by modification or substitution with different function to the same or better result, is a new and patentable process. New or substantially changed methods whereby the product is bettered, increased, cheapened, may be a new and patentable process. Thus are the cases. See *Mowry v. Whitney*, 14 Wall. 640, 20 L. Ed. 860; *Dental Co. Case*, 93 U. S. 494, 23 L. Ed. 952; *Tilghman v. Proctor*, 102 U. S. 722, 26 L. Ed. 279; *Loom Co. Case*, 105 U. S. 587, 26 L. Ed. 1177; *Lawther v. Hamilton*, 124 U. S. 6, 8 Sup. Ct. 342, 31 L. Ed. 325; *Richards Case*, 159 U. S. 485, 16 Sup. Ct. 53, 40 L. Ed. 225; *Steel Co. Case*, 185 U. S. 420, 22 Sup. Ct. 698, 46 L. Ed. 968; *Expanded Metal Case*, 214 U. S. 384, 29 Sup. Ct. 652, 53 L. Ed. 1034; *Rubber Co. Case*, 220 U. S. 443, 31 Sup. Ct. 444, 55 L. Ed. 527.

In this suit the doctrine of equivalents has no application. The process in suit is so clearly new that no exhaustive discussion of facts, cases, or law is necessary to distinguish it from other processes, or to demonstrate its novelty. The patentees herein discovered a new, cheap, simple, practical, and useful way or process to combine oil and air, and by agitation to float and secure the metallic content in ore concentration. The argument that the prior state of the art was such that to any one skilled therein the process in suit at the time of its discovery was obvious may, under the circumstances, be well answered by the cases:

"Knowledge after the event is always easy. * * * But the law has other tests of invention than subtle conjectures of what might have been seen and yet was not." *Rubber Co. Case*, 220 U. S. 435, 31 Sup. Ct. 444, 55 L. Ed. 527.

See *Expanded Metal Case*, 214 U. S. 381, 29 Sup. Ct. 652, 53 L. Ed. 1034.

[2] To whatever extent the patentees herein drew from the prior art, as they rightfully could, they took the last and successful step. It is urged, however, that as the patent in suit does not specify exact quantities of oil and acid, but a range thereof, it describes merely an experiment not patentable. It is true every ore presents its own problem of reduction. So, while all may lend themselves to a general method, each may require some modification of the method. All skilled in the art understand this, and know that in addition to the best scientific theory they must add the light given by trial and practice. Thus only, in the majority of cases, are good and the best results obtained in any ore reduction—smelting, milling, or concentration. It is believed that at least in cases where the combination or process is not of itself the result sought, but only the means thereto, a range of quantities that leaves something to the judgment of the operator is all that can be described, and is sufficiently definite. See *Mowry v. Whitney*, 81 U. S. 646, 20 L. Ed. 860; *Wood v. Underhill*, 5 How. 5, 12 L. Ed. 23. The patent for an ore reduction process that does not is a rarity indeed. To the contention that as in *Froment's* process the agitation must entrain some air like unto that of complainants', and

so the latter lacks novelty, it may be observed that if so, it was unintentional and unrecognized, in that Froment had in mind only flotation by quick acting gas generated in situ, it aided the art none, and is unimportant. See *Tilghman v. Proctor*, 102 U. S. 711, 26 L. Ed. 279.

And to the argument that in operating Froment, in rightful economy and decrease of oil and in rightful omission of carbonate of lime in treating ore containing it in sufficient quantity, his process would approximate this in suit and arrive at a like froth, and hence lack of novelty in the latter, the response is that the fact that infringement may be easy does not impeach an otherwise valid invention, and that if Froment's methods are modified until they approximate complainants' and produce a like product, the process is no longer Froment's but is complainants'. At the argument, with apparatus a number of tests and demonstrations were made in the presence of the court, both of the process in suit, of Froment's, and of others of the prior art, of much assistance in arriving at conclusions herein.

Upon all the evidence the court is of the opinion the defense of lack of novelty and anticipation is not established.

[3] Another defense is that the invention is not joint. It seems the patentees were experimenting with the Cattermole Granulation process. An experimenter in their employ, in obedience to their instructions determined on by consultation between all said patentees and to which each contributed suggestions, gradually reduced the amount of oil until the result was the peculiar froth of the process in suit. He frequently reported to his employers, who frequently observed his labors, and they made a record thereof in the form of reports by two of them to the third, who was chairman of the owning complainant herein, and for whose ultimate benefit the experiments were conducted. This experimenter was but the instrument through which the genius of these patentees found expression. The circumstances are sufficient to constitute these patentees joint discoverers. At any rate, it is not proven they are not. Although some of the claims in issue include elements not absolutely essential, viz., heat and acid, and in respect to which they may afford no protection, they are not invalidated by undeceiving superfluous features, if heat and acid are such. The patent is valid in respect to all claims in issue.

[4] In the matter of the defense of noninfringement, it appears when the charge of infringement was brought to defendant's knowledge he refused to permit an agent of complainants to inspect his plant. This agent later secured brief access at night, observed, noted, and carried away some of the froth then being produced. This agent is a mining engineer and metallurgist. He describes the defendant's plant, and gives it as his opinion, being versed in complainants' process, that the process therein was substantially that of complainants. Dr. Chandler analyzed the froth so secured, and found its components practically the same as those of froth from samples of some of defendant's materials thereafter furnished and treated by complainants' process, and Dr. Chandler pronounced it as his opinion, based thereon, on the testimony of the agent aforesaid and on his knowledge of complainants'

process, that defendant's operations were of complainants' process. Defendant, pending this suit, filed an application for and procured the issue of a domestic patent for a flotation process like to this in suit, which Dr. Leibman testifies "contains a description of the process disclosed in the patent in suit," and "discloses an apparatus for carrying on the process in suit." And so doth it seem to the court. Although defendant testified, he professed ignorance of the amount of oil and acid used in his plant and operations. Enough appears in the evidence to compel the conclusion defendant was using complainants' process and was infringing the claims in issue as charged.

It is worthy of note that during the taking of testimony complainants repeatedly offered to repeat, in the presence of defendant and his counsel, any of the tests or experiments testified to by their experts. They also repeatedly objected to tests, experiments, and apparatus and operations of defendant, unless an opportunity was offered complainants to repeat the experiments, and unless defendant furnished like materials therefor, and unless the apparatus were offered in evidence or access to them was given complainants. Save for some of defendant's materials furnished complainant, it does not appear to what extent, if at all, defendant obviated these objections. Otherwise the consideration of the case might be affected by them. See *Steel Co. Case*, 185 U. S. 420, 22 Sup. Ct. 698, 46 L. Ed. 968.

A decree in accordance herewith, as demanded in the bill of complaint other than for treble damages, will be entered; an accounting to be had before the master.

UNDERFEED STOKER CO. OF AMERICA v. RILEY et al.

(District Court, D. Massachusetts. September 23, 1913.)

No. 459, Equity.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—UNDERFEED FURNACE.

The Daley patent No. 644,664 for a furnace having an underfeed *held* not anticipated, valid and infringed on motion for a preliminary injunction.

2. PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

When a patent has been sustained after a thorough defense by competent and diligent counsel, and the defendants' structure in a subsequent case is substantially like that involved and held to infringe in the prior suit in essential particulars, the complainant should be given the benefit of such adjudication on an application for preliminary injunction, and the burden rests on the defendant to distinguish the cases.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

In Equity. Suit by the Underfeed Stoker Company of America against R. Sanford Riley and others. On motion for preliminary injunction. Motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Fish, Richardson, Herrick & Neave, F. P. Fish, and J. L. Stackpole, all of Boston, Mass., for complainant.

Louis W. Southgate, of Worcester, Mass., for defendants.

BROWN, District Judge. [1] This is a petition for a preliminary injunction against infringement of letters patent No. 644,664, March 6, 1900, to F. A. Daley, for furnace.

This patent was before me in *Underfeed Stoker Co. of America v. American Ship Windlass Co.* (C. C.) 165 Fed. 65, 77. In that case it was held that the stoker, shown in letters patent, to E. E. Taylor, No. 792,862, June 20, 1905, infringed the Daley patent, as well as other patents then in suit.

The Daley patent was considered also in *American Stoker Co. v. Underfeed Stoker Co. of America* (C. C.) 182 Fed. 642, 652, in which case was also considered the Garden patent, No. 648,251. The decision in respect to the Garden patent, and the distinction between it and the Daley patent, renders it unnecessary in the present case to refer further to the Garden patent, though the defendants cite it in defense.

Upon appeal the Circuit Court of Appeals for the Third Circuit affirmed the last-named decision. 188 Fed. 314, 110 C. C. A. 292.

I do not find in the defendants' affidavits any definite denial that the defendants' device, known as the "Riley Stoker," possesses the characteristic features of the Daley patent, namely a large air-chamber beneath the retort and fuel-bearing surfaces, into which the air is introduced under pressure, and in which the air has an opportunity to circulate and become heated by contacting with the heated metal portions of the retort and fuel-bearing surfaces, thereby extracting heat from these surfaces and so prolonging their life, and at the same time being itself heated and thus becoming more efficient to promote combustion when introduced into the combustion-chamber.

The affidavit of Mr. Jackson, complainant's expert, in reply, correctly points out this omission in the defendants' affidavits.

In the affidavit of Mr. Browne, defendants' expert, it is conceded that claims 3, 4, and 5 of the Daley patent are directed to an organization in which the fuel-supporting means need not be perfectly imperforate. He states, however, that it is his opinion that the prior art is of such character that the subject-matter of claims 3, 4, and 5 possesses no novelty unless construed by the court to mean that such leakage or perforations as may exist do not permit the flow of any substantial amount of air into the fire box. He states that if these claims are to be so construed as to permit the presence of such apertures in the fuel-supporting means as to permit the flow of a substantial portion of the air, then there is no novelty in the subject-matter of these claims in view of the prior art.

Daley, however, says:

"The furnace, constructed in accordance with the preferred embodiment of my invention, employs side dead plates which are imperforate, or sufficiently so to maintain the air forced into the air-chamber beneath the side fuel-support under pressure, so that the air will be forced in jets directly from the

air-chamber through the tuyère-openings into the retort. I do not wish, however, to be limited to a construction in which the side fuel-supporting means along the upper edges of the fuel retort are perfectly imperforate."

To determine the question whether the Riley stoker contains the substance of the Daley invention by considering whether or not in the Riley stoker a substantial amount of air passes through the fuel-supporting plates is not, in my opinion, the correct method of comparing the two structures, since they may resemble each other in substantial particulars, though differing in this particular. It is not correct, I think, to say that Daley requires that his side plates shall prevent any substantial passage of air through them. Such requirement is not expressed, nor is it necessarily implied.

The defendants attempt to bring the Riley structure into substantial resemblance with devices of the art preceding Daley by contending that the fuel-supporting devices of the Riley Stoker are "grates." It is not denied that the Riley stoker has tuyère openings at the side which are substantially similar in function and operation to those of the Daley patent. In the earlier Jones patent the fuel-supporting means were grates. By closing these grates and eliminating the pipes by which air was supplied to Jones' tuyères, Daley formed his air-chamber, whence the air flowed under pressure in jets controlled by the small-tuyère openings at the top of the retort. It appears, however, that it is not necessary, in order to form an air-chamber with the function of Daley's air-chamber, that the fuel-bearing means be completely closed; nor is it made to appear that it is essential that they be closed to such an extent as to prevent the escape of an amount of air which might be termed a "substantial amount"; i. e., an amount which might be regarded as substantial as an aid to combustion in the combustion-chamber, but which would not be regarded as substantial in the sense that it interfered with the functions of the air-chamber. If the defendants' air-chamber performs the functions of Daley's air-chamber, the fact that it may permit the escape of air through the fuel-supports is immaterial upon the question of infringement, even if some improvement may result.

It is also argued that Riley's fuel-supporting means has the essential characteristics of a grate; i. e., to support the fuel and to permit the passage of air into the fuel; but there seems to be an essential difference between the so-called grates of Riley and the grates of the prior art.

To support the fuel and permit the passage of air are doubtless functions of a grate, but it is hardly a usual function of a grate to serve as a wall of an air-chamber to hold air under pressure, or to resist or diminish the flow of air. Usually only such grate bars are employed as are necessary for the support of the coal, and it has not been made to appear in this case that it is usual to diminish the openings of a grate to the small comparative size of those found in the Riley fuel-support. The small number and small size of Riley's openings, and the large proportion of imperforate surface, shows that Riley's fuel-supports are intended to be sufficiently imperforate to serve as a wall of an air-chamber having the functions of Daley's chamber.

The defendant also refers to the passage of air in substantial quantity through spaces between contiguous sliding grate sections. The complainant contends that all of the openings through which air flows from the Riley air-chamber are tuyère-openings, for the reason that they are small passages through which the air is forced in different streams into the appropriate parts of the furnace, after having extracted the heat and itself become heated.

A tuyère and a grate have this in common, that it is a function of each to admit air; but ordinarily a tuyère is designed to admit it in definite quantity and direction, while a grate is designed with large and numerous openings, through which air can pass into the combustion-chamber in a general stream without definite and predetermined direction. The openings in the Riley fuel-support fall within the first rather than the second class, and devices of the prior art into the second class.

The prior patented art presented by the defendants is to a considerable extent the same that was before the court in *Underfeed Stoker Co. of America v. American Ship Windlass Co.* (C. C.) 165 Fed. 65. The following patents were in the former case: Howell, 54,730, May 15, 1866; Smith, 199,000, January 8, 1878; Roney, 409,304, August 20, 1889; Jones, 409,792, August 27, 1889; Wiesebrock, 439,738, November 4, 1890; Jones, 470,052, March 1, 1892; Shinnars, 552,335, December 31, 1895; Roe, 595,837, December 21, 1897.

The additional American patents are: Wilkinson, 480,538, August 9, 1892; Box, 549,868, November 12, 1895; Garden, 648,251, April 24, 1900.

British patents are: Smith, 170, January 15, 1876; Hawksley et al., 3,095, March 10, 1885; Brook, 1,140, January 20, 1892; Garden, 4,367, February 28, 1895; Wilton, 9,309, 1895.

After a re-examination of the patents formerly considered and an examination of the new patents cited I am of the opinion that in respect to the fundamental features of the Daley patent there is nothing in the prior art as presented by the defendants which can be regarded as an anticipation of the Daley patent. These patents are dealt with specifically in the reply affidavit of Mr. Jackson, and upon an examination of them I am of the opinion that he draws proper distinctions between these patents and the device of the patent in suit.

[2] The defendants invoke the rule that in doubtful cases a preliminary injunction should not issue, but it should also be borne in mind that when a patent has been sustained after a thorough defense by competent and diligent counsel, and when the defendants' structure is substantially like that involved in the former litigation in essential particulars, the complainant should be given the benefit of such adjudication on an application for preliminary injunction, and that the burden rests upon the defendant to distinguish the cases.

After reading and re-reading the affidavits, and after an examination of the prior art as presented by the defendants' patents, I am of the opinion that this is a proper case for the granting of a preliminary injunction.

A draft decree may be presented accordingly.

SMITH v. BOWKER TORREY CO.

In re CROWELL.

(District Court, D. Massachusetts. September 24, 1913.)

No. 176 (C. C. 725).

1. CORPORATIONS (§ 565*)—INSOLVENCY—CLAIMS PROVABLE.

Where partners indebted to claimant on a note transferred a part of the partnership assets to a corporation which the partners controlled, in consideration of a specified amount of full-paid stock of the corporation equal to their valuation of the assets transferred, the corporation agreeing to pay the partnership debts and to save the partners harmless therefrom, there being no claim of novation, nor that claimant could not obtain payment by enforcing the liability of the partners, he was not entitled to prove his debt as a claim against the corporation's assets in insolvency, on the ground that he was entitled to subrogation to the rights of the partners against the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

2. CORPORATIONS (§ 30*)—PURCHASE OF PARTNERSHIP ASSETS—ASSUMPTION OF PARTNERSHIP DEBTS—CONSIDERATION.

A partnership, owning a large amount of real and personal property, being desirous of withdrawing the real estate from the firm, organized a corporation, which they dominated, and, having determined that the value of the firm's personalty was \$249,700, as directors of the corporation voted to purchase the personal property of the firm from themselves, as members thereof, in consideration of a transfer to themselves, as members of the firm, of 2,497 shares of the capital stock of the corporation, full-paid and nonassessable. In carrying the transaction into effect, they also voted, as directors of the corporation, to assume and pay all indebtedness of the firm, and to hold it and its surviving partner or partners and the estate of a deceased partner and the trustee or executor thereof harmless and fully indemnified from all liability in connection therewith. *Held*, that such assumption by the corporation of the debts of the firm was without consideration, and was not enforceable as against the corporation's assets in insolvency by one of the firm's creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. § 30.*]

Claim of Warner R. Crowell against the insolvent estate of the Bowker Torrey Company, to the allowance of which Albert O. Smith, conservator, and others, filed objections. Objections sustained.

See, also, 199 Fed. 985.

Sherman L. Whipple, of Boston, Mass., for claimant.

John B. Sullivan, Jr., and Paul Dudley Dean, both of Boston, Mass., for receiver.

BROWN, District Judge. The claimant seeks to charge the corporation, the Bowker Torrey Company, with the debt of a copartnership whose business was taken over by the corporation. The claim is based upon a promissory note dated February 1, 1904, for \$10,000, with interest at 5 per cent., payable semiannually, signed by Bowker, Torrey & Company, a copartnership, payable to the order of Torreys & Company, a copartnership; by Torreys & Company indorsed to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Julia S. Torrey, or order; and by Julia S. Torrey and Torreys & Company to Crowell, the present claimant.

By an instrument in writing (Exhibit No. 2), signed and sealed by members of the firm of Bowker, Torrey & Company, it was provided, on the one hand, that the firm of Bowker, Torrey & Company would sell to the Bowker Torrey Company, a corporation, their entire stock in trade, good will, and other personal assets, and, on the other hand, that on receipt of a bill of sale transferring full title to the personal property the Bowker Torrey Company, a corporation, would transfer to the members of the firm of Bowker, Torrey & Company, 2,497 shares of the stock of the corporation at par, full-paid and nonassessable. By this document the persons signing it assume, as individuals, to contract both for themselves and for the corporation.

It is apparent from this document that the purpose of the parties was to transfer the business and personal assets of the copartnership to a corporation and to receive the shares of the corporation in payment therefor.

Another instrument in writing purports to convey to the corporation the personal assets, in consideration of the transfer of 2,497 shares of the corporation.

At this time the copartnership had real estate valued at about \$300,000, which was reserved by the copartners and did not become an asset of the corporation.

At a meeting of the directors of said corporation held July 29th the offer was presented to the directors and a copy spread upon the minutes. It was voted that the property described in the written offer was necessary for the business of the corporation, that in the judgment of the board of directors the value of said property equalled the sum of \$249,700, that said offer should be accepted, and that the corporation should issue in full payment of the purchase of the property described 2,497 shares of the capital stock, full-paid and non-assessable.

The following record was also made:

"It is also voted unanimously that, in accepting the transfer of all the personal property, assets, and rights of the late firm of Bowker, Torrey & Company, the new corporation assumes and agrees to pay all indebtedness of the late firm, and hold the said firm, its surviving partner or partners, and the estate of the partner or partners and the trustee or executor thereof, harmless and fully indemnified from all liability connected therewith."

It is quite evident that the parties in interest were acting both as members of the firm and as officers of the corporation, and that the valuation was not fixed by buyer and seller acting in separate and opposing interests, but was a valuation adopted more or less arbitrarily and largely as a matter of form.

The claimant, Crowell, denies that there was any agreement by the holder of the note of the copartnership to release the copartnership and accept the corporation as the sole debtor. On the contrary, he makes proof of claim against the corporation, stating that he does so "without waiving any rights which he may have against the copartnership of Bowker, Torrey & Company, or the members thereof."

Furthermore, it is in evidence that Crowell has instituted in the state courts suits at law and in equity against the surviving partners of the firm of Bowker, Torrey & Company upon this note, and has attached the real estate of the copartners. In other words, it appears that the claimant, Crowell, is now asserting the right to seek satisfaction of his claim both from the real estate of the copartnership and the personal assets of the corporation. In his verification of claim is this statement:

"Your petitioner makes this claim against the corporation of the Bowker Torrey Company upon the note executed by the partnership of Bowker, Torrey & Company for the reason that said corporation received certain money, accounts receivable, and other assets of the partnership of Bowker, Torrey & Company, with which to pay the debts of said copartnership, and agreed to pay the same, and has therefore received said assets of the copartnership, and holds said assets and other proceeds to and for the use of the creditors of the said copartnership existing at the time of said transfer, etc., one of which debts is evidenced by the note in question."

It is in evidence that interest was paid by the corporation on the note from August 1, 1905, to February 1, 1910. As the claimant, however, denies that there was any novation, and asserts the right to hold the assets of both copartnership and corporation, and as counsel for the receiver also denies the sufficiency of the evidence to show a novation, we may accept the contention of both parties, and hold that there was no novation.

Counsel for the receiver, in the interest of creditors of the corporation, denies that upon the evidence there was any consideration for an agreement by the corporation to assume the indebtedness of the copartnership. It was doubtless a part of the arrangement between the copartners that they should act on the one side as a copartnership selling personal property and on the other side as a corporation buying the personal property, and that as a corporation they should continue the business and should relieve themselves as copartners and the copartnership real estate from the claims of creditors.

So far as the note in question is concerned, this they have failed to do.

The claimant asserts an equitable claim upon the assets of the corporation, and bases his case upon *Forbes v. Thorpe*, 209 Mass. 570. His brief states:

"This contract between the partnership and the corporation being made by the partnership for the benefit of its creditors, the latter may enforce in equity the rights of the copartners to compel the corporation to perform its agreement in this regard."

He contends, also, that in the event of his recovery of a judgment against the surviving partners of the firm they would be entitled to hold the corporation on its contract to assume the liabilities of the partnership, and that the claimant, Crowell, is entitled to be subrogated to the claim which the surviving partners might have against the corporate assets.

[1] Upon the theory of a right to be subrogated to any claim which the surviving partners of Bowker, Torrey & Company might have against the corporation, the claimant stands on most doubtful ground.

Before the formation of the corporation, the copartnership was amply solvent. By the continuance of the business in a corporate form, with the withdrawal of all the real estate, the financial standing of the business was greatly impaired.

The corporate record to the effect that, in the judgment of the board of directors, the value of the property equalled the sum of \$249,700, and that full-paid stock be issued to a like amount, is, as counsel for the receiver and creditors contends, inconsistent with the theory that there was any consideration for assuming the debts. The question how far a person who is not a party to an agreement made for his benefit may be entitled to enforce that contract, either at law or in equity, is based upon various theories. In the case of *Urquhart v. Brayton*, 12 R. I. 169, it was based on the ground of novation. The present claim cannot rest upon that ground. There is also difficulty in basing it upon the ground of a trust fund received for the payment of debts.

Looking to the substance of the matter, the agreement between the corporation, all of whose stock was held by the copartners, and the copartners, is primarily a matter of form. Their agreement in the form of a corporation to pay their own debts as copartners, and in the form of a corporation to hold themselves harmless against their copartnership debts, does not seem to give rise to any substantial equities of the copartners against the corporation. In the absence of any allegation of the claimant that he is unable to obtain satisfaction from the copartners by suit at law, or that the copartners who made the note are without assets to pay it, his case is lacking in the elements which are ordinarily essential to a creditors' bill to follow equitable assets. The claimant apparently has no interest in the exoneration of the copartners from the payment of the note, and if there be any sort of equitable claim of the copartnership upon the corporation, which is, to say the least, most doubtful, there appears no reason why this claimant should be permitted to follow such equitable assets of the copartnership, when he may resort to the copartnership real estate or to the individual liability of the copartners.

There seems little equity in the claim that the corporate assets available for part payment of the creditors of the corporation should be diminished by the amount of a dividend upon this note of the partnership, and that the liability of the copartners should to this extent be shifted from their shoulders and put upon the corporation.

The argument of the receiver, that upon the evidence afforded by the corporate records and the documents there was no consideration for the assumption by the corporation of the liabilities of the copartnership, is entitled to weight which it might not have, perhaps, in a case where the copartnership and the corporation were composed of different persons acting in different interests. Such a vote of a corporation contemporaneous with the offer and acceptance might, in the case of a contract between adversary parties, be regarded as evidence tending to show that the assumption of debts was part of the consideration for the purchase of assets; but in this case, where the same parties appear in different legal forms upon both sides of the transaction,

it is but just that we should strictly interpret the records that they have made.

The real intention of the copartners was to set aside their real estate, to go on in business under a corporate form with their personal estate as capital, and to satisfy the creditors out of that personal estate or from the profits of the business.

While it is doubtful if it can be said that the transaction was in fraud of creditors, since sufficient assets seem to have been withheld and retained for the full payment of the copartnership debts, yet there is nothing in the division by the copartners of their property into two parts, real and personal, and their agreement to pay these debts out of their personal assets, which gives them an equity, if compelled to satisfy a judgment out of their real estate, to resort to the corporate funds for reimbursement at the expense of creditors of the corporation.

Under such circumstances we must look strictly to the documents constituting this artificial arrangement of the same interests on two sides of the transaction.

[2] The written offer, as made by the copartners, does not require or provide for the payment of debts. The corporation accepts this offer and issues its stock in payment at its own valuation of the assets. The argument that there remains no consideration for the assumption of debts seems sound, and the vote of the corporation to assume the debts is made as a voluntary act, being no part of the purchase of the copartnership assets, or, if it can be held to be an agreement, an agreement without consideration.

The present case differs in substantial particulars from the case of *Forbes v. Thorpe*, 209 Mass. 570, 95 N. E. 955. In the present case there was no express agreement to assume and pay debts as a part of the consideration for the transfer. Neither the offer, the vote of acceptance, nor the bill of sale contains any reference to the payment of debts, or in terms makes this a part of the consideration, nor can this be implied from the circumstances. The acceptance was on the ground that the value of the property received was \$249,700, and that full payment should be made by the issue of stock. The vote, as we have said, imposed no further liability upon the corporation, and gave the copartners no further equity in its assets. The issue of fully paid stock satisfied the specified consideration.

The assumption of liabilities is a piece of inconsistency in the corporate record; such inconsistency as is not unlikely to occur where the arrangement is fictional, rather than corresponding to the true intent of parties with opposing interests. Proceeding upon the theory that all that the corporation received it paid for in stock, it follows that the corporation received no consideration for its assumption of debts.

In *Forbes v. Thorpe* all the assets of the partnership were conveyed to a trustee upon express condition, and the court found that, but for the agreement of the corporation to pay debts, the conveyance would have been a fraud upon the firm and creditors. The obligation to pay debts was made upon a valuable consideration, and the transaction

between parties having opposing interests was real, and not fictitious. The facts are so substantially different from the facts in the present case that the case is not controlling.

Counsel for the receiver cites, also, *Robb v. Mudge*, 14 Gray (Mass.) 534; *Howe v. Lawrence*, 9 Cush. (Mass.) 553, 57 Am. Dec. 68; *Harmon v. Clark*, 13 Gray (Mass.) 131; *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75; *Clare v. Hatch*, 180 Mass. 96, 62 N. E. 250; *Griffin v. Cunningham*, 183 Mass. 585, 67 N. E. 660; *Anthony v. Campbell*, 112 Fed. 212, 50 C. C. A. 195; *Reynolds v. New York Trust Co.*, 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391.

Counsel for the claimant relies upon *Forbes v. Thorpe*, 209 Mass. 570, 582, 95 N. E. 955, and *Pennsylvania Steel Co. v. N. Y. C. Ry.*, 198 Fed. 721, 749, 117 C. C. A. 503.

Upon the whole, I am of the opinion that the receiver's disallowance of the claim was right. The claim was presented as an equitable claim. The claimant has not shown that at law he is without a remedy against the makers of the note, or that they are without assets to satisfy a judgment, and has failed to show any necessity for resorting to equitable assets, or to rights of his debtors against the corporation, in order to obtain payment of the note. He has no apparent interest in contending that the copartners should be wholly or partly exonerated from their direct obligation to pay the note, and it is not shown that the copartners themselves have asserted in these proceedings such a right to be exonerated from payment of their copartnership debts.

He has also failed, in my opinion, to show that the copartners have in fact any equitable claim upon the assets of the corporation which could avail him by way of subrogation. These grounds are sufficient, in my opinion, to justify the disallowance.

There is a further question whether the claimant can consistently claim the benefit of the corporate vote to pay the debts and to hold the firm and partners harmless against them, without electing to accept the obligation of the corporation in lieu of his claim against the copartners. The vote is in effect to substitute the corporation as debtor in discharge of the firm. It is doubtful if the claimant can consistently claim to hold both the original debtor and a debtor who was intended to be, not a surety, nor an additional debtor, but a substituted debtor. His denial that there is a novation, or that he will accept the corporation in lieu of the debtor, might be taken as a refusal to accept the corporation's entire undertaking as expressed in the whole of the vote. In view of our previous findings, however, it is not necessary to so decide.

The claim is disallowed, and an order to that effect may be entered.

MECHANICS' & METALS' NAT. BANK et al. v. HOWELL.

(District Court, D. Connecticut. July 24, 1913.)

1. JUDGMENT (§ 710*)—CONCLUSIVENESS—PERSONS BOUND—CONSENT DECREE.

A consent decree under which the property of a corporation is sold to a creditors' committee as a step in carrying out a plan of reorganization cannot cut off or affect the rights of one not a party nor brought under its operation by consent or otherwise.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 710.*]

2. CORPORATIONS (§ 579*)—REORGANIZATION—VALUATION OF PROPERTY—RIGHTS OF PARTICIPATING CREDITORS AGAINST INDORSER.

Defendant, in proceedings in involuntary bankruptcy, was a stockholder and officer of a large manufacturing corporation and with its president had indorsed some of its notes which were outstanding when receivers were appointed for the company in a creditors' suit. A committee was appointed under an agreement of creditors with authority to formulate and submit to the creditors depositing their claims a plan of reorganization or other plan of settlement, and defendant and the other indorser signed an agreement waiving demand and notice, etc., and consenting that any extension might be given to the company without impairing the obligations of the indorsers. On the report of experts that the value of the company's property as it stood was less than the indebtedness, but that as a going concern, properly financed and managed, it would be worth much more and the business could be made profitable, the committee submitted a plan of reorganization which was accepted and carried out as follows: The committee purchased the property from the receivers at private sale, which was confirmed practically without objection, for \$870,000, receiving also a confirmatory deed from the corporation; the committee conveyed the property, with a sum of money for working capital, to a new corporation and received in payment all of the common and preferred stock, amounting to \$4,725,000, the minutes of the transaction reciting that the property received was worth the full par value of the stock, to conform to a law of the state; each creditor was given common and preferred stock equal at par value to the amount of his claim with an agreement that his right against any indorser should not be affected thereby. Defendant was not a party to the suit, took no part in the reorganization, and waived no rights except to the extent stated. *Held*, that the sale of the property to the committee, confirmed by consent decree, was merely a step in the reorganization plan, and that the price paid did not fix its value as against defendant, but, as between him and the creditors participating in the reorganization, its value was that placed upon it by the new corporation on the basis of which its stock was issued; that the indorsement creditors, having received and accepted full payment of their claims in such stock, had no further claim against the indorsers and could not maintain a petition in bankruptcy against defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313-2318; Dec. Dig. § 579.*]

In the matter of George D. Howell, alleged bankrupt. On involuntary petition by Mechanics' & Metals' National Bank and others. Petition dismissed.

The petitioners allege the insolvency of the respondent and his liability as an indorser of the notes which they severally hold.

The McCrum-Howell Company was a corporation organized under the laws of Connecticut but having the largest amount of its property and assets in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Pennsylvania. The capital stock was \$7,000,000, half preferred, half common. It carried on a large business in the manufacture and sale of boilers, radiators, enameled iron ware, vacuum and suction cleaners, and transom lifts. Lloyd G. McCrum was its president and George D. Howell was a director and its vice president. Both were accommodation indorsers of the company's commercial paper.

On March 13, 1912, a bill in equity was filed by a stockholder praying for the appointment of a receiver to take possession of the properties of the company in order to conserve its assets. To this bill the company filed its answer, verified by respondent, and the court appointed two receivers, both concededly able men of large affairs. Ancillary decrees appointing the same receivers in other jurisdictions were made in due course.

On the same day that these receivers were appointed (March 13, 1912), Howell and McCrum transferred and delivered certain personal property and certain deeds to real property to one Oscar L. Telling, then president of a bank in Pittsburg, taking from Telling a receipt to the terms of which they agreed, which reads in part as follows: "In trust, however, to hold the same; * * * to collect the rents, issues and profits thereof; * * * to sell and dispose of the same at public or private sale; * * * and from time to time to promptly, as the same are received, to distribute the proceeds thereof ratably and proportionately, and upon a basis of equality, to the debts of said Howell and McCrum, and renewals thereof, a schedule of which denominated Schedule B is attached hereto, but in addition to the debts in Schedule B, to make distribution cover all of their contingent liabilities as soon as said contingent liabilities become absolute from or by reason of their indorsement on the obligations of the McCrum-Howell Company and the Richmond Sales Company, and upon such other contracts as upon which they may be at this time liable. * * *" This transfer to Telling is asserted by petitioners to be a general assignment and to constitute the act of bankruptcy upon which petitioners now seek to have Howell adjudicated a bankrupt.

On April 10, 1912, a creditors' committee was created (hereinafter called for brevity the Wiggin committee) and a "creditors' agreement" prepared. This agreement had the familiar provisions for depositing claims, for appointing a depository, and for authorizing the committee to act as attorney and agent. The "fourth" and "eleventh" paragraphs are especially important in this connection. They are:

"Fourth. The committee is authorized and requested to formulate a plan and agreement for the reorganization of the company or of any of its subsidiary companies or the readjustment of its or their obligations and the discharge of said receivers, or in the discretion of the committee, to collect, compromise or otherwise adjust the claims without a reorganization. In the event the committee formulates a plan and agreement for reorganization, printed copies of such plan and agreement shall be filed with the depository and notice of such filing published * * * and mailed to each depositor. * * * Holders of certificates of deposit hereunder who shall not assent to such plan and agreement, if any is formulated, may at any time before a date to be specified in such notice * * * surrender such certificates and withdraw their deposited claims on payment of their pro rata share. * * * All holders of certificates of deposit not so withdrawing shall be bound by such plan and agreement with like effect as if they had executed the same."

"Eleventh. The depositors do not assign to the committee any claim against any party other than the company, and do not waive or release any rights or claims against any indorser or guarantor of or person otherwise secondarily liable upon any of the claims deposited hereunder."

At the foot of this paper and following the signatures of the committee and the depository, McCrum and Howell signed the following:

"Lloyd G. McCrum and George D. Howell, indorsers upon certain of the obligations of the McCrum-Howell Company, execute this agreement, severally assenting to the terms hereof, and hereby waive demand of payment, protest and notice of protest of any of the notes of the company indorsed by them.

and consent and agree that any extension of time of payment of any of the notes of the company indorsed by them, or either of them, may be given by the holders of any of such notes without impairing the obligations of the indorsers or the right of recourse against them by the holders of such notes.

"Lloyd G. McCrum. (L. S.)

"George D. Howell. (L. S.)"

Under date of April 24, 1912, the receivers made a preliminary report in which they set forth that they had employed Gunn, Richards & Co., a disinterested and responsible firm of auditors and engineers, to examine the property and estimate its value. The receivers pointed out the desirability of prosecuting the business vigorously and, to that end, of being authorized to make the necessary and appropriate arrangements. They annexed to and made part of their report an "approximate statement of assets and liabilities of the McCrum-Howell Company as of March 14, 1912." Exclusive of patents, patent rights, trade-marks, and good will (in respect of which no figures were given), the assets were estimated at \$2,662,957.88 and the excess of assets over liabilities (exclusive of contingent liabilities, capital stock, and disputed claims) was put at \$85,928.03.

On or about May 14, 1912, Mr. W. E. S. Strong, presumably a capable expert, undertook a scientific investigation for the receivers, at the request of the Wiggin committee, and reported at considerable length under date of July 16, 1912, detailing the good and bad features of the company's plants and management.

On August 19, 1912, Mr. Strong wrote the receivers stating that in his opinion the plants were carefully appraised but for reasons stated he recommended a deduction of \$117,308.91 from the appraisal of Gunn, Richards & Co. He also recommended the deduction of \$75,369.43 to cover shrinkages of materials.

On or about September 9, 1912, the Wiggin committee filed a cross-bill of which they made the creditors' agreement of April 10, 1912, a part. In the cross-bill it was alleged, among other things, that the Wiggin committee was "authorized to prepare and put into effect a plan of reorganization of the McCrum-Howell Company." The bill further set forth that the corporation was insolvent and that investigation by the receivers since their report of April 24, 1912, showed that the full value of the assets would not exceed the sum of \$2,400,000 appraised as a going concern. Three days later, to wit, on September 12, 1912, a circular was prepared by the Wiggin committee, addressed to the creditors of the company, in which it was stated that the committee had prepared and would submit shortly a plan of reorganization. It was further announced in the circular that sufficient stock of the new company had been underwritten to provide necessary working capital and to pay the expenses of the receivership and reorganization, and that the announcement made in the circular was for the purpose of correcting a statement in certain newspapers that it was intended to dispose of the assets of the company and that no reorganization would be had. "The petition," continued the circular, "filed by the committee in the United States District Court at Philadelphia was for the purpose of facilitating the reorganization."

Up to this time, so far as the record discloses, Howell had not signed any instrument since April 10, 1912, and had had no communication, verbal or written, in relation to his transfer to Telling or his liability as an indorser except a letter dated April 29, 1912, written to the president of the Corn Exchange National Bank of Philadelphia, in which he explained the transfer to Telling, by McCrum and himself, saying: "We are in hopes that the company will pay its debts. If not, you and all its creditors will share in this property (meaning McCrum's and his) without preference. We did this to back up our indorsements if we were to be held ultimately."

Under date of September 16, 1912, the receivers wrote to the Wiggin committee (the letter being printed evidently for circulation) and recapitulated various statements and reports made from time to time in regard to the business and condition of the company. Revising the assets as of September 1, 1912, they made the total, exclusive of patents, patent rights, trade-marks and good will, \$2,179,361.02. Excluding certain contingent liabilities,

they figured the total liabilities as \$2,606,265.68. On this estimate the excess of liabilities over assets was \$426,904.66, but they did not undertake "to put a value on patents, patent rights, trade-marks, or good will." They called attention to the fact that they had effected an arrangement with the owners of one patent which might result in the company receiving a substantial income each year during the life of the patent, in addition to the profit that might be realized in the manufacture and sale of stationary vacuum cleaners. They pointed out that: "A forced sale of the assets would probably be attended by very great shrinkage and loss. The only other alternative appears to be the reorganization of the company or the formation of a new company by creditors and stockholders to take over the business. By accepting, in settlement, securities of a properly organized and managed company, with sufficient capital, the creditors can realize whatever value the business has as a going and income producing business." They then went on to say that, in order to aid creditors and stockholders in deciding upon the proper course to pursue, they caused estimates of probable earnings to be made on the assumption that the business would be continued under a competent management and with adequate working capital. They informed the Wiggin committee (and doubtless through them the creditors) that Messrs. Gunn, Richards & Co. in a report rendered April 27, 1912, expressed the opinion that net profits of \$330,000 per annum could be realized on the basis of certain sales after certain deductions; that Mr. Strong, on a somewhat different basis of figuring, estimated possible net profits of approximately \$210,000 a year increasing to \$320,000; and they expressed the opinion that from \$800,000 to \$850,000 would be sufficient additional capital if the new company could readily negotiate loans in amounts necessary for a season's operations and other purposes. They concluded: "It may not be out of place, however, to say that in our judgment the business has sufficient value and prospects to justify an attempt to save and realize this value by the reorganization of the company or the formation of a new company."

On or about September 18, 1912, Mr. Howell had a conversation with Wiggin in which he proposed to Mr. Wiggin a plan of reorganization that did not meet with Mr. Wiggin's approval. In this conversation Mr. Wiggin in substance said that Howell had not figured in his plan on the personal indorsements which Wiggin thought would be 25 or 30 per cent., to which Mr. Howell replied that he thought Mr. Wiggin was "putting it too high."

On September 27, 1912, the Wiggin committee promulgated a "plan and agreement for reorganization," and also on the same date prepared a circular to the creditors. This circular stated, among other things: "The investigations made by the committee have convinced it that, if the property be disposed of at a forced sale, the creditors can realize but a small percentage of their claims. The business, however, appears from the reports of the engineers and accountants to have an earning power. Mr. Strong estimates the earnings, after making certain improvements, at \$209,000 a year with a gradual increase until the profits will equal \$300,000. Others name higher figures." The circular called attention to the plan of reorganization adopted by the Wiggin committee, copy of which accompanied the circular, and the essential details of which were summarized in the circular, as follows:

"The creditors' committee proposes to purchase at a judicial sale all, or such portion thereof as may appear desirable, of the assets of the McCrum-Howell property, and in turn to transfer such assets to a new corporation in exchange for \$1,575,000 of preferred stock of the company and \$3,150,000 of common stock; all of the stock of the new company to be placed in a voting trust for five years. The creditors of the McCrum-Howell Company are to receive voting trust certificates for preferred stock of the new company in an amount equal to 25 per cent. and voting trust certificates for common stock of the new company in an amount equal to 75 per cent. of their claims. The noteholders reserve all of their rights against the individual indorsers of the company's paper. To furnish working capital necessary for the new company, and to pay the expenses of receivership and reorganization, it is proposed to permit the present stockholders of the McCrum-Howell Company to subscribe for, or if they fail to do so, to sell \$875,000 of the pre-

ferred stock of the new company, carrying with it a similar amount of common stock. This amount of stock has been underwritten and the underwriters will receive a cash commission for their services."

The plan and agreement for reorganization dated September 27, 1912, need not be set forth at length because its purport is concisely and clearly stated in the circular just referred to. From this plan it appeared that the liability of the company (exclusive of stock liability) was estimated at approximately \$2,800,000; that the new company was to acquire the property of the McCrum-Howell Company at judicial sale; that the new company was to have an authorized capital of \$4,725,000, of which \$1,575,000 was to be cumulative preferred and the remainder common stock, all of the par value of \$100 per share; and that the holders of McCrum-Howell stock were to be permitted to subscribe at so much per share to provide "for the expenses and other purposes of the reorganization, including the expenses of receivership, and to supply the new company with additional working capital." It further appeared that the \$875,000 of preferred stock, together with the equal amount of common stock, to which "the present stockholders are entitled to subscribe," had been underwritten by a syndicate.

"For the cash to be furnished and the property which the new company will acquire, pursuant to the plan, the new company is to issue and deliver the following:

"\$1,575,000 par value preferred stock.	
"\$3,150,000 common stock.	
New 7 per cent. cumulative preferred stock authorized....	\$1,575,000
To the stockholders participating or to the underwriters..	\$ 875,000
To the creditors 25 per cent. of the face of the claims, or to be used for purposes approved by the committee.....	700,000
	<u>\$1,575,000</u>
Common stock, authorized.....	<u>\$3,150,000</u>
(a) To the creditors for 75 per cent. of their claims, or for purposes approved by the committee.....	\$2,275,000
(b) To old stockholders participating in plan (or to under- writers) 100 per cent. of par of new preferred stock....	875,000
	<u>\$3,150,000"</u>

Under paragraph 7 of this plan of reorganization was set forth the following:

"Result to Creditors of the McCrum-Howell Company.

"Creditors will receive:

"(a) 25 per cent. of face of claims in new preferred stock.

"(b) 75 per cent. in new common stock.

"Noteholders holding indorsements do not surrender same but retain their respective claims against indorsers."

On October 1, 1912, Mr. Howell wrote to Mr. Wiggin, inclosing a proposed plan of reorganization. On October 7, 1912, Mr. Wiggin wrote Mr. Howell disapproving the plan and pointing out what he regarded as its defects, and concluding: "You must also bear in mind that the committee is placing a valuation on the individual indorsements which does not seem to be properly cared for in your suggested plan."

On October 21, 1912, Judge McPherson, sitting in the District Court for the Eastern District of Pennsylvania, made an order setting November 2, 1912, as the time for the hearing of a motion on the part of the petitioning creditors for a decree of sale of the assets of the McCrum-Howell Company. Under date of November 1, 1912, the Wiggin committee addressed the receivers, offering to buy the assets of the company for \$870,000 in cash, conditioned,

among other things, upon the committee or its nominee receiving a confirmatory deed and other instruments authorized by the stockholders and directors of the McCrum-Howell Company at a meeting or meetings properly called and held for that purpose. The committee proposed that it should be permitted to apply on account of the purchase price the dividend to which it was entitled on account of the claims assigned to it by various creditors, amounting to \$2,098,947. This was the bid which, with other things, was the subject-matter of discussion when the motion came on before Judge Buffington on November 2, 1912. There was considerable discussion on that occasion, and the attention of the court was called to the plan and agreement of reorganization, and it was made clear that all who desired to participate would have the opportunity so to do upon an equal footing. The sole objection to the proposed procedure came from the Corrigan, McKinney & Co. of Cleveland, whose attorney said that he was not in a position to state any specific objection and asked only that an objection be placed on the record to protect the rights of his client in the future. Largely because of this objection, and doubtless to some extent because of the natural caution of the court in desiring to give full opportunity to all who might wish to be heard, a decree nisi was made which provided that the bid of the Wiggin committee be accepted and approved unless on or before November 13, 1912, "there shall have been presented to the court such high bid or *such other plan* as may be approved by the court, * * * and that, in the event that there is no other such bid or plan so received and approved by the court, the court will at such time enter a final decree approving the bid * * * and directing a conveyance of the property by the receiver to such purchaser or its nominee." It was further ordered that "a meeting of the directors and stockholders of the McCrum-Howell Company be called in the method provided for by its by-laws or by-law for the purpose of voting upon the question of whether the said company will make the necessary confirmatory deeds of sale or other instruments that may be necessary to vest in the purchaser, if said bid is accepted by this court, the legal title to said property, so far as said action of said corporation may be necessary."

On November 4, 1912, the receivers sent a letter to creditors, stockholders, and all persons claiming to be interested in the company, notifying them of the decree nisi and the action of the court accepting the bid unless there should be presented a higher bid or some other plan or method of sale.

Under date of November 13, 1912, a final decree was made the only opposition (if such it may be called), being that of Messrs. Corrigan, McKinney & Co., who, as the order recited, stated that they had no objection to a decree directing a private sale of the assets, but "who desired to be considered as making a formal objection to the entry of the proposed decree on the ground of inadequacy of price, but who did not desire to submit any evidence in opposition thereof, and who did not request any further time in which to offer such evidence."

Among other things, it was decreed that no creditor, stockholder, or other person "has presented another or other bid or has suggested any other plan or method of sale," and finally the nisi decree was made absolute. Mr. Howell was not present at this meeting, nor was his appearance noted or recited in any order or in any part of the proceedings either on November 2d or November 13th.

The Richmond Radiator Company of Delaware was the reorganized company. Its first meeting was held on November 25, 1912, and the usual proceedings were had. The offer of the Wiggin committee to sell all of the assets of the McCrum-Howell Company and to pay \$340,000 for the issue to it of the full preferred and common stock of the Richmond Radiator Company was duly accepted, and, in accordance with the laws of the state of Delaware, the property thus turned over by the Wiggin committee was declared to be of the actual value of the stock issued therefor, to wit, \$4,725,000. The Richmond Radiator Company thus became the owner of all of the assets of the McCrum-Howell Company, and the plan and agreement of reorganization were approved and carried out to the letter. In due course the receivers made their report to the court, and, after deduction for expenses, it was

found that the \$870,000 produced a dividend of 21.2 per cent. It is now claimed by the petitioners that Howell, as an indorser, is liable for the remaining 78.8 per cent.

Finally it is to be remembered that, in the testimony given by Mr. Wiggin, it affirmatively appears that \$870,000 was not the value of the property based upon any estimate or appraisal or on any other measure of value. That figure was arrived at as the amount necessary to raise in order to pay the expenses of the receivership, provide working capital for the reorganized company, and, according to Mr. Wiggin, "to be able to present to those banks (the 'country' banks), that were not willing to go along and take securities, some alternative cash offer." While the Wiggin committee would have preferred to have had \$900,000 or \$1,000,000, it seems that this was all that could be raised or for which assurance could be obtained from the underwriting syndicate.

White & Case, of New York City (Joseph M. Hartfield, James N. Rosenberg, and Irving S. Olds, all of New York City, of counsel), for petitioners.

William F. Henney, of Hartford, Conn., and William E. Curtis, Henry A. Stickney, and Philip J. McCook, all of New York City, for respondent.

MAYER, District Judge (after stating the facts as above). The number of writings in evidence and their considerable detail have made necessary the foregoing extended statement.

The petitioners insist that \$870,000 was the value of the assets sold; that the respondent in effect gave his consent to the decree by his writing of April 10, 1912, and by his subsequent conduct. The respondent, with equal insistence, contends that the sale of November 2 and 13, 1912, was merely a step in a reorganization, and that the true value of the property was that which the depositing creditors themselves placed on the property in their organization of the Richmond Radiator Company and the declaration as to the value of the stock issued. Other propositions are advanced but these lie at the bottom of the controversy.

It is plain beyond controversy that the \$870,000 bid at the sale in the court in Pennsylvania was not any test of the value of the property and was simply a step in the plan of reorganization. The course taken by the Wiggin committee was the only feasible and practical solution of a difficult situation.

To sell the property disassociated from a plan of reorganization, stripped of its organization, its mechanics and salesmen scattered and its plants shut down, would have been to sacrifice it as scrap. Such a disposition was not to be expected of the experienced men who constituted the Wiggin committee, and this they, as well as the receivers, made clear to the creditors in the circulars explaining the desirability of coming into the reorganization plan. The problem was not an unusual one.

In the busy jurisdictions, the question is constantly presented of selling a business as a going concern or letting it go under the hammer as so much land or merchandise. Even though the liabilities exceed the assets, substantial value may be attained with the addition of working capital and good management. That was the case here,

as everybody realized and as the expert Strong (selected by the receivers at the request of the Wiggin committee) in due time reported.

It is said, however, that the \$870,000 must be accepted as the purchase price; that so the decree of the court in Pennsylvania declares; and that to place any other construction on the decree is to attack it collaterally. It is true that for some purposes and between certain parties \$870,000 must be regarded as the price of the property. For instance, the Wiggin committee and the receivers are, as to each other, bound by the decree, as it reads on its face, on the same principle as would be bondholders and stockholders under a reorganization contract as discussed in *Northern Pacific Railway v. Boyd*, 228 U. S. at page 502, 33 Sup. Ct. 554, 57 L. Ed. 931, or as would be consenting parties to a judicial sale accomplished by a consent decree.

[1] But, if the decree be a consent decree and obviously an instrument in a plan of reorganization, it cannot cut off nor impair the rights of one who was not brought under its operation, either individually or through some other acting for him in a representative capacity and who has neither waived nor otherwise, in legal effect, foregone his rights.

[2] What was the status of Howell as an indorser after the reorganization had been effected? In conjunction with McCrum he had transferred certain property in March, 1912, in trust to apply to his and their debts if ultimately necessary; this done at a time when no one could foresee the results to come. Next he waived demand of payment, protest, and notice of protest of any of the company notes indorsed by him and consented that the holders might extend time of payment without impairment of his obligation to them as indorser. It is contended by Howell that this is all he did; but such a construction would put a highly technical meaning on the McCrum-Howell addendum to the agreement of April 10, 1912; and his letter of April 29, 1912, to Mr. Calwell (although referring only to the Telling transfer) is illuminating as to his mental attitude, and that mental attitude discloses his own practical construction negating the meaning now contended for. The addendum clearly consents to everything in the agreement.

Paragraphs cannot, however, be isolated. The agreement must be read as a whole, and, so read (omitting the usual formal provisions), paragraphs fourth and eleventh bear an important relation to each other. Concededly the claims against the maker could not be assigned and the rights against the indorser reserved without impairing the obligation of the indorser in the absence of the latter's consent. *Spies v. National City Bank*, 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193. To have sued and obtained judgment against the indorsers at that time for the principal of the debt might inadvisedly have opened up complications, legal and practical. The intent of the agreement, therefore, was to exhaust first the estate of the principal debtor, meanwhile preserving any rights against those secondarily liable.

Paragraph fourth empowered the Wiggin committee to choose between alternatives (1) to formulate a reorganization plan and agreement, or (2) to collect, compromise, or otherwise adjust the claims without a reorganization. Until the committee determined which alternative to select, it was impossible to fix the basis of the secondary liability.

If the property went to absolute public sale without a reorganization plan, the decree of the court would fix the purchase price in the first instance, and after that, in due course, the dividend and the indorser under paragraph eleventh (consented to by the addendum) would be held for the balance. If the committee formulated a reorganization plan and agreement and filed and published the same as required under paragraph fourth, all depositors not dissenting were to be bound by such plan and agreement. In such event, a judicial sale might and probably would be a mere step to the final result, more especially if the sale price were an arbitrary figure designated by the committee, not fixing value as between assenting depositors and the indorsers but necessary to the termination of the receivership, to divesting the receivers of such right, title, or possession as they might have, and to furnishing a winding up fund for the purposes of the receivership.

As between the assenting creditors and the indorsers, however, the secondary liability could only be determined after the true value of the property had been ascertained, because clearly such a reorganization contemplated a valuation of the res for reorganization purposes as a going concern as distinguished from a purchase price after competitive bidding or an arbitrary figure in a judicial decree decided on without relation to the value of the property but as a necessary incident to the process of reorganization. That such was the view which must be attributed to the Wiggin committee (and, of course, its depositors) and to Howell is well confirmed by the situation.

Why should the creditors in April, 1912, delay suing the indorsers unless they wished first to ascertain the ultimate result? At that time the outlook was by no means gloomy, and Gunn, Richards & Co. were already estimating and appraising on a basis which shortly thereafter justified the receivers in reporting a probable surplus for creditors exclusive of patents, patent rights, trade-marks, and good will. A successful reorganization might mean a hundred cents on the dollar, a consummation equally desired by creditor and indorser.

Having given the Wiggin committee broad power, Howell, in any event, so long as he remained silent, was bound by every step they took and in turn they bound themselves as to him by their acts done in pursuance of this same agreement. If they abandoned reorganization, he must take the consequences. If they accomplished reorganization, he must abide by the result for better or for worse. To assert that they could reorganize as far as affected themselves and utilize judicial procedure as a step to that end, but call the procedure something else as affecting Howell, is to ignore the intent and purpose of the document of April 10, 1912. While only those depositors

who assented to a plan of reorganization were bound, yet McCrum and Howell bound themselves by the addendum wherein they severally assented to the terms of the agreement.

It is unnecessary to determine what the situation would have been as matter of law if, at the hearings in the court in Pennsylvania, Howell had objected to the plan and agreement of reorganization or to the sale. He was under no legal obligation to express his view nor to warn the committee of the effect in law of their acts; and it is not at all certain that they would have changed their course if he asserted to them what he does now.

Every step the Wiggin committee took relates back to April 10, 1912, and every paper they signed reads into the instrument of April 10, 1912. In the plan for reorganization of September 27, 1912, it was provided:

"The annexed agreement of reorganization * * * constitutes a part hereof." Last paragraph.

In the "annexed agreement" of September 27, 1912, the agreement of April 10, 1912, is recited and then:

"It is intended that this agreement shall be and it *is* the agreement of reorganization and readjustment contemplated in the agreement dated April 10, 1912. * * *" Paragraph seventh.

As if to say (colloquially):

"Mr. Howell, we now advise you that we have finally determined on a plan of reorganization as to the details of which we herewith inform you and this is the plan to which you have taken no objection for you gave us plenary power on April 10, 1912. The indorsement creditors retain their rights against you, whatever they may be."

The circular of September 27, 1912, places the committee's construction upon its own procedure and shows beyond dispute that the judicial sale was to be merely a step in the reorganization. More than that, every step thereafter shows that the reorganization plan was carried out to the letter and the committee's knowledge was Howell's knowledge up to the last act and the last document necessary to carry into complete effect the plan of reorganization. If, throughout, it be remembered that the only rights which by waiver and consent the committee retained against Howell originated in the agreement of April 10, 1912, and that as to him every act they did in pursuance of that agreement bound both him and them, then it will be seen that he does not collaterally attack the court's decree.

The stenographic minutes of the hearing before Judge Buffington support and do not undermine the decree, and they are probably admissible on the facts in this case, but we may dispose of the matter without resort to these minutes.¹ It is enough to read the decree in the light of the undisputed facts.

In addition to those set forth, there are others of significance. Why did the decree require confirmatory deeds from the McCrum-

¹ Note.—Much is said because the minutes were not "official." There are no official stenographers in the District Courts except in equity under the rules effective on February 1, 1913.

Howell Company? Why was the expression used, "any other plan or method of sale?" Why was the price fixed at \$870,000 except to conform with the plan of reorganization? See testimony of Wiggin and Stettinus. Why did the cross-bill attach the agreement of April 10, 1912, and make clear that the bill was filed to facilitate a reorganization? Finally on this branch it is urged that the decree was not a consent decree because opposed by one creditor; but the recital in this regard in the final decree shows that the objection was pro forma and is particular in stating that there was "no objection to a decree directing a private sale of the assets," and that the objecting creditor "desired to be considered as making a formal objection" on the ground of inadequacy of price.

The next question is: What was the value of the property of the company upon which the reorganization rested? Here both sides cite *Northern Pacific Ry. v. Boyd*, supra, as authority for their contentions. Whatever may be urged was decided in that case, it was clearly held that, as between the parties and the public generally, the sale was valid but as against creditors it was a mere form. Then the court continued:

"The invalidity of the sale flowed from the character of the reorganization agreement regardless of the value of the property, for in cases like this the question must be decided according to a *fixed principle*, not leaving the rights of the creditors to depend upon the balancing of evidence as to whether, on the day of sale, the property was insufficient to pay prior incumbrances."

The court (at page 507 of 228 U. S., at page 561 of 33 Sup. Ct., 57 L. Ed. 931) pointed out that the purchaser at foreclosure at once issued securities aggregating \$345,000,000 on a property which a month before had been bought for \$61,000,000.

"But there was an entirely different estimate of the value of the road when the reorganization contract was made. For that agreement contained the distinct recital that the property to be purchased was agreed to be 'of the full value of \$345,000,000, payable in fully paid nonassessable stock and the prior lien and general lien bonds. * * *' The fact that at the sale, where there was no competition, the property was bid in at \$61,000,000 does not disprove the truth of that recital, and the shareholders cannot now be heard to claim that this material statement was untrue and that as a fact there was no equity out of which unsecured creditors could have been paid, although there was a value which authorized the issuance of \$144,000,000 fully paid stock. If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever."

While the facts in *Northern Pacific Ry. v. Boyd* differ from those in the case at bar, certain principles, it seems to me, by parity of reasoning, are here applicable. Howell was a possible debtor and not a creditor, but, before his secondary liability can now be fixed, the value of the property of the principal debtor must be ascertained. That value should be ascertained, if possible, "according to a fixed principle." Had the sale been independent of a plan of reorganization, the value for all purposes would appear in the decree; but where the

property is dealt with in a reorganization, such as this, how shall we find the value as against this indorser? The property must be regarded as a going concern, for the purpose of the reorganization was, of course, to keep the business alive.

"The investigations made by the committee have convinced it that, if the property be disposed of at a forced sale, the creditors can realize but a small percentage of their claims. The business, however, appears * * * to have an earning power." Exhibit 1.

The appraisals and estimates of experts would, in this case, be speculative at best (see estimates Gunn, Richards & Co. and Strong; testimony of Wiggin and Stettinus, especially in answer to the court's questions); but the valuation placed on the property by the Wiggin committee was exact and not speculative. To carry out the reorganization, the Wiggin committee proposed to transfer, and did transfer, the property of the principal debtor and \$340,000 in cash for \$4,725,000 of stock. The committee knew and were bound to know that under the laws of Delaware the property thus transferred was of the actual value of \$4,725,000, else full-paid capital stock to that amount could not have been issued. If the \$340,000 cash be deducted from this total, or if by some process of figuring \$870,000 be deducted, the balance attributable to the value of the property is far in excess of the debts of the company.

The Wiggin committee creditors cannot be heard as against Howell to attack the value of the Delaware stock. That was their view of the value of the property for reorganization purposes, and the public, thenceforth, were entitled to deal with the stock as full paid and non-assessable and on the assumption that the property for which issued was as stated in the minutes of Richmond Radiator Company November 26, 1912, "of the actual value of \$4,725,000."

Enough has been pointed out to warrant the conclusion that, as between the petitioners and the alleged bankrupt, the latter's liability as indorser no longer exists. Other contentions have been suggested which present persuasive considerations in support of the respondent's view, but the limits of an opinion (already long) preclude further discussion.

The petition should be dismissed.

MUNSON S. S. LINE v. ELSWICK STEAM SHIPPING CO., Limited.

(District Court, S. D. New York. June 26, 1913.)

SHIPPING (§ 40*) — TIME CHARTER — TERMINATION — RIGHT OF CHARTERER TO MAKE NEW VOYAGE.

A steamship was delivered in an English port under a charter for "about" six months; charter hire to continue until redelivery, which was required to be in a European port. She carried a cargo from England to Havana and thence proceeded to Mobile, where she loaded a cargo of lumber for Buenos Aires. Owing to unexpected long delays, not due to the fault of either party, she did not reach and complete her discharge at Buenos Aires until more than three weeks after the six months' char-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ter period had expired. *Held*, that the owner was within his rights in refusing to load a cargo for Europe under the charter and in withdrawing the vessel at Buenos Aires, waiving redelivery in Europe.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 40.*]

In Admiralty. Suit by the Munson Steamship Line against the Elswick Steam Shipping Company, Limited. Decree for respondent.

Haight, Sandford & Smith, of New York City (Charles S. Haight, of New York City, of counsel), for libellant.

Convers & Kirlin, of New York City (J. Parker Kirlin and John M. Woolsey, both of New York City, of counsel), for respondent.

VEEDER, District Judge. This is an action by the Munson Steamship Line, charterer of the steamship Elswick Lodge, for breach of charter party. By stipulation of the parties only two of the claims set forth in the libel are presented for determination. The claim for galley coal must be denied upon the decision of the Circuit Court of Appeals of this circuit in the recent case of *Dampskibelskabet Ella v. Inter-American Steamship Co.* (C. C. A.) 205 Fed. 734. The claim for loss sustained by the charterer by reason of the withdrawal of the Elswick Lodge from the charterer's employment at Buenos Aires is therefore the only item remaining for consideration.

The charter party under which the controversy arises is a government form time charter made at New York on October 9, 1911, by which the owners agreed to let and the charterers agreed to hire the steamship Elswick Lodge from the time of delivery for a period of about three to about six calendar months, at charterer's option. The steamer was to be placed at the disposal of the charterer at Middlesbrough, Hamburg, or in the Tyne, at charterer's option, and was to be employed in such lawful trade as the charterer should direct "between safe port and/or ports in United States of America, and/or West Indies, and/or Central America and/or Carribean Sea, and/or Gulf of Mexico, and/or South America, not south of the River Plate, and/or Europe, and/or Africa, and/or Asia, not east of Singapore, excluding White Sea, Black Sea and the Baltic, Magdalena river, and all unsafe ports; Lulea to be excluded."

The charter contained, among others, the following provisions:

"(4) That the charterers shall pay for the use and hire of the said vessel £(1100) eleven hundred pounds British sterling per calendar month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the owners (unless lost) at a port in the U. K. or on the continent of Europe between Bordeaux and Hamburg, both inclusive, Rouen excluded, at charterers' option.

"(5) That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as the owners or their agents, and charterers, or their agents, may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to owners' agents any difference shall be refunded by steamer or paid by charterers, as the case may require."

"(16) That in the event of loss of time from deficiency of men or stores,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

breakdown of machinery, stranding, or damage preventing the working of the vessel for more than twenty-four consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service; but should the vessel be driven into port or to anchorage by stress of weather or from any accident to cargo, such detention or loss of time shall be at the charterers' risk and expense.

"(17) That should the vessel be lost, freight paid in advance and not earned (reckoning from the date of her loss) shall be returned to the charterers. The act of God, enemies, fire, restraint of princes, rulers and people, and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation throughout this charter party, always mutually excepted."

The steamer was delivered under this charter party to the Munson Steamship Line at Middlesbrough, England, on October 16, 1911, and five days later sailed for Havana with coal. She encountered severe weather and was compelled to deviate from her course and proceed to Corunna, Spain, for repairs. She arrived at Corunna October 29th and spent a week there making temporary repairs. Arriving at Havana November 28th, she discharged her cargo and, on December 10th, left for Mobile, where she arrived four days later. At Mobile she took on a cargo of pitch pine lumber for the River Plate. Encountering the Christmas holidays, 33 days were spent in loading. When at length on January 16, 1912, she sailed from Mobile, she struck an obstruction in the river and was forced to return to her dock for repairs. Twenty-eight days were thus lost. She left Mobile again on February 13th and proceeded to Pensacola for coal. Arriving there on the same day, it was found that, in consequence of the long delay at Mobile, the coal that had been engaged in advance had not been held and there was no coal ready. It was not until February 19th that the ship was able to sail from Pensacola for the River Plate. When the steamer arrived at Buenos Aires, on March 28th, the master served notice that he would not discharge any cargo until the consignees made a deposit of 12 per cent. of the value to protect the owners' claim against the cargo for contribution in general average in connection with the injury sustained by the steamer at Mobile. The deposit was not made by the consignees until late on April 9th. All told, the libellant claims that it thus lost, by no fault of its own, 63½ days between October 16th and April 10th, or a little over two months out of a total of somewhat less than six months. Discharge began on the morning of April 10th and was completed on May 10th. On the latter date the vessel was withdrawn by the owner from the charterer's service pursuant to notice previously given on April 17th; the flat period of six months having expired on April 16th. The owner paid the charterer for all advances made and for coal on board, and made proper deductions from the hire for the time while the vessel was under repairs at Corunna and Mobile, in accordance with clause 16 of the charter.

At this time there had been an extraordinary rise in rates in the neighborhood of the River Plate. After resuming possession, the owner sent the Elswick Lodge to Bahia Blanca in ballast, where she arrived May 14th, loaded a cargo of grain there for England, and

sailed thence on June 5th. She arrived off Sharkness July 12th and finished discharging 10 days later. The homeward voyage with a cargo similar to that contemplated by the charterer thus occupied a period of 97 days beyond a flat period of 6 months, and 73 days beyond the time of the withdrawal of the vessel on May 10th.

The libelant's testimony tends to show that the vessel was chartered for just such a series of voyages as she undertook, viz., Middlesbrough to Havana, Mobile to Buenos Aires, and Buenos Aires to Europe, and that the charter period of about six months was sufficient to allow completion of those three voyages under ordinary conditions of weather and dispatch. According to the statement of the head of the libelant's chartering department, the average time employed under normal conditions for such performance, allowing such time as might be reasonably contemplated both in steaming and in loading and discharging cargo, is 185 days, or two days over a flat period of six months from the date of the steamer's delivery under the charter. Comparing this estimate with the actual home voyage, for example, it appears that, while only 51 days are allowed in the estimate, 73 days were actually consumed. But the libelant properly calls attention to the fact that there is no testimony to show whether this homeward voyage (which, moreover, was not direct but by way of Bahia) was a normal one. The libelant's testimony also tends to show that bringing the vessel from England to this country and then working her to South America necessarily involved a loss to the charterer, and that a vessel which was ready for employment in Europe always received a lower rate than one which was offered on this side, because of the difficulty in obtaining a paying cargo from Europe to the United States.

Upon this evidence the question to be decided is, according to the libelant, whether, in cases of unexpected and unforeseen delays, the owner may invariably construe the charter party as suits his personal advantage. If rates have gone down after delivery of the vessel so that she is worth less to the charterer at the point where she may happen to be at the expiration of the flat period, it is undeniable that the owner may require the charterer to redeliver the vessel in accordance with the charter. May the owner also, when the market has risen, retake possession of the vessel at an intermediate port, thus at his option treating the agreement for redelivery in Europe as binding or not as best suits his advantage in the variations of the market? In answer to this question the respondent refers to the charter party. Whether the charterer has made a successful commercial venture during the term of the charter or not is not pertinent on the question whether he has a right to keep the vessel beyond the term. The charterer asks that he be allowed to keep the vessel two months or more beyond the charter period in order that he may start on a new and profitable adventure. On its face this is unjust to the owner and is permissible only where the charter party contains some clear provision permitting it.

In the nature of things charters for a fixed period involve considerable difficulty because of the uncertainty as to the time voyages are likely to occupy. At the expiration of a fixed term, the charterer is no

longer entitled to possession. If in the employment of the ship he overruns the term, he is certainly liable at the charter rate of freight for the overlap, and, if freights have advanced, to the difference between the market rate and the charter rate in addition. If the last voyage of the vessel terminate so near the expiration of the fixed term that another voyage cannot be made, the charterer either loses that time entirely, or, if he employs the vessel on another voyage, he does so at the risk of being liable for the increase of the market rate of freight for the overlap. Accordingly various provisions have been inserted in charters to cover this contingency. In some cases a clause like No. 4 in the charter in issue has been inserted to cover a possible overlap. In other cases the term was not absolutely fixed, but was rendered flexible by the use of the word "about." Occasionally, as in the present charter, both provisions have been employed. These provisions have been construed in several cases arising in this circuit and in England, and the principles therein formulated afford, I think, a solution of this controversy.

In *Straits of Dover Steamship Co. v. Munson* (D. C.) 95 Fed. 690, affirmed 100 Fed. 1005, 41 C. C. A. 156, on opinion below, the steamer was let for "three calendar months from August 1, 1898, to be delivered at Philadelphia and to be employed in carrying lawful merchandise, etc., between any safe ports in the United States, West Indies, Mexico, Cape Verdes, Azores, and for North Coast South America, excluding Brazil, as the charterers shall direct." The charter contained provisions similar to paragraphs 4 and 5 of the charter in issue. The steamer was delivered in accordance with the charter at Philadelphia on August 1st, was loaded with a cargo of coal for Tampico, Mexico, sailed on August 5th, and arrived at Tampico on the 16th. Owing to extraordinary washouts, no berth could be obtained at Tampico until October 5th. Her cargo was discharged on October 18th, and on that day she left for Tuxpam, a short distance south of Tampico, where she arrived on October 19th, to take on a cargo of logs which had been engaged for her return trip in September. The loading at Tuxpam was greatly delayed by bad weather, and the steamer finally left Tuxpam before taking on her entire cargo of logs on December 20th, but was obliged to go to Vera Cruz for bunker coal. On December 27th she left Vera Cruz for Progreso, where between December 29th and January 10th she took on 2,000 bales of hemp. On the latter date she sailed for New York, where she arrived on the 20th, completed her discharge, and was redelivered to the owners on January 24th, 2 months, 23 days, and 8 hours after the expiration of the charter term of three months. After the expiration of the charter period on November 1st, the current market rate for steamers had advanced materially above the charter rate. The libellant demanded payment at the market rate from November 1st.

"The question involved," said Judge Brown, "is reduced to the simple one whether the respondent by the terms of the charter was forbidden to take on a return cargo after the discharge was finished on the 18th of October; there being time only for a return without cargo, if the vessel was bound to reach her return port by November 1st."

After examining the charter provisions 4 and 5, he concluded:

"The reasonable inference as to the intention to be drawn from these circumstances is that the charterer should be authorized to make use of the vessel, at the rate agreed upon, for at least one complete voyage, taking any customary return cargo at the customary ports; and that any prolongation of the charter period in accomplishing the voyage and in taking on a return cargo, not caused through any negligence or lack of diligence of the charterer, or his agent, must be deemed governed by paragraphs 4 and 5 and not subject to any increased rates. I do not see anything in this contract that places the risk of delay through causes beyond the control of the parties upon the one party more than upon the other, either as respects the discharge of the outward cargo or the shipping of the return cargo. Each party takes the risk incident to his contract, and such loss as may incidentally attend it."

The case of *Anderson v. Munson* (D. C.) 104 Fed. 913, involved a dispute between the owner and charterer as to their respective rights and obligations in regard to the dispatch of a vessel on a new voyage a short time before the close of the time charter. The steamer was chartered:

"For the term of six calendar months from the day of delivery * * * to be employed as the charterers or their agents shall direct in lawful trades between safe ports and/or ports in British North America, between May 1st and September 1st, and/or United States of America, and/or West Indies and/or Central America, and/or Carribean Sea, and/or Gulf of Mexico, and/or South America (not south of River Plate), and/or Europe * * * at the rate of £925 per month, with an option of continuing the charter for a further period of three months and/or three months more upon giving 15 days notice previous to the expiration of the first named term."

The charter also contained a "hire to continue" clause similar to paragraph 4 of the charter in issue. The charterer used both options; and, the vessel having been delivered under the charter on June 7, 1898, the full term of 12 months expired on June 7, 1899. The vessel was not in fact redelivered until July 26th. Meanwhile freights had advanced, and the owner sought to recover compensation at the market rate from June 7, 1899. It appears that on May 25th, the vessel having completed her discharge on a prior voyage, the charterer ordered her to Philadelphia to load a cargo for Tampico, Mexico. The time ordinarily occupied for such a voyage and return was about 60 days, which would overrun the termination of the charter by 74 days. The master proceeded to Philadelphia but refused to load for Tampico. After considerable negotiation the master agreed under protest to load for Cuba, proceeded thither, and returned with cargo after many delays, redelivering the steamer on July 26th, as above stated.

Judge Brown held that the rights of the parties depended upon the construction of the "hire to continue" clause; and, construing that clause in the light of the evidence of custom or usage as to the employment of vessels under such clauses (which was uniform to the effect that the charterer may dispatch the vessel upon some of the voyages mentioned in the charter where any considerable period remains of the charter term, although the voyage cannot be completed within the term), he found that:

"The only additional voyage that can be required of the vessel without the owners' consent is the shortest of the voyages that are commercially prac-

ticable under the charter, or of those in which the vessel has in fact been employed, and for which she was presumptively engaged; and that any custom to dispatch the vessel on a longer voyage is unreasonable and invalid because unnecessary for the objects of the clause in question as respects the charterer and an unnecessary extension of the time limits of the charter to the owners' prejudice. * * * The voyage to Cuba, which was finally made, was the shortest of the voyages previously made and the shortest of those contemplated by the charter. Upon the evidence it was therefore one which could be reasonably and justifiably required."

In the Case of *Rygja*, 161 Fed. 106, 88 C. C. A. 270, a steamer was chartered for a period of about six calendar months to be employed between (among others) ports in the United States and/or West Indies, and for South America, and/or Europe. The charterers were given the option of continuing the charter for a further period of about six calendar months more on giving a month's notice. There was also the usual "hire to continue" clause, with provision for redelivery "at a United States, Gulf, or Atlantic port, or a port in Europe, at charterer's option." The steamer was delivered in Italy on July 13, 1905. She proceeded to New York, loaded there for South America, thence to the West Indies, thence to New York, where she completed her discharge March 3, 1906. She then loaded for South America, thence to Cuba, thence to New York, where she completed her discharge August 4, 1906. On December 12, 1905, the charterer declared its option for a second term of about six months under the charter provision, and on June 12, 1906, it declared its option to redeliver the steamer in Europe. The master refused to load for a European port, and the charterer brought an action for damages for the withdrawal of the steamer from its use.

"The question is," said Judge Ward, speaking for the Circuit Court of Appeals, "Did the second term begin at the end of the first six calendar months, viz., January 13th, or at the termination of the voyage, March 4th? * * * In this charter the term is not an absolutely fixed period but is 'about six calendar months.' The district judge restricted the effect of the word 'about' to the underlap. Doubtless in a charter containing a clause like No. 4 the word is not necessary because that clause accomplishes the same thing. Still we think the word 'about' applicable to the term whether it be over or under six calendar months, and that, if the last voyage terminate so near the end of the fixed time as to make another voyage unreasonable, the charterer may deliver and the owner may withdraw the vessel, or, if another voyage is reasonable, the charterer may require it at the charter rate of freight. This leaves room for dispute in the case of an underlap as to what voyage is reasonable, but that is a difficulty which cannot be avoided where a fixed term is not agreed upon. In this case, if there were no question of a second term, it could not be denied that the charter terminated March 4th. The charterer having declared its option for a second term, we think the further period began to run from March 4th. * * * In the case before the court, the voyage taken was a usual one, and, as it terminated March 4th, about one month and nine days was left of the second term when the steamship discharged August 24th, and the charterer was entitled to the benefit of its option to redeliver her at a port of Europe."

In the recent case of *Trechmann Steamship Co., Ltd., v. Munson Steamship Line* (C. C. A.) 203 Fed. 692, in the Circuit Court of Appeals for this circuit, a steamer was chartered for about 12 months in any safe trade, excluding British North America, Baltic, China Sea,

and White Sea, and south of River Plate; and the charter contained provisions similar to clauses 4 and 5 of the charter in issue. The steamer was delivered to the charterer on January 13, 1908, and by it redelivered to the owner on December 15th, 29 days prior to the expiration of a flat period of 12 months. The owner insisted that there was a reasonable time left in which to make a commercially practicable voyage, which the charterer denied. In sustaining the conclusion of the district judge that the charterer had no right to redeliver on December 15th, because a voyage to Cuba and back, the usual time for which would be 43 days, would have been reasonable, the court said:

"The actual employment of a chartered vessel is under the sole control of the charterer. He may employ her as much or as little as he chooses. In the case of a charter for 'about' a stated term, the owner will be sufficiently compensated if he gets the charter hire for the stated term, subject, however, to his right to withdraw the vessel before the expiration of the stated term, if there is not reasonable time enough left for a commercially practicable voyage. * * * [Referring to the court's previous statement in the case of *The Rygja*, supra:] The libellant erroneously infers from this that we meant not only that the charterer might insist in such case on another voyage but that the owner could require him to make it. The only option the owner has is to withdraw the vessel if a reasonable time is not left to make a voyage commercially practicable under the charter. He will be sufficiently compensated if at that time no such voyage is practicable by getting his vessel back, or if such a voyage is practicable and not ordered by the charterer, by getting the charter hire to the end of the stated term. Because the charterer cannot generally make voyages end at a precise date, it is equitable to construe the word 'about' so that he may get the benefit of the vessel so long as he can reasonably use her under the charter and yet not be obliged to pay hire for time in which he cannot use her at all."

The conclusion is plain from these cases that under a charter party like this the charterer may embark on a voyage during the charter term although it is certain to overlap, provided that the voyage is a reasonable one. If the voyage be reasonable it is compulsory; that is, the charter hire must be paid. If the remaining time is so short that another voyage within the limits prescribed is unreasonable, then the charterer may redeliver or the owner may withdraw the vessel. In this way the charterer gets the benefit of the vessel so long as he can reasonably use her under the charter and yet is not obliged to pay hire for time in which he cannot use her at all, while the owner either gets his vessel back if no such voyage is practicable, or, if it is practicable and not ordered by the charterer, his charter hire to the end of the specified term.

But cases dealing with provisions concerning charter hire do not reach the issue involved in this case, viz., the right of the charterer to start on a new voyage after the expiration of the charter period. This question was not involved in the case of the *Straits of Dover*, supra. No attempt was made by the owner in that case to withdraw in Mexico when the three months' period expired. The position taken by the owner was that the charterer should return the vessel in ballast to a port of redelivery.

In the case of *Bucknall Bros. v. Murray*, 5 Com. Cas. 312, however, it was explicitly held that the charterer had no right to start on another

voyage after the expiration of the charter period. There the charter was for a period of about six calendar months, for employment between ports of Europe, Australia, South America, etc., hire to be paid at a specified rate and to continue until the redelivery of the steamer to the owner at a safe port in the United Kingdom or continent (Bordeaux to Hamburg) or in the United States. If redelivered in the United Kingdom or on the continent, the charterers were to pay a penalty of £500. There was a provision similar to clause 5 of the charter in issue, providing that if the vessel was on a voyage at the termination of the period specified the charterers should have the use of her until the completion of the voyage and "in order to bring the steamer to a port of delivery as provided." The steamer was put at the disposal of the charterers at New York on September 21, 1899. She was sent on a round voyage from New York to Cape Town, Calcutta, Colombo, Aden, Suez, and back to New York, where she arrived March 23, 1900, and finished discharging March 28th. On February 15th the charterers had given notice to the shipowner that they intended to load the vessel at New York and redeliver her in the United Kingdom. But the owner replied on February 19th that he should hold the charter to be determined on March 21st, when the flat period of six months terminated, or as soon as the discharge at New York was finished. Pursuant to such notice the owner resumed possession of the steamer on March 28th, and the charterer sued for loss of profits on the proposed voyage from New York to the United Kingdom. Mathew, J., said:

"It was contended on behalf of the plaintiffs that I ought to construe this charter party as covering six months *and* such further time as might be necessary for a voyage to the United Kingdom. To establish that I was referred to clause 39 of the charter party, and it was argued that the charterers were thereby given an option to redeliver the steamer in the United Kingdom and so to continue the hiring until her arrival there. But is that the proper interpretation of the clause? To ascertain what it means I turn to clause 23, which provides for the only case in which there may be an extension of time under the charter party. [His lordship read clause 23.] In the present case the steamer was on a voyage to New York when the six calendar months expired on March 21st. She did not discharge all her cargo in New York until March 28th. But then it is said that the plaintiffs were entitled to send the steamer to the United Kingdom after March 28th, and that the charter party would continue until her arrival there. I cannot discover any indication of an intention in this charter party that such a result should follow. The time of hire is for six months, and it is only if the steamer is upon a voyage at the end of the six months that there is to be any extension of the period under clause 23. To accede to the plaintiffs' view would be to extend the time of hire indefinitely. If before the expiration of the six months the steamer had been free to make another voyage to the United Kingdom, she might no doubt have been sent on that voyage. That was a chance which the plaintiffs had when they entered into the charter party; but it was a chance they could only avail themselves of, provided the steamer was sent on a voyage to the United Kingdom, before the expiration of the six months. In the circumstances of this case, however, the charter party came to an end upon March 28th, and the plaintiffs' case therefore fails."

In the foregoing case, it is true, the vessel was in a port of redelivery at the time of withdrawal. In the later case of *The Istok*, 6 Com. Cas. 220, however, the vessel was withdrawn under similar circumstances

at the terminus of the outward voyage, as far as possible from the specified port of redelivery. The charter was for 12 months, the hire was to be paid for any part of a month used to complete a voyage and was to continue "until her delivery to owners * * * at a port in the United Kingdom, in charterer's option." The charter period of 12 months ran out on August 12th, and the vessel completed the discharge of an outward cargo at Cronstadt on August 28th. The charterers then claimed the right to send her in ballast to Lulea, as originally contemplated, to load timber for Rotterdam, and thence to Gravesend, to be delivered there to the owners. The owners' refusal to allow this was sustained by the divisional court. Kennedy, J., said:

"Now, assuming that we are to deal with this case upon the footing that 'voyage' in clause 3 of the charter party means or includes a round voyage, I am not of opinion that merely to contemplate the user of a ship by sending her to further ports after she has been discharged at one port without being under any binding agreement to do so can justify the description of such user as a round voyage. A round voyage seems to me to involve an actual round and the returning of the vessel; and to say that where an owner contemplates that, after his ship has discharged at one port, he will send her on some other engagement, the ship is on a round voyage is a proposition with which I, as at present advised, do not agree. In my opinion the outward voyage in this case was ended at Cronstadt, and after that a further voyage would be a fresh voyage. The owners said that they were willing to waive the question of the charterer having to redeliver the vessel in the United Kingdom, and that they would take delivery at Cronstadt. I think that it was within their power to do that; but it was contended on behalf of the charterer that, as there was a duty on him to redeliver in the United Kingdom, there must be read into the charter party an implied condition in his favor that, although the voyage to Cronstadt was ended and the 12 months had expired, he might commence at Cronstadt a voyage which he contemplated as advantageous from a business point of view and which would ultimately, though not directly, bring the vessel to the United Kingdom with a cargo. I can find nothing in the language of the charter party to justify such a contention, and the result of adopting that view would be that the shipowner would never know when he would get redelivery of the vessel. It is said that in this particular case, if the contemplated voyage had been carried out, the ship would have arrived in the United Kingdom within one month after the contract time; but, if the argument is correct, the charterer's right must equally exist if she would not have arrived till after the month. As long as the 12 months are running, the charterer had the right to commence a new voyage, but, once the 12 months had expired, any prolongation of the period for a new adventure renders it quite uncertain when the shipowner is going to get his ship, and that seems to me to be very objectionable from a business point of view."

This judgment was affirmed by the Court of Appeal. 7 Com. Cas. 190. Clause 3, said Vaughan Williams, L. J., "gives the charterers the right of completing a voyage, which has been begun before the expiration of the 12 months, but which has not been terminated within that period. But that is not what the charterer proposed to do in this case." Two of the three judges composing the court expressly reserved judgment on the question whether in such a charter party the expression "voyage" might not include the return of the ship, with cargo, direct to the United Kingdom; and also the question as to whether the clause providing for the redelivery of the ship in the United Kingdom was solely for the benefit of the ship owners. So far

as the latter question may be involved in the determination of the issue here, I concur in the conclusion reached by Mr. Justice Kennedy. The libel is dismissed.

In re WALL.[†]

(District Court, E. D. Oklahoma. June, 1910.)

1. SALES (§ 451*)—CONDITIONAL SALES—WHAT LAW GOVERNS.

Where a conditional sale is made in one state, but contemplates or provides that the property is to be delivered or used in another state, the construction and validity of the contract is to be determined by the law of the latter state.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. § 451.*]

2. BANKRUPTCY (§ 184*)—RECLAMATION OF PROPERTY—CONDITIONAL SALE CONTRACT—CONSTRUCTION OF STATUTE—"CREDITORS."

In Comp. Laws Okl. 1909, § 7911, which makes unrecorded conditional sale contracts void "as against innocent purchasers, or the creditors of the vendee," the word "creditors" is limited in meaning to such creditors as have acquired a specific lien upon the property; and the mere intervention of bankruptcy proceedings against the purchaser does not change the status of the property, but the trustee takes no greater right therein than the bankrupt had as against the seller.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

In the matter of J. B. Wall, bankrupt. On review of order of referee denying petition of the Southern Rock Island Plow Company to reclaim property. Reversed.

Bledsoe & Little, of Oklahoma City, Okl., and Finley, Knight & Harris, of Dallas, Tex., for petitioner.

Thomas Norman, of Ardmore, Okl., for trustee.

CAMPBELL, District Judge. This matter is now before the court on petition of claimant, the Southern Rock Island Plow Company, to review the action of J. W. Harreld, referee, in dismissing its petition to reclaim certain goods in the possession of the bankrupt at the time the petition was filed, and which afterwards passed into the possession of the trustee. The goods were delivered to the bankrupt under a contract dated November 2, 1908, and by the terms of which claimant contends the title was retained by it. It is also urged by claimant that the bankrupt obtained the goods by fraudulent statements made to certain commercial agencies, by which he secured a false rating as to his financial ability, upon which claimant relied. As the claimant must

[†]Ed. Note.—This case has reference to transactions in 1909, before amendment of Bankruptcy Act, § 47a, Act June 25, 1910, c. 412.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

prevail upon the ground that the title to the goods did not pass to the bankrupt, and hence, under the circumstances in this case, did not pass to the trustee, it is unnecessary to consider the question of fraudulent procurement or false rating.

Section 7911 of Snyder's Compiled Statutes of Oklahoma provides:

"That any and all instruments in writing, or promissory notes now in existence or hereafter executed, evidencing the conditional sale of personal property, and that retain the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept, and when so deposited shall be subject to the law applicable to the filing of chattel mortgages."

[1] The contract involved in this case is one of conditional sale, and not a mortgage, as claimed by the trustee. In *re Columbus Buggy Co.* (C. C. A., 8th Cir.) 16 Am. Bankr. Rep. 759, 143 Fed. 859, 74 C. C. A. 611; *Bryant v. Swofford Bros.*, 214 U. S. 279, 22 Am. Bankr. Rep. 111, 29 Sup. Ct. 614, 53 L. Ed. 997; *Jones on Chattel Mortgages*, §§ 26 and 26a.

"Where a conditional sale is made in one state, which contemplates or expressly provides that the property is to be delivered or used in another state, the law of the latter state governs." *Loveland on Bankruptcy*, p. 448.

So that, whether the contract be considered a Texas or Oklahoma contract, still it must be measured by the laws of the latter state.

[2] The contract under which the goods in this case were delivered was not recorded. It is necessary, therefore, to determine the meaning of the term "creditors" in the statute, and whether under the laws of Oklahoma it is void as to ordinary or general creditors, and hence void as to the trustee. For if it is not void as to such creditors, but only as to such as shall have taken the steps necessary to entitle them to a specific lien upon or interest in the property, then the mere intervention of bankruptcy proceedings does not in any way change their status, and the trustee merely steps into the shoes of the bankrupt, and enjoys no greater right to retain the goods than the bankrupt did before such proceeding. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. Bankr. Rep. 633, 26 Sup. Ct. 481, 50 L. Ed. 782; *In re Fish Bros. Wagon Co.* (C. C. A., 8th Cir.) 21 Am. Bankr. Rep. 149, 164 Fed. 553, 90 C. C. A. 427, 26 L. R. A. (N. S.) 433. Nor does the fact that the goods were sold by the conditional vendee in the regular course of business of itself render this contract fraudulent. *Bryant v. Swofford Bros.*, *supra*; *In re Dunlop* (C. C. A., 8th Cir.) 19 Am. Bankr. Rep. 361, 156 Fed. 545, 86 C. C. A. 435.

No decision of the Supreme Court of Oklahoma, construing the term "creditors," as used in the statute regarding conditional sales, is cited by counsel. Nor has the court been able to discover any which appears to clearly define this term. If this term had received judicial construction in this state, that, of course, would govern in the determination of this case. *York Mfg. Co. v. Cassell*, *supra*. The Supreme Court of Oklahoma, in the case of *Cornelius v. Boling et al.*, 18 Okl. 469, 90 Pac. 874, held that the trustee in bankruptcy might recover

property from the mortgagee taken under unrecorded mortgage, where the possession of the property was taken within four months prior to the filing of the bankruptcy petition. In this case the court cites the case of Greenville National Bank v. Evans-Snyder-Buel Co. et al., 9 Okl. 353, 60 Pac. 249, as authority for holding the mortgage void as against the creditors of the mortgagee. An examination of the case cited shows that the creditors involved were attaching creditors. In concluding the opinion, the court cites *Mueller v. Nugent*, 184 U. S. 1, 7 Am. Bankr. Rep. 224, 22 Sup. Ct. 269, 46 L. Ed. 405, to the effect that the filing of the petition in bankruptcy amounts to an attachment and injunction.

It appears that the Oklahoma court overlooked the qualification which the Supreme Court placed upon this doctrine in the later case of *York v. Cassell*, supra. So that it cannot be said that the state courts have definitely construed the term "creditors" as used in the statute. By section 2929, Snyder's Compiled Laws of Oklahoma, it is provided:

"In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien upon the property affected by such contract."

This section was adopted in 1890. The statute relating to the recordation of conditional sale contracts was enacted in 1897, and the second section of the act specifically repeals all former acts or parts of acts in conflict therewith, so that it is doubtful whether the former act may be considered as in any way limiting the latter. In 8 American & English Encyclopedia of Law, it is said:

"In some states recording acts provide that unrecorded conveyances shall be void as against creditors. The term 'creditors,' however, has been frequently held not to include creditors at large, but is confined to judgment creditors and those who have in some manner affected a lien on the debtor's property. So, when statutes require chattel mortgages to be registered for the protection of creditors, it has been held that a mere creditor at large is not within the protection of the statute."

In the fifth volume of the same work, at page 1016, it is said:

"A creditor of the mortgagor, entitled to take advantage of the recording acts, is generally held to be a creditor who has perfected a lien by legal process upon the mortgaged property. A creditor at large cannot attack the mortgage"—citing numerous authorities.

Kansas has long held a statute providing that an unrecorded mortgage of property, not followed by immediate delivery and actual and continued change of possession, should be void as to the creditors of the mortgagor. In the early case of *Cameron v. Marvin*, 26 Kan. 612, Judge Valentine, in construing the term "creditors" as used in this statute, said:

"Counsel for defendant in error seems to contend that where a chattel mortgage is not recorded immediately after it is executed, and the property is not immediately delivered to the mortgagees, it is absolutely void as to all creditors whose debts have been created subsequent to the execution of the mortgage and prior to its being recorded, and prior to the delivery of the property, without reference to any lien procured upon the property by virtue of an attachment, or execution, or otherwise; that is, they claim that such

a mortgage is so absolutely void as to general creditors, whose debts have been created after the execution of the mortgage and before the recording of the same, or before the delivery of the property, that they may obtain a lien upon the property after the mortgage is recorded and after the property is delivered, by virtue of an attachment, or other legal process. * * * But whether the doctrine claimed by counsel is sustained by any authority or not, we do not think it is sound. Of course, a chattel mortgage not recorded, of property not delivered, is void as against all creditors who have no notice of the mortgage; but they have no right to or interest in any specific property until they have obtained this right or interest by some legal process. They have no more right to the property than the mortgagee has whose mortgage is void. They all have an equal right to the property—that is, they all have a right to procure a lien upon it or interest in it by virtue of legal process, or chattel mortgage, or purchase; and the one who first acts will obtain the prior right in and to the property."

This holding has been extensively followed in Kansas, and I find it to be the construction by most of the state courts that have considered it, and I am constrained to hold that such is the proper construction of the terms as used in the statute under consideration, and at any rate until the Supreme Court of the state shall have definitely construed it.

In the case of *Cornelius v. Bolling*, supra, the Supreme Court of Oklahoma Territory held that:

"The rights of the parties are to be measured from the date of the commencement of bankruptcy proceedings, and we are of the opinion that such proceedings are commenced by the filing of the petition in bankruptcy, and when such petition is filed all creditors and claimants against the estate must stop, and then and there and thereafter measure their rights as the same are affected by the Bankruptcy Act. In voluntary bankruptcy, if the petitioner does not secure an adjudication and ultimate discharge the parties may proceed according to their respective priorities at the time of the filing of the petition; but, if he does succeed, it is immaterial when the trustee was appointed, for his right to the estate dates from the date of the filing of the petition, and not from the date of his appointment as trustee."

There is no charge of fraud in connection with the contract involved here. The validity of such contracts, in the absence of fraud, is well established. *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; *Bierce v. Hutchins*, 205 U. S. 347, 27 Sup. Ct. 524, 51 L. Ed. 828; *Bryant v. Swofford Bros.*, supra.

It follows that the order of the referee, disallowing the petition, must be overruled, and an order will be entered, directing the trustee to pay to petitioner the sum of \$1,857, now held by him in lieu of the goods sought to be recovered.

THE J. DOHERTY.

(District Court, S. D. New York. September 18, 1913.)

1. MARITIME LIENS (§ 25*)—CONSTRUCTION OF STATUTE—"NECESSARIES."

In Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1191), giving a maritime lien "to any person furnishing repairs, supplies or other necessities * * * to a vessel whether foreign or domestic upon the order of the owner or owners or of a person by him

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or them authorized," the word "necessaries" does not include towage, which is not within the scope of the act, but is limited in meaning to such things, of the general nature of repairs and supplies, as are fit and proper for the use of a ship.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31–36; Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4693–4703.]

2. TOWAGE (§ 9*)—LIEN—SERVICES RENDERED TO CHARTERER.

A towing company furnishing towage to chartered barges employed by a firm dealing in ice, under a general contract with the charterers and with knowledge that they were charterers and not the owners, is not entitled to a maritime lien on the vessels therefor.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 9; Dec. Dig. § 9.*]

In Admiralty. Suit by the Cornell Steamboat Company against the boat J. Doherty, Mary F. Doherty, claimant. Decree for respondent.

Amos Van Etten, of Kingston, N. Y., for libellant.

Hyland & Zabriskie, of New York City, for claimant.

VEEDER, District Judge. This is a libel in rem for towage services. The libel alleges that, at the instance and request of the master and owner, libellant towed the boat J. Doherty from and to the points named, at the times stated, and by agreement with said master and owner was to receive for the towing service rendered the sum set forth in the statement attached. The claimant denied these allegations and asserted that during the time that the towage services were rendered the boat was under charter to third persons, who ordered the towage services, and who were without authority to bind the boat therefor, all of which the libellant knew or could have ascertained by the exercise of reasonable diligence.

The evidence shows that the boat in question, a barge without motive power, was owned by the claimant. Prior to the performance of the services here involved she had been chartered by the firm of Doherty & Herbert, the senior member of which was the owner's son, for employment in the ice business on the Hudson river. The charter was for an indefinite period and simply called for payment at the rate of \$5 per day, which seems to have included the services of a man in charge. Various other barges chartered by Doherty & Herbert from their respective owners were also employed by them in their business; they owned no boats.

Early in June, 1912, Doherty called at the libellant's office in New York City to arrange for towage of the barges. He told libellant's manager about the business in which the firm was about to embark with chartered boats, and a definite charge for towage was agreed upon. He says he asked for credit and was told that he could pay every two weeks. This is denied by the libellant's manager and clerk, with whom he talked, and I believe them wherever there is a conflict in the testimony. The libellant's manager testified that, inasmuch as Doherty & Herbert owned no boats and were apparently without finan-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cial responsibility, he at first demanded payment in advance; but, although he refused credit, he finally consented to this arrangement:

"I told him we would arrange and send him a bill against the boat on the regular form, but we wouldn't open an account with him because he had no responsibility himself. * * * After the service is rendered on the boat, we will send you the bill and you can pay it on demand."

Doherty did in fact pay in advance on this occasion, by his mother's check (part of a loan of \$200), for the towing of a barge up the river that night. The libelant's manager explains that the owner of the boat in question was known to be financially irresponsible. Thereafter Doherty notified the libelant by telephone when barges were to be towed, and bills for service were sent regularly by libelant to Doherty & Herbert at their office in Jersey City. All the bills were on a printed form, which read:

"Master and owners of * * * to Cornell Steamboat Company, Dr."

At the top of the bill was printed this notice:

"This bill is now due. Remit to the company pier foot West 51st street."

With the single exception above mentioned, all payments for towage were made by check by Doherty & Herbert. The exhibits in evidence show that their first check, dated June 25, was in payment of a bill dated June 17. Their next check, dated July 9, was in payment of two charges on June 11 and 24. Their third check, dated July 26, paid 12 separate bills extending from June 17 to July 19. Their last check, dated August 16, paid eight separate charges between July 25 and August 10. Other bills for services from July 25 to September 21 were not paid. Among the latter were three bills for towage services on the J. Doherty here involved. The first bill, dated August 14-17, covers two separate charges on those dates. The second bill, dated August 12-19, evidently covers four separate charges on August 12, 17, and 19. The last bill, dated August 31-September 7, covers four separate charges on August 31 and September 7 and 9. Finally, in default of payment, the libelant's manager told Doherty that he would seek recourse against the boats themselves. Ascertaining without difficulty that the boat J. Doherty was owned by the claimant (he says he had suspected this; the libelant had towed her before), he demanded payment from claimant. The claimant testified that this notice, received shortly before the libel was filed on November 12, 1912, was her first knowledge of the transaction.

[1] A preliminary question of some importance is raised by the libelant's contention that the Act of June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1191), "relating to liens on vessels for repairs, supplies, or other necessities," is applicable to towage. By the first section of that act it is declared:

"That any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

The history and peculiar phraseology of the act afford the only possible grounds of confusion concerning its scope. It appears that when the act was under consideration by the committee of the House of Representatives the suggestion was made that "towage" be added after the word "including" on the ground that there seemed to be some question (see *The Columbus*, 67 Fed. 553, 14 C. C. A. 522) whether a lien arose for towage ordered by the owner. The proposed amendment was rejected as being something foreign to the subject-matter of the act. In the Senate, however, a similar proposal met with the suggestion that the committee state in its report that towage was not enumerated because deemed to be covered by "necessaries"; but no such statement was made. As used in the Twelfth Admiralty Rule of the Supreme Court, from which the title and some of the phraseology of the statute seems to have been taken, the term "other necessities" doubtless means other like necessities, and includes necessary materials, furnishings, fittings, and appliances of all kinds appropriate to the vessel. The inclusion of "the use of dry dock or marine railway" in the context is perhaps unfortunate. If a dry dock and a marine railway be necessities, towage might well be included. I am of the opinion, however, that the clause in question is a mere addition to the specified subject-matter of the act, and that towage is not a necessary within the meaning of the act. In the broad sense of the term everything is necessary for a ship which tends to facilitate her use as such or to save her from danger. In that sense seaman's wages, salvage, and towage are necessary. But such is not the ordinary meaning of the word when used in connection with supplies and repairs. It means merely such things of that general nature as are fit and proper for the use of a ship. As a technical term it is not properly used in as broad a sense as its colloquial meaning would imply. *Hughes' Admiralty*, 96, 97. Moreover, the evils which the act of 1910 sought to remedy had no application to towage. Statutes relating to repairs, supplies, and other necessities were enacted by the states and were enforced by the federal courts in consequence of the declaration of the Supreme Court in the case of *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609, that the general maritime law provided no lien for such necessities when furnished in the home port. But the Supreme Court has never suggested that the general maritime law gave no lien for towage or similar services rendered in the home port of the vessel, and therefore the necessity for a municipal law upon the subject, as in the case of maritime necessities, did not exist.

[2] The principles of law applicable to the case at bar were stated with admirable precision by Judge Gray in the case of *The Alligator*, 161 Fed. 37, 88 C. C. A. 201:

"There are maritime services which are usually rendered under circumstances which make them so essential to the movement of a vessel and to the performance of her primary function as an instrument of commerce that the admiralty law presumes they are rendered on the credit of the vessel, in the absence of proof to the contrary, and creates a maritime lien in their favor, independently of the question whether it be a domestic vessel or not. Notable examples are the lien for pilotage services, the lien for seamen's wages, for towage services, and for salvage services. The reasons for the

rule in these cases are obvious and arise out of the necessities of the situation. * * * The peculiar exigency of the situation in all these cases supplies the reason for the rule of presumption of lien, as it has been long recognized in the administration of the general admiralty law. The exigency for such services, as are above enumerated, so generally exist that the rule of presumption of lien is sometimes dissociated from the reason upon which it is founded. The service of a diver can be imagined as rendered under circumstances so exigent as to come within the reason of the rule of presumption of lien, as the service may have been necessary to prevent the immediate sinking of a vessel, but the service of the same diver in examining a sunken wreck or the bottom of a ship lying in port to discover whether its general condition required that the ship should be docked would come within a different rule. So a towage service, as ordinarily performed, is a maritime service, which from the peculiar situation of the parties and of the circumstances of necessity surrounding it, and in the absence of proof to the contrary, creates a presumption of credit given to the vessel and a consequent lien. But why, where the relation of the parties and the circumstances attending the performance of the service are different from those ordinarily obtaining, should this same rule of presumption apply? If the reason ceases, why should not the law cease?"

In short, for towage services rendered in the exigencies of navigation there is at least a presumptive lien upon the boat. Whether such presumption arises, or whether the lien exists, depends upon the circumstances under which the services are rendered. If it appear that the services were not rendered upon the credit of the boat, or that the surrounding circumstances were such as to apprise the tower that they were not to be so rendered, then no lien exists. *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

In the light of these principles, the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. *Monk v. Cornell Steamboat Co.*, 198 Fed. 472, 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to protect her from liens. Moreover, so far as knowledge of the charter party on the part of the libellant is concerned, or his duty to inquire, there is no essential distinction, for if the libellant knows that the vessel is chartered, though orally and informally, he must be held to know, as a matter of course, that the usual obligations exist. *The Surprise*, 129 Fed. 873, 64 C. C. A. 309. It is quite possible that the libellant believed that it had a lien, no matter who was relied upon to pay. But this was not giving credit to the vessel. *The Samuel Marshall*, 54 Fed. 398, 4 C. C. A. 385. Nor was its method of charging the items. *McCaldin v. The Stroma*, 53 Fed. 281, 3 C. C. A. 530. Knowledge that the boat was chartered, and the necessary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libellant's clerk Oliver as to the usual practice of collecting from charterers are sufficient to prevent a recovery by the libellant. *The Mary A. Tryon* (D. C.) 93 Fed.

220; *The Tillie A.* (D. C.) 84 Fed. 684; *The Sarah Cullen* (D. C.) 45 Fed. 511; *Id.*, 49 Fed. 166, 1 C. C. A. 218.

I have not referred to the state statute relating to liens for towage because no mention was made of it by the parties in the pleadings, proof, or arguments.

The libel is dismissed.

UNITED STATES v. GOLDMAN.

(District Court, N. D. Ohio, E. D. February 27, 1913.)

No. 3,593.

1. POST OFFICE (§ 35*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—STATUTE.

The purpose of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), making it an offense to use the post office establishment in furtherance of a scheme to defraud, on which Pen. Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (U. S. Comp. St. Supp. 1911, p. 1653), relating to the subject, is based, was to prevent the use of the mails in aid of schemes and artifices planned to defraud others of their money and property. It included everything designed to defraud by misrepresentations as to the past or present, or by suggestions or promises as to the future; the significant fact being the intent and purpose to defraud.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

2. POST OFFICE (§ 35*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—ELEMENTS OF OFFENSE—STATUTES.

Pen. Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (U. S. Comp. St. Supp. 1911, p. 1653), provides that whoever, having devised, or intended to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, etc., shall, for the purpose of executing such scheme or artifice, place or cause to be placed any letter, etc., in any post office, or shall take or receive any such therefrom, etc., shall be fined. *Held* that, though Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), on which the section of the Penal Code was founded, in order to constitute the offense, required that the person charged devise the scheme or artifice to defraud, the intent to effect such scheme by opening or intending to open correspondence with some person through the post office establishment, or by inciting such other person or persons to open communication with him in carrying out of such scheme, and that the accused shall have either deposited a letter or package in the post office, or taken or received one therefrom, the section of the Penal Code is much broader, and under it only two things need be proved to establish the offense, to wit, that a fraudulent scheme has been devised, and that to execute it accused has placed, or caused to be placed, any letter, etc., in the post office, or has taken one therefrom.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

3. POST OFFICE (§ 48*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—INDICTMENT.

An indictment for misuse of the mails in furtherance of a scheme to defraud charged that defendant devised a scheme to defraud men of reputed high financial and social standing, to be effected by inciting certain persons to enter into communication with defendant by means of the post office establishment, the scheme being that defendant would rent a post office box, advertise for a woman of chic appearance, with whom he was to get into communication through the mail, and arrange with her to meet prominent men in some appropriate hotel or apartment house for a social or business purpose, and when she had succeeded in getting one

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of them in a compromising position photographs would be taken by defendant, and thereafter one of the photographs would be offered to the victim for a large sum of money, on the threat that, if he did not pay, it should be made public in such a manner as to humiliate him, and if he did pay, and at a later time made any objections, or threatened to cause trouble, the second photograph taken at the same time would be produced and offered for sale, or a threat made to make it public if objections were made. The indictment further alleged that accused had full knowledge of the scheme, had fully planned and formulated it at the time, and that he took certain letters from the mails in execution or attempted execution thereof. *Held*, that the taking of the letters from the mail under such circumstances was a necessary step to the execution of the scheme and in furtherance of the plan previously devised, which completed the crime, and that the indictment sufficiently stated a violation of Pen. Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (U. S. Comp. St. Supp. 1911, p. 1653), prohibiting the use of the mails in furtherance of a scheme to defraud, etc.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

4. POST OFFICE (§ 48*)—MISUSE OF MAIL—SCHEME TO DEFRAUD—INDICTMENT.

An indictment for misuse of the mails in furtherance of a scheme to defraud must describe the alleged scheme with such certainty as to clearly inform the defendant of the charge made against him and the nature of the evidence to be produced in proof of the execution of the scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

5. INDICTMENT AND INFORMATION (§ 71*)—REQUISITES—CERTAINTY.

An indictment which states the essential elements of the offense with such reasonable particularity as will advise the defendant with reasonable certainty of the nature of the accusation, and thus enable him to prepare his defense, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. § 71.*]

Jacob L. Goldman was indicted for misuse of the mails. On motion to quash, and on demurrer to the indictment. Overruled.

U. G. Denman, U. S. Atty., and Cary R. Alburn, Asst. U. S. Atty., both of Cleveland, Ohio.

Francis J. Wing, of Cleveland, Ohio, for defendant.

DAY, District Judge. The defendant was indicted for violation of section 215 of the federal Penal Code of 1910. Act March 4, 1909. This section is founded on Rev. Stats. U. S. § 5480, and the act of March 2, 1889 (25 Stat. 873, c. 393 [U. S. Comp. St. 1901, p. 3696]). To the indictment there have been filed a motion to quash and a demurrer.

Omitting provisions which are not necessary to the disposition of the pending case, section 215 of the Penal Code provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement," etc.

Section 5480 of the Rev. Stats., in so far as it is necessary to quote it, provides:

"If any person having devised or intending to devise any scheme or artifice to defraud, * * * to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, package, * * * circular, * * * or advertisement in any post office, branch post office, or street or hotel letter box of the United States, to be sent or delivered by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall, upon conviction, be punishable," etc.

It has been held that under section 5480 it is essential, to work a conviction, that the government must charge in the indictment, and establish in the proof, first, that the person charged devised a scheme or artifice to defraud; second, that he had intended to effect this scheme by opening or intending to open correspondence with some person through the post office establishment, or by inciting such other persons or person to open communication with him; third, that in carrying out such scheme the accused has either deposited a letter or package in the post office, or taken or received one therefrom. *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; *Horman v. United States*, 116 Fed. 350, 53 C. C. A. 570; *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485.

The indictment in this case charges in substance: That Goldman had devised a certain scheme or artifice to defraud men of reputed high financial and social standing in the city of Cleveland, the names of whom were unknown to the grand jury. That this scheme was to be effected by Goldman inciting, encouraging, and causing certain persons to enter into communication and correspondence with him, by means of the post office establishment of the United States, and this misuse of the mails and use of the mails was part of the scheme and artifice to defraud. That the scheme and artifice devised by Goldman was that Goldman planned and intended that he would rent a post office box in the city of Cleveland, that this box would be kept by him for the reception of mail, and that, having rented the box, he would thereafter advertise in a newspaper in the city of Cleveland, inserting the following advertisement:

"Desire the assistance and co-operation of a well-educated and well-groomed lady on a big financial proposition. Must be good looking, chic, and have the ability to interest men of means. If you can measure up with this standard, write me for personal interview. Box 14, Station D."

That Goldman planned, having inserted this advertisement, that he would encourage various women to answer the same by placing a let-

ter in the United States mails, addressed to this Box 14, Station D, and that upon receipt of these letters he would arrange for personal interviews with the writers of certain of the letters, and from these writers he would select a woman whom he thought suitable for his purpose and plans. That he would then arrange with such woman, so selected, for the further carrying out of his scheme, which he had theretofore devised. That having selected the person answering to this advertisement, he would arrange with her that she should devise means, through pretended business engagements, to meet and become acquainted with prominent and influential men of Cleveland. That Goldman further planned that he would arrange with this woman that, through the acquaintance she would make with these men, she would induce these men from time to time to come to her place of residence on the pretense that she was inviting them there for a social or business purpose. That these meetings with these men should take place at some appropriate hotel or apartment house, and would take place in a suite of rooms connected one with the other in such a manner that two photographic views could be taken of the persons in these rooms, and that, when this woman succeeded in getting one of these prominent men in a compromising position, photographs would be taken by Goldman, and then at a proper time one of them would be offered to the man whose picture was taken for a sum of money of from \$50,000 to \$75,000. That, if this man should refuse to pay this sum of money for this photograph, it was planned that Goldman would threaten to expose and make public the photograph in such a manner as to humiliate the man whose photograph had been taken in this compromising position. That if one of these men should pay for the photograph, and at a later time should make any objections, or threaten to cause any trouble, the second photograph taken at the same time would be produced and offered for sale, or threatened to be published by Goldman.

The indictment further alleged that Goldman had full knowledge of this scheme, and had fully planned and formulated it at the time he took certain letters from the mails in execution or attempted execution of the scheme. It is alleged in the indictment that Goldman, having devised the scheme and artifice to defraud, in executing or in attempting to execute this scheme or artifice, unlawfully, knowingly, and feloniously took certain letters from the post office establishment of the United States, which had been placed there in answer to his advertisement.

[1, 2] It has been frequently decided by the courts that the purpose of section 5480, upon which this present section 215 of the Penal Code is modeled, was to prevent the use of the mails in the aiding of schemes and artifices planned to defraud others of their money and property. *Durland v. United States*, 161 U. S. 306, 16 Sup. St. 508, 40 L. Ed. 709. Mr. Justice Brewer, in passing upon the indictment, said:

"It includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. The question presented by this indict-

ment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident Company and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could, by investment or otherwise, make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth this scheme it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which there is only the allurement of specious and glittering promises."

Weeber v. United States (C. C.) 62 Fed. 740, is in accordance with this decision. The court said:

"The criminality of the defendant does not rest upon the probabilities of the success of the scheme, or upon the fact of success, nor is it avoided by the fact that the act of using the mails is only one step in a series of acts intended to accomplish the fraudulent scheme. It is enough that the defendant, having devised a scheme to defraud, in the execution of that scheme, and as a necessary or convenient step in the execution thereof, transmits through the post office a letter used, or designed to be used, for the purpose of carrying that scheme into effect."

This construction has been followed in the cases of *United States v. Stever*, 222 U. S. 167, 32 Sup. Ct. 51, 56 L. Ed. 145; *Milby v. U. S.*, 109 Fed. 638, 48 C. C. A. 574; *O'Hara v. United States*, 129 Fed. 551, 64 C. C. A. 81; *Bartholomew v. United States*, 177 Fed. 902, 101 C. C. A. 182; *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485; *Harrison v. United States* (C. C. A.) 200 Fed. 662, 665.

It is thoroughly established that the essential elements of an offense, under section 5480 of the Rev. Stats., are three, as has been referred to earlier in this memorandum. Section 215 of the Penal Code is, however, much broader. It is not necessary, under the requirements of section 215, to incorporate in the indictment, or substantiate in the proof, that the scheme was to be effected by either opening or intending to open correspondence or communication with any person, or incite such person so to do by the use of the mails. Under the later statute it is only required, to complete the offense, that two things must be done: First, that a fraudulent scheme be devised; and, second, that for the purpose of executing it there be placed or caused to be placed any letter, postal card, etc., in the postal establishment, or one taken therefrom; consequently, under the earlier statute, it was necessary that the use of the post office establishment should be a part of the plan, and that such use should be contemplated, while under the later statute this element is not essential.

[3] From the reading of the indictment in this case it is quite apparent that the defendant had completely planned and devised all of the details of a finished scheme to defraud certain influential men of the city of Cleveland, and that having made this plan, and having had that intent in his mind, he resorted to the postal establishment of the Unit-

ed States to take certain letters therefrom, for the purpose of executing this devised scheme. There are a very few reported cases construing section 215 of the Penal Code; but this construction which I have placed upon it is approved in the case of *Ex parte King* (D. C.) 200 Fed. 622; *United States v. Maxey* (D. C.) 200 Fed. 997; *Erbaugh v. United States*, 173 Fed. 433, 434, 97 C. C. A. 663.

It has been urged in argument that the act of taking these letters from the mails was not done for the purpose of executing the scheme, but was simply an act in preparation therefor. It is only necessary to read the indictment to see that the taking of the letters from the mails was a necessary step in the execution of the scheme, that it was a material and important part of the scheme, and was a step directly in line with the furtherance of a plan previously devised, and that when these letters were taken from the post office box, the crime was completed.

[4] It is the unquestionable rule that an indictment must describe the alleged scheme to defraud with such certainty as to clearly inform the defendant of the charge made against him, and thus of the nature of the evidence to be produced in proof of the execution of the scheme. *Stewart v. United States*, 119 Fed. 89, 55 C. C. A. 641; *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485.

[5] An indictment which states the essential elements of the offense with such reasonable particularity as will advise the defendant with reasonable certainty of the nature of the accusation, and thus enable him to prepare his defense, is sufficient. *Brown v. United States*, 143 Fed. 60, 74 C. C. A. 214; *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485. The object of criminal proceedings is to convict the guilty as well as to shield the innocent, and no impracticable standard of particularity should be set up, whereby the government may be entrapped into making allegations which would be impossible to prove. *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; *O'Hara v. United States*, 129 Fed. 551, 64 C. C. A. 81; *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485.

The scheme to defraud in the present indictment is very similar to the scheme alleged in the indictment in the case of *Horman v. United States*, 116 Fed. 350, 53 C. C. A. 570. In each of these cases the scheme planned was to receive sums of money by threats to ruin and blacken the reputation and character of others by accusations of misdeeds. Such schemes are not innocent, but are aimed at personal enrichment by reason of threats. As was said in the *Horman Case*:

"In other words, these persons were to be despoiled of their money unless they paid for silence as to accusations which" they believed "would ruin their character."

Under the provisions of section 215 of the Penal Code, the essential elements of the statute have been pleaded with the particularity required in indictments of this nature.

The motion to quash and the demurrer are overruled.